

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceedings between

NIKO RESOURCES (BANGLADESH) LTD.
(Claimant)

and

PEOPLE'S REPUBLIC OF BANGLADESH
(First Respondent)
BANGLADESH PETROLEUM EXPLORATION & PRODUCTION COMPANY LIMITED
("BAPEX")
(Second Respondent)
BANGLADESH OIL GAS AND MINERAL CORPORATION ("PETROBANGLA")
(Third Respondent)

(jointly referred to as Respondents)

ICSID Case No. ARB/10/11
and
ICSID Case No. ARB/10/18

DECISION ON JURISDICTION

Members of the Tribunal
Mr Michael E. Schneider, President
Professor Campbell McLachlan
Professor Jan Paulsson

Secretary of the Tribunal
Ms Frauke Nitschke

Date of decision: 19 August 2013

TABLE OF CONTENTS

GLOSSARY	5
1. INTRODUCTION	8
2. THE PARTIES AND THE ARBITRAL TRIBUNAL	11
2.1 The Claimant.....	11
2.2 The Respondents.....	11
2.3 The Arbitral Tribunal.....	12
3. SUMMARY OF THE RELEVANT FACTS.....	14
3.1 The negotiations leading to the JVA.....	14
3.2 The JVA and its arbitration clause.....	20
3.3 The negotiations of the Gas Purchase and Sale Agreement (GPSA).....	24
3.4 The arbitration clause in the GPSA	33
3.5 The Payment Claims under the GPSA.....	36
3.6 The blowouts and the Compensation Claim	36
4. THE PROCEDURAL HISTORY	40
4.1 From Registration to the Constitution of the two Tribunals	40
4.1.1 ICSID Case No. ARB/10/11.....	40
4.1.2 ICSID Case No. ARB/10/18.....	43
4.2 Following the Constitution of the two Tribunals	45
5. THE CLAIMANT – ITS IDENTITY AND ITS NATIONALITY.....	51
5.1 The position of the Parties	51
5.2 The Claimant’s identity.....	52
5.3 The Claimant’s nationality.....	55
5.3.1 The link with Cyprus	55
5.3.2 The link with Canada.....	58
6. THE STATE OF BANGLADESH AS A PARTY TO THE ARBITRATION.....	61
6.1 The role of the Government of Bangladesh.....	62
6.2 Petrobangla and BAPEX as agencies or instrumentalities of the Government of Bangladesh	63
6.3 The separate legal identity of Petrobangla and BAPEX	66
6.4 Petrobangla and BAPEX as agents for Bangladesh.....	67
6.5 Attribution.....	68
6.6 Consent	70

7.	JURISDICTION WITH RESPECT TO BAPEX AND PETROBANGLA –	
	THE ISSUE OF DESIGNATION	73
7.1	The issue and the Parties’ positions	73
7.2	The requirement of designation	75
7.2.1	The term “designation” as distinguished from “notification”	75
7.2.2	The purposes of designation under Article 25(1)	77
7.2.3	Types of designation – General and <i>ad hoc</i> designation	80
7.2.4	The form of designation and the question of implicit designation	81
7.2.5	Communicating the State’s designation to the Centre	84
7.2.6	Conclusions concerning the requirement of “designation” under Article 25(1).....	91
7.3	Designation in the present case	92
8.	THE DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT	97
9.	ILLEGAL ACTS, GOOD FAITH AND CLEAN HANDS	104
9.1	The Parties’ positions.....	104
9.2	The Canadian conviction of Niko Canada on account of bribes to the Minister of Energy in 2005.....	107
9.3	Other indications of possible acts of corruption and the Respondents’ disclosure request.....	110
9.3.1	Investigation by the Bangladesh Anticorruption Commission (ACC)	110
9.3.2	The BELA proceedings	112
9.3.3	The proceedings against Stratum.....	112
9.3.4	The action of Mr Harb	113
9.3.5	The Respondents’ request for document production	114
9.3.6	Conclusion on the Claimant’s acts of corruption.....	116
9.4	Corruption and international public policy	117
9.5	Contracts of corruption	118
9.6	Contracts obtained by corruption.....	120
9.7	Denial of jurisdiction despite an otherwise binding arbitration agreement	126
9.7.1	Arbitration offer applicable only for good faith investment	126
9.7.2	Protecting the “integrity of the system”	128
9.7.3	The “clean hands” doctrine.....	128
10.	JURISDICTION WITH RESPECT TO CLAIMS UNDER THE JVA (THE COMPENSATION DECLARATION AND THE COOPERATION CLAIM)	133
10.1	The position of the Parties	133
10.2	Jurisdiction <i>ratione materiae</i>	135
10.3	Jurisdiction <i>ratione personae</i>	138

10.4	Impact on legal interests of third parties	140
10.5	BAPEX cooperation with respect to the GPSA claims (the Cooperation Claim)	142
11.	JURISDICTION WITH RESPECT TO CLAIM UNDER THE GPSA (THE PAYMENT CLAIM)	144
11.1	The Position of the Parties	144
11.2	Has Petrobangla agreed to arbitrate with Niko?	145
11.3	Is Niko precluded as a matter of principle to claim for both Joint Venture Partners?.....	146
11.4	The position under the agreements	148
12.	DECISION.....	155

GLOSSARY

ACC	Bangladesh Anti-Corruption Commission
BAPEX	Bangladesh Petroleum Exploration & Production Company Limited, the Second Respondent
BELA Proceedings	Proceedings brought by the Bangladesh Environmental Lawyers Association (BELA) and others in the Supreme Court of Bangladesh, High Court Division against the Government of Bangladesh, Petrobangla, BAPEX, Niko and others
BGSL	Bakhrabad Gas System Ltd.
C-MJ.1	Claimant's Memorial on Jurisdiction, 1 April 2011
C-MJ.2	Claimant's Second Memorial on Jurisdiction, described as <i>Claimant's Response to the Respondents' First Counter-Memorial on Jurisdiction for the Payment Claim, and the Claimant's Memorial on Jurisdiction for the Compensation Claim</i> , 30 June 2011
C-MJ.3	Claimant's Third Memorial on Jurisdiction, described as <i>Reply to the Respondents' Response with respect to the Compensation Declaration</i> , 10 October 2011
Centre or ICSID	International Centre for Settlement of Investment Disputes
Committee	Gas Pricing Committee, formed further to a letter from the Ministry of Power, Energy and Mineral Resources dated 15 July 2004
Compensation Claims	Claims for compensation brought by the First and Third Respondents in the Court of District Judge, Dhaka, against the Claimant and others for damages alleged to arise from the blowout of 2 wells in the Chattak field (subject matter of ARB/10/11)
Compensation Declaration	The declaration requested by the Claimant concerning the Compensation Claims
Convention or ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Crore	10 million in the South Asian numbering system

GOB or Government	The Government of the People’s Republic of Bangladesh, the First Respondent
Framework of Understanding	Framework of Understanding for the Study for Development and Production of Hydrocarbon from the Non-producing Marginal Gas Fields of Chattak, Feni and Kamta executed on 23 August 1999 between BAPEX and Niko
GPSA	Gas Purchase and Sale Agreement of 27 December 2006 between Petrobangla and the Joint Venture Partners BAPEX and Niko
HT 1 and 2	Hearing Transcript Day 1 (13 October 2011) and Day 2 (14 October 2011)
ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings
ICSID Institution Rules	Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
Joint Venture Partners	BAPEX and Niko
JVA	Joint Venture Agreement of 16 October 2003 between BAPEX and Niko
Ministry	Ministry of Power, Energy and Mineral Resources, unless otherwise specified
Money Suit	Proceedings brought by Bangladesh and Petrobangla in the Court of the District Judge in Dhaka against Niko and others (see paragraph 102)
Niko, Niko Bangladesh or NRBL	Niko Resources (Bangladesh) Ltd., the Claimant
Niko Canada	Niko Resources Ltd., the Canadian parent company of the Claimant
Payment Claims	Claims to payment under the GPSA for gas delivered (subject matter of ARB/10/18)
Petrobangla	Bangladesh Oil Gas and Mineral Corporation, the Third Respondent
The Procedure	Procedure for Development of Marginal/Abandoned Gas Fields, prepared in 2001 and attached as to the JVA as Annex C
R-CMJ.1	Respondents’ Counter-Memorial on Jurisdiction, 16 May 2011
R-CMJ.2 – Payment Claim	Respondents’ Second Counter-Memorial on Jurisdiction, described as <i>Respondents’ Rejoinder on the Payment Claim</i> , 30 August 2011

R-CMJ.2 – Compensation Declaration	Respondents’ Supplemental Counter-Memorial on Jurisdiction, described as <i>Respondents’ Response to the Claimant’s Presentation of its Position with respect to the Request for the Compensation Declaration</i> , 28 September 2011
RfA I	Request for Arbitration, dated 1 April 2010 and received by the Centre on 12 April 2010 (ARB/10/11)
RfA I Clarification	Claimant’s response of 18 May 2010 to the Centre’s request for clarification of 7 May 2010
RfA II	Request for Arbitration, dated 16 June 2010 and received by the Centre on 23 June 2010 (ARB/10/18)
R-Preliminary Objections	Preliminary objections raised by the Respondent in the letter of 21 June 2010 (ARB/10/11)
Stratum	Stratum Development Ltd.
Tk	Bangladeshi taka
Tribunal	Collectively, the two Arbitral Tribunals constituted in ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18

1. INTRODUCTION

1. The proceedings relate to marginal or abandoned gas fields in Bangladesh which the Government of the People's Republic of Bangladesh (the **Government**), the First Respondent, had decided to develop. In the course of this development Niko Resources (Bangladesh) Ltd. (**Niko**), the Claimant, concluded on 23 August 1999 a Framework of Understanding with the Bangladesh Petroleum & Production Company, Limited (**BAPEX**), the Second Respondent.
2. Niko conducted a Marginal Field Evaluation of three fields and, in a report of February 2000, concluded that two of them, the Chattak and the Feni fields, were sufficiently promising to continue with a work plan. Thereupon Niko and BAPEX, under the direction of the Ministry of Power, Energy and Mineral Resources (the **Ministry**), negotiated a Joint Venture Agreement (**JVA**), which was concluded on 16 October 2003 with the approval the Government.
3. The development of the Feni field was successful and gas supplies from two wells in this field started in November 2004. BAPEX and Niko (the **Joint Venture Partners**) began to negotiate with the Bangladesh Oil Gas and Mineral Corporation (**Petrobangla**), the Third Respondent, a Gas Purchase and Sale Agreement (**GPSA**). However, due to difficulties in reaching agreement on the price for the gas, the finalisation of the GPSA was much delayed. Eventually it was concluded on 27 December 2006 with the approval of the Government.
4. The Joint Venture Partners had delivered gas to Petrobangla already before the conclusion of the GPSA. They continued to do so thereafter. Petrobangla made some payments but Niko claims that much of the delivered gas remains unpaid. In the Request for Arbitration of 1 April 2010 Niko quantified the outstanding amount at US\$35.71 million.¹
5. During drilling in the Chattak field a blowout occurred on 7 January 2005 and another on 24 June 2005. The Government formed a committee to enquire about the causes of

¹ RfA I, paragraph 6.6.

the blowouts and the damage caused. It concluded that Niko was responsible for the blowouts and estimated the damage caused by them. In May or June 2008 Petrobangla and the Government of Bangladesh commenced legal action in the Court of District Judge, Dhaka, against Niko and others, seeking compensation on the order of Tk746.5 crore as damages for the two blowouts (the **Compensation Claim**). To the knowledge of the Tribunal, these proceedings are still pending.

6. During the course of the negotiations for the GPSA the Claimant delivered on 23 May 2005 a car to the State Minister for Energy and Mineral Resources; in June 2005 Niko Resources Ltd. (**Niko Canada**), the Claimant's parent company, invited the Minister, at its costs, to an exposition in Calgary. The delivery of the car became public knowledge in Bangladesh; the Minister resigned on 18 June 2005 and returned the car to BAPEX on 20 June 2005. Following an investigation in Canada, Niko Canada, on the basis of an agreed statement of facts, was convicted on 24 June 2011 and ordered to pay Canadian Dollars 9.499 million.
7. The present proceedings were started by two successive Requests for Arbitration, one filed with the International Centre for Settlement of Investment Disputes (**ICSID** or the **Centre**) on 1 April 2010 (the **First Request** or **RfA I**) and registered as ARB/10/11; the other filed with ICSID on 16 June 2010 (the **Second Request** or **RfA II**) and registered as ARB/10/18. The Claimant specified that the first of these requests concerned the Compensation Claim and the second the outstanding payments under the GPSA (the **Payment Claims**).²
8. The Respondents have objected to the jurisdiction of ICSID and this Tribunal on a number of grounds which shall be described and examined in further detail in this Decision.
9. The Tribunal held preliminary procedural consultations on 14 February 2011 in Geneva, followed on the same day by a First Session during which the organisation of the proceedings in the two cases was discussed. It was agreed that the two cases were to proceed in a concurrent manner and that the two Tribunals may render their decisions in the two cases in a single

² RfA II, paragraph 6.10.

instrument. In the present decision the two Tribunals therefore are referred to collectively as “the Tribunal”.

10. At the First Session it was also decided that, in a first phase of the proceedings, the issue of jurisdiction would be considered and decided. The Parties produced written submissions and documentary evidence; witnesses were heard and oral argument was presented in a procedure described in further detail below.
11. Some of the documentary evidence produced in the arbitration is in the Bengali language. In accordance with paragraph 10.1. of the Summary Minutes of the Joint First Session, the Party introducing such documents in the proceedings produced an English translation which accompanied the document. None of these translations were challenged during the course of the proceedings. The Tribunal therefore takes the produced English translation as correct and relies on it.
12. Documents issued by authorities in Bangladesh normally are dated according to the Bengali calendar, often with a corresponding date according to the Gregorian calendar. In the present Decision only the date according to the Gregorian calendar is given.

2. THE PARTIES AND THE ARBITRAL TRIBUNAL

2.1 The Claimant

13. The Claimant in both cases is Niko Resources (Bangladesh) Ltd.. It is a company incorporated under the laws of Barbados. The Claimant and its nationality will be discussed in further detail below in Section 5, when the Tribunal considers the Respondents' objections in this respect.

14. The Claimant is represented in this arbitration by

Mr Kenneth J. Warren QC, Mr James T. Eamon QC,
Mr John R. Cusano and Ms Erin Runnalls
Gowlings
1400,700 - 2nd Street S.W.
Calgary, Alberta
Canada T2P 4V5

and

Mr Ajmalul Hossain QC
A. Hossain & Associates
3B Outer Circular Road
Maghbazar, Dhaka 1217
People's Republic of Bangladesh.

2.2 The Respondents

15. The Respondents in this arbitration are

(i) the People's Republic of Bangladesh, the First Respondent,

(ii) Bangladesh Petroleum Exploration & Production Company Limited ("BAPEX"), the Second Respondent

and

- (iii) Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”), the Third Respondent.³
16. Petrobangla is a statutory corporation created by the Bangladesh Oil, Gas and Mineral Corporation Ordinance 1985 (the **1985 Ordinance**).⁴
17. BAPEX is a wholly owned subsidiary of Petrobangla incorporated under the Bangladesh Companies Act 1994.⁵ By Notification issued on 8 June 2003 the Ministry of Power, Energy and Mineral Resources granted to BAPEX “*complete administrative and financial freedom by the Government*”.⁶
18. The legal status of these two corporations and their relationship with the Government of Bangladesh will be considered in further detail below in Sections 6 and 7.
19. The Respondents are represented in this arbitration by

Mr Tawfique Nawaz, Senior Advocate
and Mr Mohammad Imtiaz Farooq
Juris Counsel
59/C, Road #4
Banani, Dhaka 12 13
People’s Republic of Bangladesh

and

Mr Luis Gonzalez Garcia and Ms Alison Macdonald
Matrix Chambers, Griffin Building, Gray's Inn
London WC1R 5LN
United Kingdom

2.3 The Arbitral Tribunal

20. The Arbitral Tribunal is composed of

Professor Jan Paulsson
Bahrain World Trade Centre
East Tower, 37th Floor
P.O. Box 20184
Manama, Bahrain

³ The sequence in which the three Respondents are presented is that adopted by the Claimant in the First Request, even though a different sequence was adopted in the Second Request.

⁴ RfA II, Attachment G.

⁵ HT 1, p. 42.

⁶ R-CMJ.1, Exhibit 2, Appendix B.

National of Sweden, France and Bahrain
Appointed by the Claimant

Professor Campbell McLachlan QC
Victoria University of Wellington Law School
Old Government Buildings
15 Lambton Quay
PO Box 600
Wellington
New Zealand

National of New Zealand
Appointed by the Respondents

Mr Michael E. Schneider
LALIVE
35 rue de la Mairie
P.O. Box 6569
1211 Geneva Switzerland

National of Germany
Appointed as President of the Arbitral Tribunal upon agreement
by the Parties

3. SUMMARY OF THE RELEVANT FACTS

21. The present dispute relates to two gas fields named Feni and Chattak (sometimes also spelled Chhatak) in Bangladesh. These two fields, together with the Kamta gas field, had been declared by the Government as “Marginal/Abandoned Gas Fields.”
22. Both Chattak and Feni are vested in Bangladesh pursuant to Article 143 of Bangladesh’s Constitution.
23. The Chattak field (located in Sylhet) was discovered in 1959 by Pakistan Petroleum Ltd (subsequently renamed Bangladesh Petroleum Ltd) and brought into production in 1960. It supplied local users and, from 1974, the Sylhet Pulp and Paper Mill. It was shut down in 1985 due to increased water production.⁷
24. The Feni field (located in Chittagong) was discovered by a predecessor of BAPEX in 1980. It was in production between 1988 and 1998.⁸
25. Both fields were at some point sold or transferred to BAPEX.⁹ Only the Feni field became productive again and delivered gas, which is the subject of the present arbitrations.

3.1 The negotiations leading to the JVA

26. Starting with a letter and preliminary proposal of 12 April 1997, Niko Resources Ltd, the parent company of the Claimant, approached the Bangladesh Minister of Energy and Mineral Resources regarding the development of some marginal and non-productive gas fields in Bangladesh.¹⁰ After some further correspondence Niko Resources Ltd was invited to make a presentation to the Ministry on 21 June 1998.

⁷ Adolph Statement [175], RfA I, Attachment A, citing ‘*Bangladesh Marginal Field Evaluation – Chattak, Feni and Kamta*’ (February 2000) B-8, Annex B to the JVA.

⁸ Ibid.

⁹ Imam Hossain, HT 2, 160-161.

¹⁰ The original correspondence is listed in the letter of Niko Resources Ltd to BAPEX dated 1 February 1999, Exhibit 9, Appendix B to R-CMJ.1.

27. This presentation was followed by a letter of 28 June 1998 in which the proposal was further developed. In addition to technical and commercial considerations the letter contained the following passage:

“Niko will support and follow the procedural requirement the Government of Bangladesh will require to privatise the marginal, non-producing fields. However, in order to ensure transparency, Niko proposes the following modality for finalising the proposed joint venture contract with BAPEX and putting the subject non-producing marginal fields on production:

A. To our understanding since Niko is the first international company to promote the development of the marginal fields, the Ministry of Energy and Mineral Resources may execute an MOU with Niko Resources (Bangladesh) Ltd. A copy of the MOU is attached for your consideration.

B. Upon execution of the MOU, the terms and conditions of the contract are negotiated between Petrobangla and Niko and a draft contract are prepared.

C. Petrobangla then makes a public announcement of the project complete with the finalised terms and conditions... [follows the description of a competitive procedure]”¹¹

28. After some further correspondence, Niko Resources Ltd wrote to BAPEX on 1 February 1999, referring to the past correspondence with the Ministry and Petrobangla and stated:

“As you may be aware that the cornerstone of our proposal is the partnership we seek with BAPEX wherein the following key benefits will be availed by BAPEX: ...”¹²

29. Following a meeting of representatives from the Ministry and Petrobangla on 26 January 1999,¹³ the Ministry wrote to Petrobangla on 25 May 1999, giving instructions “in the matter of implementation of proposal of Niko Resources on Marginal

¹¹ Exhibit 7, Appendix B to R-CMJ.1.

¹² Exhibit 9, Appendix B to R-CMJ.1; the parts of the letter containing the proposal have not been produced.

¹³ Exhibit 10, Appendix B to R-CMJ.1.

Gas Field Development”. In the English translation produced by the Respondents, the letter reads as follows:

“On the above referenced matter it is notified that after examining the proposal of Niko Resources on Marginal Gas Field Development, Government has made the following decisions:

- *The gas fields Chattok [sic], Kamta and Feni may be developed in the ‘Marginal Gas Field Development’ system as per the proposal of Niko Resource.*
- *A Joint Venture Agreement must be executed between Bapex and Niko before a Memorandum of Understanding (MOU) is signed with Niko. The Managing Director of Bapex can conduct discussions with Niko regarding this.*
- *The ‘Swiss Challenge’ method may be adopted for developing the said gas fields.*

You are requested to take necessary next steps for implementation of the proposal.”¹⁴

30. By a letter of 12 August 1999 to Petrobangla, with copy to BAPEX, the Ministry approved a Framework of Understanding.¹⁵ The letter refers to the Petrobangla letter of 30 June 1999 and identifies as subject “*Regarding the Approval of the Proposal of Niko Resources on Marginal Gas Field Development and Production*”. The text of the letter reads as follows:

“In light of the above subject and reference it is to inform that before signing the MOU regarding Marginal Gas Field Development between BAPEX and Niko Resources, technical evaluation of the Non-Producing Marginal gas fields is required to complete the joint study.

02. In this respect approval is given as directed to complete the Framework of Understanding.”

31. On 23 August 1999 BAPEX and Niko executed an agreement entitled “*Framework of Understanding for the Study for Development and Production of Hydrocarbon from the Non-producing Marginal Gas Fields of Chattak, Feni and Kamta*” (the

¹⁴ Exhibit 11, Appendix B to R-CMJ.1 (emphasis in the original).

¹⁵ Claimant’s Exhibit 7, p. 502; see also Petrobangla Management Meeting of 22 July 2003, Claimant’s Exhibit 9, pp. 563 and 566.

Framework of Understanding).¹⁶ The effectiveness of this understanding was made “*subject to the approval of the appropriate authority*”.¹⁷

32. Pursuant to the Framework of Understanding, BAPEX and Niko conducted a Marginal Field Evaluation of the three fields. The report on this evaluation, dated February 2000, concluded that the results were sufficiently promising to continue with a work plan for the Chattak and Feni fields; the Kamta field was found “*uneconomic to further develop at this time*”.¹⁸ The Report concluded:

*“Based on the result of the study as indicated in the currently established reserves stated above, a joint venture contract may be executed between BAPEX and Niko as stipulated in the study upon approval of Petrobangla and the Ministry of Energy and Mineral Resources.”*¹⁹

33. On 29 March 2001 the Ministry requested Petrobangla “*to take the necessary steps for finalising the JVA by following the Swiss challenge method ...*”;²⁰ The instructions were passed on by Petrobangla to BAPEX on 11 April 2001, transmitting the letter of 29 March 2001 “*for your kind acknowledgement and necessary steps to be taken ...*”²¹
34. In 2001 the Ministry prepared a Procedure for Development of Marginal/Abandoned Gas Fields (the **Procedure**). The Procedure was submitted to the Prime Minister with a note from the Ministry, dated 6 June 2001.²² The Procedure formed the framework for the JVA, and when this agreement eventually was executed, was attached to the JVA as Annex C.²³
35. The Ministry directed the preparation of a joint venture agreement between BAPEX and Niko. In a letter to Petrobangla, dated 20 May 2001, the Ministry wrote:

¹⁶ Attached as Annex A to the JVA and produced as Attachment A to RfA I.

¹⁷ Framework of Understanding, clause 12.05.

¹⁸ Bangladesh Marginal Field Evaluation Chattak, Feni & Kamta, February 2000, p. B-13, attached as Annex B to the JVA.

¹⁹ Ibid., p. B-15.

²⁰ Exhibit 13, Appendix B to R-CMJ.1.

²¹ Exhibit 14, Appendix B to R-CMJ.1.

²² RfA II, Attachment I.

²³ The Procedure is also described in Exhibit 18, Appendix B to R-CMJ.1.

“Subject: - Policy on Development and Production of Hydrocarbon from the Marginal and Abandoned gas fields

A draft policy regarding the Development of Marginal and Abandoned gas fields is sent herewith. In light of this policy it is requested as directed to finalise and forward a Joint Venture Agreement on Chattak, Kamta and Feni between BAPEX and Niko Resources for the approval of ministry.”²⁴

36. The Ministry gave directions on 10 June 2001 to Petrobangla and BAPEX with respect to the negotiations of the JVA. Referring to the Development Procedure, which at the time was “awaiting the final approval of the Honourable Prime Minister”, it gave directions in the following terms:

“2. In this situation in light of the draft procedure for development of Chatak, Kamta and Feni marginal and abandoned gas fields for urgent finalisation of the Joint Venture Agreement between Bapex and Niko Resource:

(1) Write a letter to Niko Resource mentioning specific date for coming to Bangladesh and

(2) After finalisation of the negotiation of Joint Venture Agreement between Bapex and Niko Resource, send the JVA to this ministry for approval of the government by 20/06/2001.”²⁵

37. Petrobangla passed on these directions to BAPEX on the following day, stating:

“... For urgent finalisation of the JVA between BAPEX and Niko Ltd in the light of the procedure mentioned in the draft procedure, it has been stated to (i) send invitation letter to Niko mentioning specific date and (2) upon completion of negotiation between BAPEX and Niko, the JVA to be sent to Ministry for approval of Government by 20.06.2001. You are requested to take urgent steps in this regard.”²⁶

38. By that time, a difference had arisen concerning the coordinates of the Chattak gas field. The difference was discussed at a meeting between BAPEX and Niko intended for finalising the JVA. The difference was not resolved at that meeting, but the

²⁴ Claimant’s Exhibit 7, p. 504. A similar but shorter letter, also dated 20 May 2001, is produced by the Respondent as Exhibit 1, Appendix B to R-CMJ.1.

²⁵ Claimant’s Exhibit 7, p. 510.

²⁶ Exhibit 20, Appendix B to R-CMJ.1.

Parties agreed that “*other than the issues under discussion herein all other issues, terms and conditions in the Negotiated Draft JVA June 2000 have been agreed to between BAPEX and Niko subject to final approval from BAPEX management*”.²⁷

39. An opinion of the Ministry of Law, Justice and Parliamentary Affairs was sought. Once this opinion had been obtained, the Ministry of Power, Energy and Mineral Resources wrote to Petrobangla and BAPEX, indicating the precise coordinates of the Chattak gas field and gave the following directions:

*“(b) In order to finalise the draft Joint Venture Agreement, Petrobangla should adhere to all the conditions mentioned in the Procedure for Development of Marginal/Abandoned Gas Fields approved by the Ex-Prime Minister on 14-06-2001 and other relevant rules-regulations, and requested to send the draft Joint Venture Agreement to this division.”*²⁸

40. The JVA continued to be discussed at the Ministry of Power, Energy and Mineral Resources. After a meeting at the Ministry on 16 September 2002, Petrobangla received a letter from the Ministry dated 25 September 2002 which it passed on to BAPEX and requested it “*to send the proposed JVA arising from the Minutes of the Meeting held at the Ministry held on 16.0.2002.*”²⁹ The Respondents have produced a series of other letters from the Ministry and from Petrobangla which show that Petrobangla turned to the Ministry for directions which it then passed on to BAPEX.³⁰

41. On 18 March 2003 a proposal seems to have been submitted to the Prime Minister concerning the JVA. Referring to the approval of this proposal by the Prime Minister, the Minister wrote to Petrobangla on 11 October 2003 with copy to BAPEX stating the following:

“2. It may be mentioned that the approved direction of the Hon’ble Prime Minister is as follows:

A) In the light of the opinion of Ministry of Law, Justice and Parliamentary Affairs, Chhatak Gas Field shall

²⁷ Exhibit 21, Appendix B to R-CMJ.1; neither the 2000 draft nor any other draft of the JVA seems to have been produced.

²⁸ Claimant’s Exhibit 7, p. 513; the division concerned is that for Energy and Mineral Resources.

²⁹ Exhibit 26, Appendix B to R-CMJ.1.

³⁰ See in particular Exhibits 27, 28, 29, 30, Appendix B to R-CMJ.1.

be considered as per Exhibit-A of Frame Work of Understanding.

And

Petrobangla shall be directed for finalisation of the draft of Joint Venture Agreement following the entire conditions as described in Procedure for Development of Marginal/Abandoned Gas Fields approved by the former Hon'ble Prime Minister on 14-06-2001 for signing a joint venture agreement between BAPEX and NIKO and as per other related terms and conditions.”³¹

42. Two days later, on 13 October 2003 BAPEX wrote to Niko, inviting it to sign the JVA in the following terms:

“In accordance with the approval accorded by the Government of the Peoples Republic of Bangladesh to sign the “JOINT VENTURE AGREEMENT FOR THE DEVELOPMENT AND PRODUCTION OF PETROLEUM FROM THE MARGINAL/ABANDONED CHATTAK & FENI GAS FIELDS” between Bangladesh Petroleum Exploration & Production Company Ltd (BAPEX) and Niko Resources (Bangladesh) Ltd, you are requested to send your Authorised representative with due authorisation to sign the said contract on 16th October, 2003 at 12.00 Noon to the Registered office of BAPEX, Dhaka, Bangladesh.”³²

43. The JVA was then executed on 16 October 2003.

3.2 The JVA and its arbitration clause

44. The JVA's “Whereas” clauses present important elements relating to the context in which it was concluded and the function in which BAPEX acted when it entered into this agreement. Some of these clauses are particularly relevant for the jurisdictional issues which the Tribunal has to address. They deserve to be quoted *in extenso*, emphasis being added:

“WHEREAS

- 1. All mineral resources including Petroleum within the territory, continental shelf and economic zone of*

³¹ RfA II, Attachment K.

³² RfA I Clarification, Attachment 8; RfA II, Attachment L; Exhibit 34, Appendix B to R-CMJ.1.

Bangladesh are vested in the Republic of Bangladesh, and

2. **The Government has**, under the Bangladesh Petroleum Act 1974 (Act No LXIX of 1974) (as amended up to date) **the exclusive right and authority to explore, develop**, exploit, produce, process, refine and market **Petroleum Resources** within the territory, continental shelf and economic zone of Bangladesh **and it has also the exclusive right to enter into Petroleum Agreements** with any persons for the purpose of any Petroleum Operations, and
3. **Petrobangla has the power to exercise rights and powers of the Government to explore, develop**, exploit, produce, process, refine, market petroleum in the territory, continental shelf and economic zone of Bangladesh and also to enter into Petroleum Agreements with any person/company for the purpose of any Petroleum Operation, and
4. **OPERATOR [i.e. the Claimant]** made a request in 1998 to the Ministry of Energy and Mineral Resources, Govt. of the Peoples Republic of Bangladesh to develop Marginal & Non Producing Gas Fields of Bangladesh.
[...]
12. BAPEX is vested with all rights free from all encumbrances and liabilities whatsoever to assign, develop, produce, process, refine and distribute 100% (One hundred percent) of all Petroleum resources from or with within the territory of the Marginal/Abandoned gas fields of Chattak & Feni
[...]
14. BAPEX warrants that it has acquired from Petrobangla and the Government **the requisite approvals** to execute this JVA. The **responsibilities and obligations of Petrobangla and the Government** in all relevant Articles, Annexes and Amendments under this JVA **has been assign [sic] to Bapex.**”

45. The arbitration clause in the JVA reads as follows:

“Article 18. Disputes and arbitration

18.1 The Parties shall make their best efforts to settle amicably through consultation any dispute arising in connection with the performance or interpretation of any provision of this JVA or over an impasse in any decision of the JMC.

18.2 If any dispute mentioned in Article 18.1 has not been settled through such consultation within ninety (90) days after the dispute arises, either Party may, by notice to the other Party, propose that the dispute be referred either for determination by a sole expert or to arbitration in accordance with the provisions of this Article.

18.3 Following the giving of notice under Article 18.2 the Parties may, by mutual agreement, refer the dispute for determination by a sole expert to be appointed by agreement between the Parties.

18.4 As an alternative to the procedure described in Article 18.3 and if agreed upon by the Parties, such dispute shall be referred to arbitration by an agreed Sole Arbitrator.

18.5 If the Parties fail to refer such dispute to a sole expert under Article 18.3 or to a Sole Arbitrator under Article 18.4, within sixty (60) days from giving of notice under Article 18.2, such dispute shall be referred to the International Center for Settlement of Investment Disputes (“ICSID”) and the Parties hereby consent to arbitration under the Treaty establishing ICSID. If for any reason, ICSID fails or refuses to take jurisdiction over such dispute, the dispute shall be finally settled by International Chamber of Commerce.

18.6 Arbitration pursuant to Article 18.4 shall be by an arbitration tribunal consisting of three (3) arbitrators. Each Party shall appoint an arbitrator and the two (2) arbitrators so appointed shall designate a third arbitrator. If one of the Parties does not appoint its arbitrator within sixty (60) days after the first appointment or if two (2) arbitrators, once appointed, fail to appoint the third arbitrator, the relevant appointment shall be made in accordance with the rules of ICSID.

18.7 The arbitrators shall be citizens of countries that have formal diplomatic relations with both Bangladesh and Canada and any home country of the entities comprising OPERATOR, and shall not have any economic interest in or economic relationship with the Parties.

18.8 The Sole Arbitrator or the arbitration tribunal shall conduct the arbitration in accordance with the arbitration rules of ICSID. However, if the above mentioned arbitration rules are in conflict with the provisions of this Article 18, including the provisions concerning appointment of arbitrators, the provisions of this Article 18 shall prevail.

18.9 The English language shall be the language used in the arbitral proceedings. All hearing materials, statements of claim or defense, award and the reasons supporting them shall be in English.

18.10 The place of arbitration shall be Dhaka or elsewhere as mutually agreed by the Parties.

18.11 Any arbitration award given pursuant to this Article 18 shall be final and binding upon the Parties and shall be enforceable by a court of competent jurisdiction on the same basis as obligations between private Parties, and any reference in this JVA to such an award shall include any determination by a sole expert.

18.12 The right to arbitrate disputes under this agreement shall survive the termination of this agreement.”

46. There has been no evidence about the origin of this clause, nor have there been any drafts of the agreement produced in the arbitration. However, the origin of the arbitration clause in the GSPA, which is practically identical to that in the JVA, was subject to extensive discussion at the hearing, leading the Tribunal to find that it had its origin in a draft prepared by Petrobangla.³³
47. In the absence of any argument or evidence to the contrary, the Tribunal concludes that the arbitration clause in the JVA also originated from Petrobangla. Given the chain of control recorded in the Preamble to the JVA and evidenced in the account of the negotiations, it also must be concluded that, together with other instructions from Petrobangla the wording of the arbitration clause was passed on from Petrobangla to BAPEX and thus formed the basis for the JVA negotiations with Niko.

³³ See below Section 3.4.

3.3 The negotiations of the Gas Purchase and Sale Agreement (GPSA)

48. Upon conclusion of the JVA, Niko commenced work on the development of the two fields. The first well in the Feni field which it sought to develop was Feni-3. It tested water instead of gas in 17 of a total of 19 zones.³⁴ However, towards the end of the first semester 2004 gas production was considered imminent.

49. Niko wrote to Petrobangla on 19 May 2004, with copy to the Ministry, having as reference “Gas Purchase and Sales Agreement (GPSA) for the Feni Gas Field”. The letter explained that a skid-mounted gas plant was to arrive on 1 June and the Feni-3 would be put on production in July 2004. The letter continued:

“We, therefore, would like to initiate discussions with the Government of Bangladesh and Petrobangla to finalise the subject agreement so that Feni-3 can be on production as soon as the gas plant is commissioned.

We understand that pursuant to Article 7 of the “Procedure for Development of Marginal/Abandoned Gas Fields” as approved by the Honorable Prime Minister, the gas price of the Investor shall be negotiated between the Government, Petrobangla, and the Investor. Moreover, Article 24.3 of the Bapex-Niko JV stipulates that the Buyer of the gas from the Feni Gas Field shall be Petrobangla or its designee.

In view of the above, we request a meeting with the authorised representatives of the GOB, Petrobangla, and Bapex to initiate the process to execute the subject agreement so that Feni-3 well could be on production at the earliest.”³⁵

50. On 6 June 2004, Petrobangla requested Niko to submit a proposed GPSA for the Feni Gas Field.³⁶ Niko responded on 14 June 2004, announcing that Feni-3 was completed, that work on Feni-4 was advancing and that the gas plant was expected to be in place and commissioned in time for producing gas from

³⁴ Explanations contained in Niko’s letter to the Ministry of 7 August 2004 (year erroneously shown as 2002), Claimant’s Exhibit 6, p. 475 and paragraph 3 at p. 476.

³⁵ Claimant’s Exhibit 6, pp. 494-495.

³⁶ This letter has not been produced but is referenced in Claimant’s Exhibit 6, p. 492.

these two wells by early August 2004. The letter was accompanied by a draft for the GPSA.³⁷

51. Further to a letter from the Ministry dated 15 July 2004,³⁸ a committee was formed “*to negotiate for finalisation of gas pricing of Ex. Feni gas field which is being developed by BAPEX-NIKO*”. The Committee, described here as the Gas Pricing Committee, was composed of a representative of the Ministry in the function of Convenor³⁹ and representatives from Petrobangla, BAPEX and Niko.⁴⁰
52. The first two meetings of the Committee took place on 24 July and 4 August 2004 under the chairmanship of the Convenor. The minutes of the two meetings are drawn up on the letterhead of the Ministry.⁴¹ They record that Niko requested a price of US\$2.75/MCF. At the end of the discussion “*the Chair offered Niko to agree Feni Gas Price at US\$1.75/MCF, since Niko signed the JVA considering this price*”. Niko stated that it would respond later.⁴²
53. Niko answered the proposal by a letter to the Additional Secretary in the Ministry on 7 August 2004, insisting that the gas price which it demanded was reasonable and justified. It suggested consultations on the economics of the Feni development.
54. Gas delivery started on 2 November 2004, without agreement having been reached on the price and without a contract having been executed.
55. On 7 January 2005, the first blowout occurred, followed by another on 24 June 2005, as will be discussed in further detail below in Section 3.6.
56. On 14 February 2005 Niko wrote to Petrobangla that the “*trial production period has ended. Our gas plants have been commissioned. We now find ourselves in an extremely difficult*

³⁷ Claimant’s Exhibit 6, p. 492. The draft GPSA is not attached to this Exhibit.

³⁸ This letter has not been produced but is referenced in Claimant’s Exhibit 6, p. 482.

³⁹ Mr Ehsan-ul Fattah, identified as “Addl. Secretary, Petroleum & Mineral Resources Division, Ministry of Power, Energy & Mineral Resources, GOB, Dhaka”.

⁴⁰ For a list of members and observers see Claimant’s Exhibit 6, p. 485.

⁴¹ Minutes produced at Claimant’s Exhibit 6.

⁴² Claimant’s Exhibit 6, pp. 482, 484.

position with our management and board to justify and continue gas production from Feni without finalisation of the price of our share of the gas.” It required an immediate interim payment for the gas delivered from November 2004 to January 2005 at the rate of US\$2.35/MCF and finalisation of the gas price within the next ten days, failing which it would suspend gas production from the Feni field.⁴³

57. Petrobangla responded the same day, announcing that it “*would make a lump sum interim payment against the gas supplied from November, 2004 to January, 2005*” without prejudice to the rate to be agreed.⁴⁴ On 10 March 2005 Petrobangla announced that it had “*arranged a payment of US\$2 million today for the time being to you on a lump sum basis ...*”⁴⁵ Niko confirmed its receipt as “*lump sum partial payment for Niko’s share of gas production for November, December and January*”.⁴⁶
58. In a letter of 10 March 2005, BAPEX referred to the letter which Niko had addressed to the Ministry on 9 March 2005 of which it had received copy. BAPEX relied on Article 16.1(c) of the JVA which identified as an event of default if “[a]ny of the party indulges/commits any act which is contrary to the interests of Bangladesh” and required Niko to withdraw the notice of suspension of gas production “*or else we would be constrained to take all necessary steps under the JVA to up hold the interests of the country*”.⁴⁷
59. Further meetings by the Gas Pricing Committee were held. After a meeting on 16 March 2005 Niko wrote to the Ministry, to the attention of the Minister himself, summarising its understanding of the differences. The letter contained the following passage:

“It was expressed by the Chairman of Petrobangla that the final result of the Committee’s deliberations may be that we will not reach a consensus on the price. He further opined that it is possible that the Committee will have to conclude its deliberations with a report to the Ministry that a price for the gas could not be agreed. Niko acknowledged

⁴³ Claimant’s Exhibit 6, p. 471.

⁴⁴ Claimant’s Exhibit 6, p. 472.

⁴⁵ Claimant’s Exhibit 6, p. 470.

⁴⁶ Claimant’s Exhibit 6, p. 479.

⁴⁷ Claimant’s Exhibit 6, p. 470.

that this could be a possible outcome of the Committee meetings, however it was requested by Niko that this conclusion be arrived at as soon as possible so that other avenues for concluding the price agreement could be pursued. Mr Osman [the Chairman of Petrobangla] suggested that if the Committee did not agree on a price that Niko/Bapex may have to directly approach the Government of Bangladesh for a final decision.”⁴⁸

60. During these negotiations Niko ordered the car which then was delivered on 23 May 2005 to the State Minister for Energy and Mineral Resources and, in June 2005, Niko Canada invited the Minister, at its costs, to an exposition in Calgary, followed by the Minister’s resignation on 18 June and the return of the car to BAPEX on 20 June 2005. These events will be considered in further detail in Section 9.2.
61. The Gas Pricing Committee continued its work and held its final meeting on 23 October 2005.⁴⁹ It issued a report entitled “Committee Report on Feni Gas Pricing”; the report is not dated but the signatures of the members show the dates of 25 and 26 October 2005. At the beginning of this report the members of the Committee were identified in two columns, on the left the “Officials from Government” and on the right “Officials from Niko Resources (Bangladesh) Ltd”. The Officials from the Government were the Additional Secretary of the Ministry in the position of the Convener, the Chairman and a Director of Petrobangla and the Managing Director of BAPEX. In the report these members were referred to collectively as “members representing GOB”, as “GOB Team” or using similar expressions referring to them collectively. The report concluded as follows:

“Committee’s recommendation:

The Committee could not reach a consensus in respect of pricing of gas to produce from Feni field. The matter, therefore, remained unresolved.

The members representing Government side recommend that the Niko’s share of gas from Feni filed under the terms of JVA may be purchased by Petrobangla at best at a price of US\$1.75/MCF.”⁵⁰

⁴⁸ Claimant’s Exhibit 6, p. 480.

⁴⁹ Committee Report, p. 4 at Claimant’s Exhibit 6, pp. 460-463.

⁵⁰ Claimant’s Exhibit 6, pp. 460, 463.

62. Niko made comments to the Convener which it requested to “*be included as part of the Minutes*” of the 23 October 2005 meeting, presumably the Committee report just quoted. These comments were to the effect that “*if the Committee could not reach a consensus on the matter of gas pricing that the next stage should be to pursue an arbitrated settlement of the matter*”. It announced that it “*will therefore suggest to the GOB this solution to move forward on the matter*”.⁵¹
63. In a letter to the Ministry dated 25 October 2005, Niko referred to Article 18.3 of the JVA and proposed that the gas price determination “*be referred to a sole expert to arbitrate ...*”⁵²
64. This proposal was not accepted and the matter remained unresolved.
65. By 24 November 2005 no agreement had been reached on the gas price and the GSPA, but Petrobangla had made interim payments to Niko in a total amount of US\$4 million.⁵³ Niko wrote to Petrobangla that as of 28 November 2005 it would suspend gas production from the Feni Field pending “*mutual resolution*” of the gas price, the agreement and execution of a GSPA and “*settlement of arrears for gas sold to date from the Feni Field.*”⁵⁴ Petrobangla responded on the same day, requesting Niko to withdraw the notice and not to suspend deliveries. It concluded: “*If you are still determined to do so that will be seriously prejudicial to our national interest and we shall be constrained to act accordingly.*”⁵⁵
66. Following a letter from Niko dated 26 November 2005, postponing the start of suspension to 29 November 2005, Petrobangla wrote that it was restrained from making further payments by an order of 16 November 2005 of the High Court Division of the Supreme Court of Bangladesh of which it quoted the following passage:

“Since the order restraining the respondents 1.9 from making any payment to respondent No. 10 in respect of

⁵¹ Claimant’s Exhibit 6, pp. 432, 433.

⁵² Claimant’s Exhibit 6, pp. 452, 453.

⁵³ Claimant’s Exhibit 6, p. 427; confirmed by Niko at Claimant’s Exhibit 6, p. 424.

⁵⁴ Claimant’s Exhibit 6, p. 429.

⁵⁵ Claimant’s Exhibit 6, p. 428.

*any gas field or any other account passed by the High Court Division has not been modified by the Appellate Division that order shall continue.”*⁵⁶

67. Nevertheless Petrobangla insisted that deliveries should not be suspended. It stated that it expected the GPSA could be “*completed within a month or two*”.⁵⁷

68. On 29 November 2005 a meeting between Niko representatives and Mr Mahmudur Rahman, Energy Advisor of the Ministry, took place at the Ministry. Niko wrote to him on the same day, thanking him for the meeting and requesting “*full support of your Ministry and the Government of Bangladesh to assist us in having the ad-interim order of the Writ Petition No. 6911 of 2005 stayed as they apply to stopping the government from making payments to NRBL*”.⁵⁸

69. On the same day, 29 November 2005, Petrobangla wrote to Niko:

“Please be informed that the purchase price of gas of the Feni Gas Field is fixed at US\$1.75/MCF.

*We hereby invite you to negotiate the terms of the GPSA for the production of Feni Gas Field, finalise, agree and execute the same based on the above price.”*⁵⁹

70. Niko responded on 30 November 2005, stating its disagreement with that price and reiterated its proposal to settle the difference by reference to a sole expert. On an interim basis, it accepted payment on the basis of US\$1.75/MCF. It requested a meeting “*wherein discussions can proceed on the GPSA and agreement on appointment of the sole expert can be reached*”.⁶⁰

71. On 5 December 2005 Niko confirmed that it accepted payment of US\$1.75/MCF on an interim basis until determination by the proposed expert. It sent the draft for an interim GPSA to

⁵⁶ Claimant’s Exhibit 6, p. 420

⁵⁷ Claimant’s Exhibit 6, p. 421.

⁵⁸ Claimant’s Exhibit 6, p. 409.

⁵⁹ Claimant’s Exhibit 6, p. 419.

⁶⁰ Claimant’s Exhibit 6, pp. 415-416.

BAPEX. Further drafts were sent by Niko to BAPEX on 14 and 20 December 2005.⁶¹

72. On 16 January 2006 Niko announced to BAPEX the temporary reduction and shut down of production from the Feni field.⁶² It also seems to have made such announcements to Bakhrabad Gas Systems Ltd (**BGSL**). BAPEX objected to this communication in a letter of 19 January 2006, stating *inter alia*:

*“In our opinion this sort of unilateral decision and message to BGSL is a violation of JVA article no 24.3 since Petrobangla is the only authority & agent of GOB [i.e. the Government of Bangladesh] that purchases, sells, monitors and controls the transmission and distribution systems of gas in the country. ...”*⁶³

73. On 18 January 2006 a meeting apparently took place between the “Advisor, Energy & Mineral Division” of the Ministry and Niko, followed on 19 January 2006 by a meeting between Niko and Petrobangla. As a follow-up to these meetings, Niko sent on 22 January 2006 to Petrobangla and BAPEX what it described as the “final version” of the Interim GPSA, already initialled by Niko.⁶⁴

74. This version was not executed. Instead, a meeting between Niko representatives and the Advisor, Energy & Mineral Resources Division, at the Ministry took place on 12 February 2006. The meeting was followed by a letter from Niko to the Advisor dated 13 February 2006 in which it stated that the Advisor’s “*confirmation of the delay in getting final approval from the Prime Minister’s Office to allow us to proceed with our work was concerning ...*”.⁶⁵

75. At a meeting on 14 February 2006 Petrobangla requested Niko to increase production from the Feni field;⁶⁶ the request was confirmed on 20 February 2006. On 26 February 2006, Niko announced to Petrobangla, with copy to the Prime Minister, the Ministry and others, that as from 27 February 2006 it planned

⁶¹ Claimant’s Exhibit 6, pp. 369, 370.

⁶² Claimant’s Exhibit 6, p. 368.

⁶³ Claimant’s Exhibit 6, p. 366.

⁶⁴ Claimant’s Exhibit 6, pp. 357-365.

⁶⁵ Claimant’s Exhibit 6, p. 341.

⁶⁶ Claimant’s Exhibit 6, p. 334.

to shut down all gas production from the Feni field “until further notice”.⁶⁷

76. Petrobangla objected to the decision in a letter of 28 February 2006. It added:

*“We are carefully scrutinising the draft GPSA you have submitted and our response to the same shall be communicated to you in due course. If the shut down has any connection with finalisation of the GPSA, it appears to be unnecessary at this point of time when negotiations even have not started.”*⁶⁸

77. In a letter to Petrobangla of 2 March 2006 Niko provided explanations for the shutdown, referring in particular to the absence of an approved Work Programme and Budget and of a GPSA.

78. Petrobangla replied on 5 March 2006 requesting that gas production resume. The letter contained the following passage:

*“(c) As you have rightly mentioned earlier the gas price under the JVA is a matter of common understanding of the Government of Bangladesh (GOB), Petrobangla and the investor. Failure to reach any unanimous price decision, cannot be arbitrated/determined by any sole expert under the GPSA of any kind, since GOB is not going to be party to that. The truth of the matter is price negotiation under the JVA is not to be done at the time of GPSA negotiation neither it could be agreed that the GPSA negotiation has been started at the time Price Committee was made because that had been started independently. We now have a draft GPSA submitted by you. We are ready and willing to start negotiation on that. Feel free to contact us.”*⁶⁹

79. Mr Brian Adolf, at that time Country Manager for Niko,⁷⁰ explained at the hearing that the draft to which reference is made in this letter was the start of a new series of drafts. It differed from that which Niko had submitted in 2004. Since Mr

⁶⁷ Claimant’s Exhibit 6, p. 333.

⁶⁸ Claimant’s Exhibit 6, p. 332.

⁶⁹ Claimant’s Exhibit 6, pp. 319 and 320.

⁷⁰ C-MJ.1, Appendix A, expected evidence of Mr Adolf, paragraph 160.

Adolf commenced his activity as Country Manager for Niko only in January 2005, he was not familiar with the 2004 draft.⁷¹

80. According to Mr Adolf, when the attempt to reach an interim GPSA had failed, Niko invited Petrobangla as follows: “*why do you not provide us what is your standard GPSA and we will work forward from there*”.⁷² In response Petrobangla provided a text in Word format which Niko used as the basis for a draft by reference to which all further negotiations were conducted. Mr Adolf explained: “*We started from scratch with the format that Petrobangla had provided.*”⁷³

81. Petrobangla, BAPEX and Niko met on 7 March 2006. The following day, on 8 March 2006, Niko wrote to Petrobangla and to Mr Jamaluddin in his function as Managing Director of BAPEX and “Member Secretary of the Committee for Finalisation of Gas Pricing for the JVA” that it was “*in the process of finalising the DRAFT GPSA at the earliest except the fixing of the price*”; Niko proposed determination of the price by an expert, and added:

*“Furthermore, we value the relationship we have with the Government of Bangladesh and considering the national interest Niko Management after having detail discussion with the Hon’ble Advisor for the Energy & Mineral Resources Division decided to turn on the Gas Production from Feni Gas Filed [sic] as a gesture of our goodwill ...”*⁷⁴

82. The GPSA was approved by the Government, acting through the Ministry of Power, Energy and Mineral Resources. On 20 December 2006 it addressed a letter to the Chairman of Petrobangla in the following terms:

“You are informed on the above subject and reference that the draft Purchase and Sale Agreement (GPSA) for the produced gas from the Feni Gas Field as per agreement of Bapex with NAICO [sic] sent through abovementioned memo under reference has been approved by the government.

⁷¹ HT 2, pp. 189, 190.

⁷² HT 2, p. 190.

⁷³ HT 2, pp. 191, 193.

⁷⁴ Claimant’s Exhibit 6, p. 308.

2. Under the circumstances the undersigned is directed to request you to take necessary action in the due pursuance of the existing rules and regulations on the above mentioned subject.”⁷⁵

83. On the following day, 21 October 2006, Petrobangla wrote to Niko and BAPEX, informing them that the Government of Bangladesh had “*approved the initialled (31.07.2006) Gas Purchase and Sale Agreement of Marginal Gas Field Fen*”.⁷⁶
84. The GPSA was executed on 27 December 2006. It fixed a price of US\$1.75 per thousand cubic feet of gas for the period of the agreement.
85. Most of the correspondence referred to in this account of the events leading to the execution of the GPSA was copied by Niko and by Petrobangla to the Ministry of Power, Energy & Mineral Resources and, occasionally, also to the Prime Minister’s office.

3.4 The arbitration clause in the GPSA

86. The draft of the interim GPSA, sent by Niko to Petrobangla on 5 December 2005, contained a clause for expert determination of price disputes. With respect to any other dispute it provided for arbitration under the Rules of the International Chamber of Commerce (**ICC**) with a seat in Singapore or elsewhere as mutually agreed by the Parties.⁷⁷ In subsequent drafts this clause remained largely unchanged⁷⁸ until, in March 2006, Niko abandoned the attempt to reach an interim agreement.
87. From then on, a different text formed the basis for the negotiations of the GPSA. The first draft of this text produced in these proceedings is the version which, according to the testimony of Mr Adolf, Niko prepared on the basis of an electronic text received from Petrobangla, as described above in paragraph 80.

⁷⁵ RfA II, Attachment B.

⁷⁶ Ibid.

⁷⁷ Claimant’s Exhibit 6, pp. 390, 395.

⁷⁸ Claimant’s Exhibit 6, pp. 357, 362, 370, 375, 379-382.

88. The drafts which then were exchanged and discussed contained a clause which provides for ICSID arbitration in the same terms as the JVA, with a reference to ICC arbitration if “ICSID fails or refuses to take jurisdiction over such dispute”. The complete and final text of the arbitration clause is contained in Article 13 of the GPSA and reads as follows:

“13.5 The Parties shall make their best efforts to settle amicably through consultation any dispute arising in connection with the performance or interpretation of any provision of this Agreement.

13.2 If any dispute, mentioned in Article 13.1, has not been settled through such consultation within ninety (90) days after the dispute arises, either Party may, by notice to the other Party, propose that the dispute be referred either for determination by a sole expert or to arbitration in accordance with the provisions of this Article.

13.3 Following the giving of notice under Article 13.2, the Parties may, by mutual Agreement, refer the dispute for determination by a sole expert to be appointed by Agreement between the Parties.

13.4 As an alternative to the procedure described in Article 13.3 and if agreed upon by the Parties, such dispute shall be referred to arbitration by an agreed sole arbitrator.

13.5 If the Parties fail to refer such dispute to a sole expert under Article 13.3 or to a Sole Arbitrator under Article 13.4, within sixty (60) days of the giving of notice, such dispute shall be referred to the International Centre for Settlement of Investment Disputes (“ICSID”) and the Parties hereby consent to arbitration under the Treaty establishing ICSID. If for any reason, ICSID fails or refuses to take jurisdiction over such dispute, the dispute shall be finally settled by International Chamber of Commerce.

13.8 Arbitration pursuant to Article 13.4 shall be by an arbitration tribunal consisting of three (3) arbitrators. The Parties shall each appoint an arbitrator and the two (2) arbitrators so appointed shall designate a third arbitrator. If one of the Parties does not appoint its arbitrator within sixty (60) days after the first appointment or if two (2) arbitrators, once appointed, fail to appoint the third within sixty (60) days after the appointment of the second arbitrator, the relevant appointment shall be made in

accordance with the rules of ICSID or the International Chamber of Commerce, as the case may be.

13.7 The arbitrators shall be citizens of countries that have formal diplomatic relations with both Bangladesh and Canada and any home country of the entities comprising the Seller, and shall not have any economic interest in or economic relationship with the Parties.

13.8 The Sole Arbitrator or the arbitration tribunal shall conduct the arbitration in accordance with the arbitration rules of ICSID. However, if the above-mentioned arbitration rules are in conflict with the provisions of this Article 13, including the provisions concerning appointment of arbitrators, the provisions of this Article 13 shall prevail.

13.9 The English language shall be the language used in arbitral proceedings. All hearing materials, statements of claim or defense, award and the reasons supporting them shall be in English.

13.10 The place of arbitration shall be Dhaka or elsewhere as mutually agreed by the Parties.

13.11 Any arbitration award given pursuant to this Article 13 shall be final and binding upon the Parties and shall be enforceable by a court of competent jurisdiction on the same basis as obligations between private parties, and any reference in this Agreement to such an award shall include any determination by a sole expert.

13.12 The right to arbitrate disputes under this Agreement shall survive the termination of this Agreement.”

89. The Tribunal discussed at length with Mr Adolf the origin of the draft containing this arbitration clause and the negotiations about the clause. According to his testimony, the clause was not subject to negotiations and remained as it had been in the draft of March 2006, originating from Petrobangla. At the end of the discussion the Chairman of the Tribunal drew the following conclusion:

“From this evidence we must conclude that the clause, as it was in the final agreement, was put by Petrobangla.

We put it to both parties, if there is evidence to counter this assumption which we must draw from the evidence before

*us, both parties are invited to produce this evidence so that if we are wrong in this conclusion that we can correct our conclusion.”*⁷⁹

90. No contrary evidence was produced thereafter. The Tribunal concludes that the clause providing for ICSID arbitration was as originally put forward by Petrobangla which, as shown above, acted in close consultation with and under instructions of the Government.

3.5 The Payment Claims under the GPSA

91. After the GPSA had been executed, Niko invoiced Petrobangla on 10 January 2007 for the gas produced from inception of gas production in November 2004 to December 2006. These and subsequent invoices were not paid. After several reminders, Niko sent on 30 September 2007 a Notice of Default to Petrobangla, claiming payment of the outstanding amounts.⁸⁰
92. At the Joint Management Committee meeting No 8 on 25 March 2008, Niko and BAPEX reviewed the payments outstanding from Petrobangla. Niko requested that arbitration be commenced immediately against Petrobangla under the GPSA; however BAPEX did not agree.⁸¹
93. On 8 January 2010 Niko served Notice of Arbitration on Petrobangla under the GPSA.⁸² By a separate Notice of the same date, Niko joined BAPEX to the arbitration commenced against Petrobangla.⁸³ This was followed by the two Requests for Arbitration on 1 April and 16 June 2010, the latter of which concerned the outstanding payments under the GPSA.

3.6 The blowouts and the Compensation Claim

94. On 7 January 2005 the first blowout occurred in the No 2 Well of the Chattak field.

⁷⁹ HT 2, p. 206.

⁸⁰ Claimant's Exhibit 6, p. 213.

⁸¹ Letter of Niko to BAPEX, dated 17 April 2008, RfA I, Attachment D.

⁸² RfA II, Attachment P.

⁸³ RfA II, Attachment Q.

95. Starting on 9 January 2005 the Government of Bangladesh formed a number of enquiry committees to determine the causes of the fire and assess various categories of losses. The first committee report was submitted on 10 February 2005 and held Niko responsible for the blowout. Subsequent reports confirmed Niko's responsibility and assessed the quantity and value of the gas lost, the damage to the local population, environmental damage and other losses.⁸⁴
96. On 24 June 2005 a second blowout occurred in the Chattak gas field at the Relief Well Chattak 2A.
97. Niko was held responsible also for this blowout.
98. In the fall of 2005 the Bangladesh Environmental Lawyers' Association (BELA) and others issued a petition in the Supreme Court of Bangladesh, High Court Division, against the Government of Bangladesh, Petrobangla, BAPEX, Niko and others, seeking *inter alia* a determination that the JVA was invalid, that the payments made in respect of Feni gas purchases by Petrobangla were without lawful authority and an injunction restraining payments to Niko in respect to the Feni gas field or on any other account (the **BELA Proceedings**).⁸⁵
99. In the course of these proceedings injunctions were issued on which, as stated above, Petrobangla relied when suspending payments under the GPSA.
100. On 27 May 2008 Petrobangla served on Niko legal notice claiming Tk746.50 crore as damages for the blowouts.⁸⁶
101. Niko responded on 9 June 2008, denying liability for any damages arising from the blowouts at Chattak and that Petrobangla suffered the alleged damage. It added that the claims brought by Petrobangla had to be resolved by arbitration and that it was willing to resolve the issues between the Parties

⁸⁴ Information on the committees and their reports is provided in the Judgment of the BELA proceedings, RfA II, Attachment M, pp. 14-16.

⁸⁵ RfA II, paragraph 6.21.

⁸⁶ Claimant's Exhibit E.

through arbitration conducted through ICSID, as agreed between the Parties.⁸⁷

102. Sometime “in or about” June 2008 the People’s Republic of Bangladesh and Petrobangla, further to the notice of 27 May 2008 served by Petrobangla, commenced proceedings in the Court of the District Judge in Dhaka against Niko, two of its executives, GSM Inc. and its drilling manager. They claimed damages in the amount specified in the Notice (these proceedings are referred to as the **Money Suit**).⁸⁸
103. The High Court Division rendered its decision in the BELA proceedings on 5 May 2010. It found that the “*JVA was not obtained by flawed process by resorting to fraudulent means*”.⁸⁹ Concerning the claim for compensation it made the following order:

*“... Niko is directed to pay the compensation money as per the decision to be taken in the money suit now pending in the Court of the Joint District or as per the mutual agreement among the parties. The respondents are restrained by an order of injunction from making any payment to respondent No 10. This order of injunction shall remain in force till disposal of the money suit or till amicable settlement amongst the parties, whichever is earlier.”*⁹⁰

104. The Claimant states that it discussed with Bangladesh and Petrobangla the prospect of submitting the claims for damages arising from the blowouts to ICSID arbitration and that Bangladesh and Petrobangla “*appeared to be in agreement that the claims could be arbitrated under ICSID provided the arbitration was held in Dhaka*”.⁹¹ It presents a letter by its Counsel to a lawyer in Dhaka.⁹² No other written evidence for these negotiations has been produced. In any event the Claimant does not contend that agreement was reached in this respect.

⁸⁷ Claimant’s Exhibit E.

⁸⁸ Claimant’s Exhibit F; the document is not dated; the Claimant states that the action commenced “in or about June 2008”; RfA II, paragraph 6.8.

⁸⁹ RfA II, Attachment M, p. 40.

⁹⁰ RfA II, Attachment M, p. 42; Claimant’s Exhibit 8, p. 555.

⁹¹ RfA I, paragraph 6.8.

⁹² RfA I, Attachment C.

105. On 8 January 2010 the Claimant served on the three Respondents Notice of Arbitration under Article 18 of the JVA.⁹³ This was followed by the two Requests for Arbitration on 1 April and 16 June 2010, the former of which concerned the Compensation Claim.

⁹³ RfA I, Attachment C 1.

4. THE PROCEDURAL HISTORY

4.1 From Registration to the Constitution of the two Tribunals

106. Since the two cases were filed at separate dates, the initial history of this arbitration must be considered separately for each of the two cases. As explained in the introduction to this Decision, the two Tribunals constituted in the two cases are referred to collectively as “the Tribunal”.

4.1.1 ICSID Case No. ARB/10/11

107. On 12 April 2010 ICSID received a Request for Arbitration, dated 1 April 2010, from Niko Resources (Bangladesh) Ltd. against the People’s Republic of Bangladesh, Petrobangla and BAPEX (the First Request or RfA I).

108. In RfA I Niko stated that it was seeking resolution by ICSID arbitration of the dispute which the named Respondents had brought against Niko and others in the Court of District Judge, Dhaka, Bangladesh, claiming damages alleged to arise from the two well blowouts in the Chattak field (the Compensation Claims). It stated that it also sought to “*recover payment of amounts due for gas delivered*”.

109. In accordance with Rule 5 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the **ICSID Institution Rules**), the Centre acknowledged receipt of the First Request on 13 April 2010, and transmitted a copy of it to the three Respondents.

110. By letter of 7 May 2010, the Centre requested clarifications from Niko concerning the First Request, to which the Claimant responded under cover of a letter of 18 May 2010 (**RfA I Clarification**). It named Professor Jan Paulsson as its appointee to the Arbitral Tribunal.

111. On 27 May 2010 the Acting Secretary-General registered the Claimant’s First Request, as supplemented on 18 May 2010, pursuant to Article 36(3) of the Convention on the Settlement of

Investment Disputes between States and Nationals of Other States (**ICSID Convention** or **Convention**) as ICSID Case No. ARB/10/11. On the same date, in accordance with ICSID Institution Rule 7, the Acting Secretary-General notified the Parties of the registration and invited them to proceed, as soon as possible, to constitute the Arbitral Tribunal.

112. By letter of 21 June 2010 addressed to the Acting Secretary-General, the Respondents raised certain objections to the Centre's jurisdiction and indicated a proposal regarding the constitution of the Tribunal in ICSID Case No. ARB/10/11 (**R-Preliminary Objections**). In these objections the Respondents stated that the Claimant had "*failed to show how Bangladesh and Petrobangla (or even BAPEX) have consented to ICSID arbitration in the matters referred to arbitration*".
113. The Centre acknowledged receipt of the letter on 24 June 2010 and reminded the Parties that, as provided by Articles 41 and 42 of the ICSID Convention, the registration of a request for arbitration by the Centre is without prejudice to the powers and functions of the Arbitral Tribunal with respect to the Tribunal's jurisdiction and the merits.
114. The Claimant made comments on the Respondents' letters of 21 and 24 June 2010 by letter of 30 June 2010.
115. Following several rounds of communications regarding the method of constituting the Tribunal, the Respondents wrote on 26 August 2010 and invoked the formula concerning the method of constituting the Tribunal provided for in Article 37(2)(b) of the ICSID Convention. The Tribunal was thus to be composed of three arbitrators, one appointed by each Party, and the third, presiding arbitrator to be appointed by agreement of the Parties. The Respondents appointed Professor Campbell McLachlan as arbitrator and proposed Mr Gavan Griffith, a national of Australia, as President of the Tribunal.
116. On 27 August 2010 the Centre informed the Parties that it would seek from Professor McLachlan the acceptance of his appointment, and that it would also proceed to seek the acceptance of his appointment as arbitrator from Professor Jan Paulsson, who had been nominated as arbitrator by the

Claimant before the method of constituting the Tribunal had been determined.

117. On the same date, the Claimant objected to the appointment of Mr Griffith as President of the Tribunal.
118. By letter of 31 August 2010 the Centre informed the Parties that both Professors McLachlan and Paulsson had accepted their respective appointments as arbitrators.
119. On 17 September 2010 and further to its letter of 27 August 2010, the Claimant proposed Professor Guillermo Aguilar Alvarez, a national of Mexico, as presiding arbitrator. By letter of 19 October 2010, the Respondents objected to this proposal, and, on 23 October 2010, the Respondents proposed Professor Georges Abi-Saab, a national of the Arab Republic of Egypt, and, alternatively Dr S.K.B. Asante, a national of Ghana, as the President of the Tribunal.
120. By letter of 16 November 2010 the Claimant objected to the Respondents' proposals of 23 October 2010, and requested that the Chairman of the ICSID Administrative Council appoint the President of the Tribunal in accordance with Article 38 of the ICSID Convention.
121. On 29 November 2010 the Centre invited the Parties to consider candidates for presiding arbitrator by way of ballot procedure. Each Party was to select one or more acceptable candidate(s) from a list of candidates proposed to the Parties by the Centre. In the event the Parties agreed on a mutually acceptable candidate, that individual would be selected as the President of the Tribunal; however, should the procedure not produce a mutually acceptable candidate, the Chairman of the ICSID Administrative Council would make the appointment from the ICSID Panel of Arbitrators pursuant to Article 38 of the Convention.
122. By letter of 13 December 2010 the Centre informed the Parties that they had agreed under the ballot procedure to appoint Mr Michael E. Schneider to serve as President of the Tribunal.
123. On 20 December 2010 pursuant to Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the **ICSID Arbitration**

Rules), the Secretary-General notified the Parties that Msrs. Schneider, McLachlan and Paulsson had all accepted their appointments, and that the Tribunal was therefore deemed to have been constituted and **the proceedings to have begun on 20 December 2010**. The Secretary-General further informed the Parties that Ms Frauke Nitschke, Legal Counsel, ICSID, would serve as the Secretary of the Tribunal.

4.1.2 ICSID Case No. ARB/10/18

124. On 23 June 2010 the Centre received a further Request for Arbitration from Niko, dated 16 June 2010, against the same three Respondents, i.e., the People's Republic of Bangladesh, Petrobangla and BAPEX (the Second Request or RfA II).⁹⁴ Niko stated that it sought by this new Request "*to resolve all claims to payment under the GPSA and recover payment of amounts due for gas delivered*" (the Payment Claims). It clarified that the First Request concerned the Compensation Claims.
125. The Centre acknowledged receipt of the Second Request by letter of 28 June 2010 and transmitted a copy of it to the three Respondents.
126. On 28 July 2010 the Second Request was registered by the Acting Secretary-General pursuant to Article 36(3) of the ICSID Convention, and assigned ICSID Case No. ARB/10/18.
127. By letter of 9 September 2010 the Claimant requested that, based on the similarity and overlap of issues between ICSID Case Nos. ARB/10/11 and ARB/10/18, an identical tribunal be constituted in the two cases, and nominated Professor Paulsson as arbitrator.
128. By letter of 10 September 2010, the Centre reminded the Parties that the number of arbitrators and the method of their appointment had to be determined in ICSID Case No. ARB/10/18 before any appointment could take effect.
129. On 19 October 2010 the Respondents requested that the Tribunal be constituted in accordance with the formula

⁹⁴ In that request the three Respondents are presented in an order different from that in the First Request. In this arbitration, the order of the First Request is adopted throughout.

contained in Article 37(2)(b) of the ICSID Convention, and appointed Professor McLachlan as arbitrator. In their letter, the Respondents further indicated that they “*recognize that ICSID Case Nos. ARB/10/11 and ARB/10/18 may be linked so that the modality for the constitution of the Arbitration Tribunal, the Arbitrators and the President of the Arbitration Tribunal in both proceedings may be the same.*”

130. On the same day, the Centre confirmed that the Tribunal was to be constituted in accordance with Article 37(2)(b) of the Convention and informed the Parties that it would seek from Professors McLachlan and Paulsson the acceptance of their respective appointments. By letters of 21 and 28 October 2011, the Centre informed the Parties that they had accepted their appointments.
131. On 16 November 2010 the Claimant requested the Chairman of the ICSID Administrative Council to appoint the President of the Tribunal in ICSID Case No. ARB/10/18, and clarified by letter of 18 November 2010 that it wished that an identical tribunal be constituted in ICSID Case Nos. ARB/10/11 and ARB/10/18.
132. On 29 November 2010 the Centre invited the Parties to consider appointing the presiding arbitrator in ICSID Case No. ARB/10/18 by way of ballot procedure, as in Case No. ARB/10/11.
133. By letter of 13 December 2010 the Centre informed the Parties that they had agreed under the ballot procedure to appoint Mr Michael E. Schneider to serve as President of the Tribunal in ICSID Case No. ARB/10/18.
134. On 20 December 2010 the Secretary-General notified the Parties that Mssrs. Schneider, McLachlan and Paulsson had accepted their appointments and that the Tribunal in ICSID Case No. ARB/10/18 was therefore deemed to have been constituted and the **proceedings to have begun on 20 December 2010**. The Secretary-General further informed the Parties that Ms Frauke Nitschke would serve as the Secretary of the Tribunal.

4.2 Following the Constitution of the two Tribunals

135. Following an agreement between the Parties and the Tribunal constituted in the two cases, on 14 February 2011 the President of the Tribunal held **joint preliminary procedural consultations** in ICSID Case Nos. ARB/10/11 and ARB/10/18 pursuant to ICSID Arbitration Rule 20 with the Parties in Geneva on 14 February 2011.
136. Present at the preliminary procedural consultations were: Mr Michael E Schneider, President of the Tribunal; Ms Frauke Nitschke, Secretary of the Tribunal; Mr Kenneth J Warren, QC, for the Claimant; and Mr Tawfique Nawaz and Mr Mohammad Imtiaz Farooq for the Respondents. In preparation for the procedural consultation, the Tribunal had adopted a proposed agenda and its Members had discussed the issues on these agenda. The Parties did not object to the absence of the two other arbitrators at the preliminary procedural consultations.
137. Subsequently, on the same day, pursuant to ICSID Arbitration Rule 13, the Tribunal held its **Joint First Session** with the Parties in Geneva, with the two co-arbitrators joining by way of video-conference. As previously agreed by the Parties, the preliminary procedural consultations and the First Session were held jointly for both ICSID Case Nos. ARB/10/11 and ARB/10/18.
138. The consultations and the Joint First Session considered matters of procedure regarding the conduct and organization of the arbitration. The Claimant clarified the relief sought, stating in particular that, with respect to the Compensation Claim it sought a declaration of no liability for any of the blowout damage (**Compensation Declaration**).⁹⁵ The Parties agreed that the two cases were to proceed in a concurrent manner, and that the Tribunal may issue one single instrument in relation to both cases, and may discuss the two cases jointly except where circumstances distinct to one case necessitate a separate treatment. The Parties also agreed that the applicable arbitration rules would be the ICSID Arbitration Rules in force as of 10 April 2006, that the place of proceedings would be London, United Kingdom and that the language of the

⁹⁵ For details see below Section 10.

arbitration would be English. They confirmed that the Tribunal was properly constituted in the two cases and that they had no objection to the appointment of any Member of the Tribunal.

139. At the Joint First Session the Tribunal and the Parties considered the procedural timetable. It was decided that, in a first (and possibly final) phase of the two arbitrations, the Respondents' objections to jurisdiction would be heard. After consultation with the Parties, the procedural timetable for the written and oral procedure on jurisdiction was issued in Procedural Order No. 1.
140. Summary Minutes of the consultations and the Joint First Session were prepared as well as sound recordings. These were subsequently distributed by the Centre to the Parties and the Members of the Tribunal.
141. Further to the discussion at the Joint First Session, the Tribunal gave directions in Procedural Order No. 1 with respect to *inter alia* a possible counter-claim. It directed that the Respondents, if they wished to oppose the Payment Claim on the grounds of a claim for the compensation of the damage from the well blowouts (Compensation Claim), they must raise this claim with their First Counter-Memorial on Jurisdiction.
142. In accordance with Procedural Order No. 1, on 1 April 2011 the Claimant filed its First Memorial on Jurisdiction for the Payment Claim (**C-MJ**), which included a request for the Respondent to produce certain documents.
143. On 16 May 2011 the Respondents filed their First Counter-Memorial on Jurisdiction on the Payment Claim (**R-CMJ.1**), which included observations on the Claimant's document production request of 1 April 2011 but no counter-claim.
144. On 30 June 2011 the Claimant filed its Second Memorial on Jurisdiction, described as the Claimant's Response to the Respondents' First Counter-Memorial on Jurisdiction for the Payment Claim, and the Claimant's Memorial on Jurisdiction for the Compensation Claim (**C-MJ.2**) and reiterated its document production request originally filed with its First Memorial on Jurisdiction.

145. On 1 August 2011 the Respondents filed further observations on the Claimant's document production request of 1 April 2011.
146. On 16 August 2011 the Respondents filed a request for the Tribunal to decide on production of documents. The Claimant filed its observations on this request on 19 August 2011.
147. On 26 August 2011 the Tribunal decided on the admissibility of the Respondents' document production request and posed questions to the Parties regarding document production issues and certain allegations made by the Respondents concerning the Claimant.
148. The Respondents responded to the Tribunal's questions by letter of 29 August 2011 and the Claimant by letters of 6 and 13 September 2011.
149. On 30 August 2011 the Respondents filed their Second Counter-Memorial on Jurisdiction, described as the Respondents' Rejoinder on Jurisdiction for the Payment Claim (**R-CMJ.2 – Payment Claim**).
150. On 13 September 2011 the Tribunal requested further clarifications from the Claimant regarding criminal investigations notified to the Claimant or to another person or company acting on the Claimant's instructions or on its behalf, to which the Claimant responded by letter of 22 September 2011.
151. On 15 September 2011 the President of the Tribunal held a **pre-hearing organisational meeting** by telephone conference with the Parties to discuss the conduct and organisation of the hearing on jurisdiction. Prior to this telephone conference the Tribunal had addressed to the Parties a List of Points for Discussion which served as the basis for the discussion with them.
152. The following persons participated in the organisational meeting: Mr Michael E. Schneider, President of the Tribunal; Ms Frauke Nitschke, Secretary of the Tribunal; Mr Kenneth J Warren, QC, and Mr Ajmalul Hossain, QC, for the Claimant; and Mr Tawfique Nawaz, Mr Mohammad Imtiaz Farooq, Mr Luis Gonzalez Garcia and Ms Alison Macdonald, for the

Respondents. The Parties confirmed that they had no objection to the pre-hearing organisational meeting being conducted by the President alone.

153. At the pre-hearing organisational meeting the President discussed with the Parties in particular questions relating to the conduct of the hearing and witness testimony, the scope of the jurisdictional issues and outstanding issues concerning the document production requests. A procedure was agreed for further submissions with respect to these requests and the response to the questions of the Tribunal.
154. Summary Minutes of the organisational meeting and the sound recordings were distributed to the Parties and the Members of the Tribunal on 19 September 2011.
155. In the course of the organisational meeting, the Respondents requested leave to file a Supplemental Counter-Memorial on Jurisdiction, responding in particular to the Claimant's presentation concerning the Compensation Declaration. On 19 September 2011, the Tribunal issued Procedural Order No. 2, granting the Respondents' request to file a further submission on jurisdiction, and allowing the Claimant to file observations on the Respondents' further submission prior to the hearing on jurisdiction.
156. On 20 September 2011 the Claimant filed answers related to document production questions posed by the President during the pre-hearing telephone conference.
157. On 27 September 2011 the Respondents addressed certain questions relating to the replies which the Claimant had given in its submissions of 6 and 22 September 2011.
158. On 28 September 2011 the Respondents filed observations on the Claimant's letter of 20 September 2011 and, in a separate document, their Supplemental Counter-Memorial on Jurisdiction (**R-CMJ.2 – Compensation Declaration**), described as Respondents' Response to the Claimant's Presentation of its Position with respect to the Request for the Compensation Declaration.

159. The Claimant filed its observations thereon on 10 October 2011 in a submission entitled Reply to the Respondents' Response with respect to the Compensation Declaration (**C-MJ.3**).
160. A **hearing on jurisdiction** was held on 13 and 14 October 2011 in London. In addition to the three Members of the Tribunal and the Secretary, the following persons participated in the jurisdictional hearing:

For the Claimant:

Mr Kenneth J Warren, QC, Mr James T Eamon, QC, and Ms Erin Runnalls of Gowlings, Calgary, and Mr Ajmalul Hossain, QC, of A. Hossain & Associates, Dhaka.

For the Respondents:

Mr Tawfique Nawaz, Senior Advocate, and Mr Mohammad Imtiaz Farooq of Juris Counsel, Dhaka, and Mr Luis González García and Ms Alison Macdonald of Matrix Chambers, London.

161. In the course of the hearing, the Members of the Tribunal sought to clarify certain issues raised in the Parties' written submissions on jurisdiction. Mr Brian Adolph, Regional Manager, Middle East/Madagascar of Niko Canada and, from January 2005 to December 2007 Country Manager for Niko, and Mr Imam Hossain, Secretary, Petrobangla, testified as witnesses. Further to Procedural Order No. 1 the Parties had submitted descriptions of the facts on which these witnesses were expected to testify, the Claimant with C-MJ.1 and the Respondents with R-CMJ.1. The Parties were given an opportunity to question the witnesses, to develop their case orally, and to respond to the Tribunal's questions.
162. Following the witness testimony, the Tribunal declared the record on jurisdiction closed and confirmed this in the Summary Minutes of the hearing.
163. Following the Parties' closing submissions, the Tribunal enquired whether the Parties wished to raise any points of complaint with regard to the conduct of the procedure, which the Tribunal could address and rectify if necessary. The Parties confirmed that they did not have any such points they wished to raise, and the hearing was declared closed.

164. Summary Minutes of the hearing were prepared by the Tribunal and sent to the Parties on 23 November 2011.
165. The hearing was recorded and a transcript was prepared by Ms Georgina Ford and Mr Ian Roberts of Briault Reporting Services. A copy of the transcript was sent to the Parties and the Members of the Tribunal on 14 and 15 October 2011 and a corrected version on 23 November 2011. The audio recording of the hearing was distributed on 27 October 2011.
166. The Tribunal deliberated at meetings in person in Paris and Geneva, by telephone conferences and by correspondence, reaching the present unanimous decision.

5. THE CLAIMANT – ITS IDENTITY AND ITS NATIONALITY

167. The Claimant describes itself as Niko Resources (Bangladesh) Ltd. The Respondents argue that this company “*is not the real claimant in this arbitration*”.

5.1 The position of the Parties

168. The Claimant relies on the fact that both agreements are concluded by a company described Niko Resources (Bangladesh) Ltd., and indicate that this company has its “*Head Office at P.O. Box 261, Bay Street, Bridgetown, Barbados*”. The JVA also states that the company so identified is “*a corporation organised under the laws of Barbados*”.

169. It is undisputed that the company so identified is registered in Barbados. The Claimant states that it also has its Head Office there and that it at a later date “*designated a primary office in Cyprus*”.⁹⁶

170. The Respondents argue that Niko Resources (Bangladesh) Ltd. “*is not the real claimant in this arbitration*”. According to the Respondents it “*is clear that the registered office of the Claimant is one of convenience, and that the real investor in Bangladesh and, therefore the real Claimant was and continues to be Niko Resources Ltd., a Canadian company*”.⁹⁷ The parent company of the Claimant is indeed Niko Resources Ltd., a company registered in Canada with a head office in Calgary, Canada.⁹⁸

171. Barbados is a Contracting State of the ICSID Convention since 1 December 1983. Canada signed the ICSID Convention on 15 December 2006 but has not ratified it. At the commencement of the arbitration it was not a Contracting State, and is not one today. Cyprus is a Contracting State since 25 December 1966.

172. In support of their position, the Respondents rely primarily on the following facts or allegations: Niko Canada owns and is in full control of Niko Bangladesh; it carried out all the necessary

⁹⁶ C-MJ-2, paragraph 111.

⁹⁷ R-CMJ-1, paragraph 83.

⁹⁸ Claimant’s Exhibit 15, p. 985.

technical studies; its executives negotiated and signed the JVA and the GSPA; Niko Bangladesh has no office, employees, assets or business in Barbados or Cyprus, and its managerial positions are held by Canadian nationals and employees of Niko Canada.⁹⁹

173. The argument of the Respondents, in substance, has two prongs which are related but different:

- The first prong concerns the identity of the Claimant, the Respondents arguing that the corporate entity of the Barbados company is only a façade (used for “convenience”) or “*just a shell*”,¹⁰⁰ while the true investor is the Canadian company; this line of argument disregards the separate legal personality of the Barbados company and absorbs it by the parent company. The Respondents “*request the Tribunal to lift the corporate veil of Niko Bangladesh*”.
- The other prong seems to recognise the distinct legal personality of the Claimant but takes the position that, because of its control by a Canadian company, the nationality of the Claimant company was not that of Barbados. Thus the Respondents argue that the “*parties to the GPSA and JVA knew and agreed that the real nationality of Niko was Canadian*”.¹⁰¹ They argue that “*there must be real connection between the investor and the State of its nationality*”¹⁰² and, quoting Schreuer, insist that the tribunal should “*take a realistic look at the true controllers ...*”.¹⁰³

5.2 The Claimant’s identity

174. The Respondents do not question that under the law of Barbados and of Canada, the Claimant and Niko Canada have distinct legal personality and are separate corporate entities; however, they insist that this distinct legal personality does not correspond to economic reality.

⁹⁹ R-CMC.1, paragraph 85.

¹⁰⁰ HT 1, p. 108.

¹⁰¹ R-CMJ.1, paragraph 88(a).

¹⁰² R-CMJ.1, paragraph 89.

¹⁰³ R-CMJ.1, paragraph 95, quoting Schreuer, *The ICSID Convention: A Commentary* (2nd ed., 2009) (hereinafter **Schreuer**), at p. 563.

175. According to the Respondents the “*party which financed, negotiated, operated and was the decision-maker under the JVA and GPSA was Niko Canada. [...] It is clear from the evidence that Niko Bangladesh is fully controlled and dominated by Niko Canada.*”¹⁰⁴
176. The Claimant “*acknowledges that it engaged the services of the parent and other affiliated corporations from time to time to augment its internal capabilities*”.¹⁰⁵ In reality, the contributions of Niko Canada and the Claimant’s group most likely were provided not just “*from time to time*”; these contributions must have been substantial and regular. From the explanations provided by the Claimant at the hearing the Claimant’s activity in Barbados consisted essentially of holding board meetings there.¹⁰⁶
177. The Tribunal considers that, in principle it is for the investor to decide how it wishes to structure its investment and what corporate organisation it wishes to adopt for the investment, including the manner in which resources, activities and control are allocated between different corporate vehicles. The corporate structure of the investment is indeed part of the investor’s prerogatives and responsibility. Depending on the structure adopted, the corporate vehicle used for the investment which becomes party to the investment contract may rely on the resources of the group to which it belongs to secure the investment, including funding, technology or other contributions.
178. Distinct corporate identities serve a legitimate function in the cross-border mobilisation of investment. As long as the contracting parties are not misled about the corporate structure and no laws and regulations are violated, there should be no objection to the choice made by the investor in this respect.
179. In the present case, the Respondents were well aware of the corporate structure used for the investment. In the two agreements, the Claimant is clearly identified as a company

¹⁰⁴ R-CMJ.2 – Payment Claim, paragraph 55 (3).

¹⁰⁵ C-MJ.1, paragraph 111.

¹⁰⁶ HT 1, pp. 118-120.

organised under the laws of Barbados, in terms that have been quoted above. The identification of a Barbados company as contracting partner, and not the Canadian parent, did not go unnoticed. The Respondents were fully aware of the corporate structure and the choice of a Barbados company for the agreements, as the following incident demonstrates:

180. On 22 July 2003, a few months before the execution of the JVA, a meeting of the Petrobangla Board of Directors was held at which a number of questions were addressed concerning the transaction with Niko. In the resolution of the Board of which the Respondents have produced extracts, a number of questions were addressed which the Ministry had raised. One of these questions concerned “*explaining the registration in Barbados instead of Canada*”. The Board of Petrobangla provided detailed explanations on the corporate structure of the Niko group which show that the choice of a Barbadian subsidiary rather than the Canadian parent was a matter carefully considered by the Respondents and accepted by them.¹⁰⁷
181. Similarly, the substantive and regular contributions from the parent company to Niko were known to the Respondents; indeed they relied on them. For instance, the Respondents point out that the initial report evaluating the fields was prepared by Niko Canada and that, at a number of subsequent occasions, the parent company intervened in its own name.¹⁰⁸ Indeed, the Respondents do not contest that the full control of Niko Canada over the Claimant was known to them.
182. The Tribunal concludes that the choice of the Barbadian company as the party engaged on the Niko side was made in full knowledge of the Respondents and after careful consideration. It sees no justification for the Respondents now to question this choice. For the purposes of the arbitration clause and jurisdiction the party to the JVA and the GSPA is the Barbadian company acting as the Claimant.
183. This being said, the Tribunal has not overlooked that the use of a corporate vehicle without resources and activity may give rise to objections when the company chosen as the investor does not

¹⁰⁷ Minutes of the 333th Board Meeting of Petrobangla in Respondents’, Exhibit 32, Appendix B to R-CMJ.1, translation produced on 10 June 2011.

¹⁰⁸ R-CMC.1, paragraph 88.

meet its obligations. In such a situation it may have to be examined whether the group of companies behind the investor may ultimately be shielded by the separate legal personality of a corporation which turns out to be “*just a shell*”. This question need not be examined any further here since the Respondents have not raised any such claims against Niko in this arbitration, although an opportunity was given for them to do so.

5.3 The Claimant’s nationality

184. The Respondents question that the true nationality of the Claimant is that of Barbados. They argue that it could also be that of Cyprus but that it should ultimately be Canadian.

5.3.1 The link with Cyprus

185. The Respondents argue that in 2006 the head office of Niko was moved to Cyprus and that, by the time the GPSA was signed, Niko “*was already a Cyprus national*”.¹⁰⁹

186. The Claimant relies on its incorporation in Barbados but accepts that “*starting with about October 2006 there were directors meetings in Cyprus and eventually there was a place of business that was created in Cyprus*”.¹¹⁰ But the place of incorporation did not change and, in the Claimant’s view, that was sufficient for continued Barbados nationality.¹¹¹

187. It is uncontested that Niko was incorporated in Barbados. The Claimant has produced its Certificate of Incorporation, issued by the Deputy Registrar of Companies, showing as the date of incorporation 4 September 1997.¹¹² The Claimant also produced the Articles of Incorporation,¹¹³ the By-laws of the company,¹¹⁴ and minutes of meetings of directors and shareholders. The By-laws provide in their section 2.1:

¹⁰⁹ HT 1, p. 121.

¹¹⁰ HT 2, p. 262.

¹¹¹ HT 2, p. 261.

¹¹² Claimant’s Exhibit 10, p. 603.

¹¹³ Claimant’s Exhibit 10, pp. 604 et seq.

¹¹⁴ Claimant’s Exhibit 10, pp. 610 et seq.

*“The registered office of the Company shall be in Barbados at such address as the directors may fix from time to time by resolution.”*¹¹⁵

188. The registered office is recorded as being in Barbados at Worthington Corporate Centre, Worthington Main Road, Christ Church, Barbados, with the mailing address at P.O. Box 261, Bridgetown, Barbados. Either the registered office or the mailing address is indicated on the Claimant’s letterhead of documents produced by the Claimant; on some of the documents it is the mailing address which is shown. The agreements locate the “head office” of the Claimant at the mailing address.
189. The documents produced by the Claimant also include an International Business Company License, issued under the Barbados International Business Companies Act, confirming that it was authorised to “*conduct international business with effect from September 4, 1997 in accordance with the provisions of the International Business Companies Act, Cap. 77*”, as well as renewals of this license until 31 December 2011.¹¹⁶
190. Among the minutes of the meetings of the board of directors are those of 30 September 1999, which record a review of the Framework of Understanding with BAPEX and the decision to retain Stratum Development Ltd. (**Stratum**) “*to assist in securing the opportunities in the Chattak, Feni and Kamta gas fields and to act on behalf of the Company, as its management company, in Bangladesh*”.¹¹⁷
191. The evidence shows that until 2006 Niko was not only incorporated in Barbados but also had its head office there. Some change occurred in 2006.
192. On 26 October 2006 a meeting of the Board of Directors is recorded, which decided “*the Company’s migration to Cyprus*”.¹¹⁸ However, the company continued to identify itself as a “*private company registered in Barbados*” adding “*principal place of*

¹¹⁵ Claimant’s Exhibit 6, p. 613.

¹¹⁶ Claimant’s Exhibit 6, pp. 639-654.

¹¹⁷ Claimant’s Exhibit 6, pp. 688, 691.

¹¹⁸ Minutes produced as Claimant’s Exhibit 6, p. 750.

business in Cyprus under registration number AE-2221".¹¹⁹ Meetings of the Board of Directors continued to be held "*pursuant to Section 82(1) of the Companies Act CAP. 308*" of Barbados, as recorded in minutes of these meetings.¹²⁰

193. The status of the Claimant company is clarified by Certificates of the Ministry of Commerce, Industry and Tourism, Department of Registrar of Companies and Official Receiver, Nicosia. On 12 February 2007 the Registrar certified that Niko Resources (Bangladesh) Limited, "*which was formed in Barbados, was recorded today as an Overseas Company after filing documents under the Companies Law, Cap. 113, Section 347*". On 23 September 2008 the Registrar clarified the position of the Company in Cyprus:

*"It is hereby certified that, in accordance with the records kept by this Department, the above Overseas Company has established a Place of Business in the Republic of Cyprus at the following address:"*¹²¹

194. Shortly thereafter, on 10 November 2008, a change of directors of Niko took place; it was recorded on 22 December 2008 under the Companies Act of Barbados by the Barbados Corporate Affairs and Intellectual Property Office under the Claimant's Barbados registration number.¹²²
195. The Tribunal concludes that Niko Resources (Barbados) Ltd. was validly incorporated under the laws of Barbados in 1997. In 2007, this company established a place of business in Cyprus and was registered there as "Overseas Company". Its status as corporation registered in Barbados was not affected by this registration in Cyprus.
196. Consequently, the Claimant company was, at the time of consent to the two agreements in 2003 and 2006, a company incorporated and registered in Barbados. This status continued thereafter and there is no reason to conclude that it has changed since.

¹¹⁹ Claimant's Exhibit 6, p. 768 (document dated 2 July 2007) and Exhibit 6, p. 770 (document dated 29 October 2007)

¹²⁰ Claimant's Exhibit 6, p. 774 (document dated 12 February 2008), Exhibit 6, pp. 775-776 (document dated 20 March 2008).

¹²¹ Claimant's Exhibit 6, p. 599.

¹²² Claimant's Exhibit 6, p. 586.

5.3.2 The link with Canada

197. While recognising that incorporation is an accepted basis for determining the nationality of a corporation, the Respondent argues that “*there is no basis to conclude that the test of incorporation is the only criterion for the determination of a juridical person’s nationality under the Convention*”.¹²³ According to the Respondents “*international law permits the Tribunal to disregard the formal corporate structure of the Claimant in order to determine the real nationality of the investor*”.¹²⁴
198. Relying on authorities dealing with treaty claims and diplomatic protection, the Respondents assert that a “*real connection*” is required “*between a corporation and the home State*”, “*some substantial and effective connection between the legal entity and the claimant state*” and that there “*is a tendency in international treaty practice towards a requirement of connection beyond the mere fact of incorporation*”.¹²⁵ They make reference to the decisions of the ICJ in the *Nottebohm* and the *Barcelona Traction* cases,¹²⁶ as well as a number of investment treaty cases; they argue that reliance of the Claimant on its Barbados nationality “*amounts to an abuse of the ICSID system*”.¹²⁷
199. The Respondents refer to statements by representatives of Niko Canada and to support from Canadian authorities to argue that the “*real connection*” existed with Canada and that “*the parties to the JVA and the GPSA agreed to treat Niko Bangladesh as a Canadian company*”.¹²⁸
200. Article 25 of the Convention provides for jurisdiction over disputes between a Contracting State and a “*national of another Contracting State*”, but it does not establish criteria for determining corporate nationality. There is wide consensus that

¹²³ R-CMJ.2 – Payment Claim, paragraph 69.

¹²⁴ R-CMJ.2 – Payment Claim, paragraph 57.

¹²⁵ R-CMJ.2 – Payment Claim, paragraphs 70-72; see also R-CMJ.1, paragraph 89.

¹²⁶ R-CMJ.1, paragraph 89 and fn. 98.

¹²⁷ R-CMJ.1, paragraph 93 and HT 1, p. 113.

¹²⁸ R-CMJ.2 – Payment Claim, paragraph 78.

incorporation and head office are the principal criteria to establish nationality.¹²⁹

201. The Respondents' argument, as presented above, amounts to saying (a) that incorporation alone is not sufficient but must reflect a "*real connection*" to the place of incorporation and (b) that the parties to the arbitration agreement may agree to treat a juridical person as a national of another State than that of incorporation and that in the present case they have done so.
202. The authorities to which the Respondents referred the Tribunal, to the (limited) extent to which they support their argument, concern claims brought in diplomatic protection or under an investment treaty where the consent of the State to arbitration or to jurisdiction of the ICJ was given in a general form. In the present case, the Respondents have consented to ICSID arbitration of disputes arising out of two specific agreements with a specific company.
203. The Respondents have not presented any authorities to support their view that a requirement of a "*real connection*", assuming it were applicable in diplomatic protection or in treaty claims, should apply to contract claims as in the present case. In the Tribunal's view such an additional requirement cannot be read into the text of the Convention; nor can the *travaux préparatoires* for the Convention justify the assumption that this had been intended. It is sufficient for a claimant to show that it has the nationality of another Contracting State by reference to one of the generally accepted criteria, in particular incorporation or seat.¹³⁰
204. With respect to their argument on an agreement about nationality, the Respondents state that it "*is well-settled that an agreement on nationality would clarify the claimant's nationality for the purpose of the ICSID Convention and, as noted by Schreuer, such agreement will carry 'much weight'*".¹³¹ The Tribunal agrees but adds, as Schreuer did, that an agreement "*cannot create a nationality that does not exist*".¹³²

¹²⁹ For an overview, see Schreuer at Article 25, paragraphs 694-717.

¹³⁰ See e.g. Schreuer at Article 25, paragraph 707.

¹³¹ R-CMJ.2 – Payment Claim, paragraph 79, relying on Schreuer, p. 281.

¹³² Schreuer, at Article 25, paragraph 710.

205. The JVA identifies Niko as a “*Company organised under the laws of Barbados*”; the *Framework Understanding*, also between BAPEX and Niko, added to the description “*organised and existing under the laws of Barbados, having its Canada address at [...] Calgary ...*”. BAPEX, with the approval of Petrobangla and Bangladesh, has agreed to ICSID arbitration with this company “*existing under the laws of Barbados*”. In the eyes of the Tribunal, the Respondents thus have recognised the Barbados nationality of Niko. As pointed out above, this recognition was expressed consciously and after an examination of the implications of this choice.
206. By their consent in these circumstances, Respondents have accepted that their contracting partner was organised under the laws of Barbados and had its head office there. The use of ICSID arbitration by this company was fully accepted by the Respondents at the time of their consent to arbitration. There is no ground to assume that their consent was abused.
207. The references on which the Respondents rely in support of the asserted “*real connection*” to Canada and agreement to treat Niko as a Canadian company justify the conclusion that Niko and its contracts with the Respondents had a link with Canada. This is not surprising for a company forming part of a group based in Canada. But it does not transform a company organised under the laws of Barbados and having its registered office there into a Canadian company.
208. The Tribunal concludes that the Claimant qualifies as a national of Barbados, another Contracting State, in the sense of Article 25 of the Convention.

6. THE STATE OF BANGLADESH AS A PARTY TO THE ARBITRATION

209. On the Bangladesh side the only contractually named parties are BAPEX and Petrobangla. The JVA expressly defines the term “Party”: only BAPEX and the Operator, i.e. Claimant, are identified by this term.¹³³ The GPSA is concluded between Petrobangla and the Joint Venture Partners, BAPEX and Niko. The State of Bangladesh does not appear as party of either of these agreements.
210. The Claimant nevertheless argues that Bangladesh is a party to the GSPA “because the agreement was made by its agent or instrumentality, or the parties intended it that it be a party.”¹³⁴ The Claimant adds that “Bapex and Petrobangla are mere instrumentalities or agents of the Government in respect of the subject contracts. Whether the matter is viewed as an agency relationship or as a lack of separate identity, the result is the same. In the result, the GPSA is Bangladesh’s contract, accordingly Bangladesh is compellable to arbitrate as a party thereto”.¹³⁵ In this context the Claimant also relies on a theory of attribution, arguing that the acts of Petrobangla and BAPEX should be attributed to the Government of Bangladesh.¹³⁶
211. The Respondents argue that the critical question here is that of consent to arbitration under Article 25 of the ICSID Convention and that this question of consent must be considered under public international law.¹³⁷ As to the substance of the Claimant’s claim to jurisdiction, the Respondents argue that the principles of attribution are not relevant to this issue, which must be determined exclusively by reference to the question of consent. According to the Respondents, the Government of Bangladesh did not consent to arbitrate with the Claimant, whether by approving the Agreements or otherwise.¹³⁸

¹³³ Article 1.45.

¹³⁴ C-MJ.2, paragraph 25.

¹³⁵ C-MJ.2, paragraph 81.

¹³⁶ C-.MJ.1, paragraph 107.

¹³⁷ R-CMJ.2 – Payment Claim, p. 41.

¹³⁸ R-CMJ.2 – Payment Claim, pp. 45-53.

212. The Tribunal shall consider the respective roles of the Government of Bangladesh and of the two corporations, before examining the arguments concerning attribution and consent.

6.1 The role of the Government of Bangladesh

213. As the Claimant points out, the project is of direct interest to the Government: it concerns resources vested in the Republic. The Government is in charge of their exploitation and has organised and regulated it by legislation.

214. The JVA starts with a reminder of this role by pointing out in the Preamble:

“1. All mineral resources including Petroleum within the territory, continental shelf and economic zone of Bangladesh are vested in the Republic of Bangladesh, and

2. The Government has, under the Bangladesh Petroleum Act 1974 (Act No LXIX of 1974) (as amended up to date) the exclusive right and authority to explore, develop, exploit, produce, process, refine and market Petroleum Resources within the territory, continental shelf and economic zone of Bangladesh and it has also the exclusive right to enter into Petroleum Agreements with any persons for the purpose of any Petroleum Operations”.

215. As described in Section 3 above, the development of the present project commenced when the parent company of the Claimant addressed a preliminary proposal of 12 April 1997 to the Bangladesh Minister of Energy and Mineral Resources. Eventually, this preliminary proposal was followed by a presentation to the Minister which is expressly mentioned in the Preamble of the JVA:

“OPERATOR [i.e. the Claimant] made a request in 1998 to the Ministry of Energy and Mineral Resources, Govt. of the Peoples Republic of Bangladesh to develop Marginal & Non Producing Gas Fields of Bangladesh”.

216. This led to negotiations, and on 25 May 1999 the Minister gave instructions for the implementation of the proposal. These

instructions included notice of the following decision taken by the Government:

*“A Joint Venture Agreement must be executed between Bapex and Niko before a Memorandum of Understanding (MOU) is signed with Niko. The Managing Director of Bapex can conduct discussions with Niko regarding this.”*¹³⁹

217. The evidence shows that the negotiations for this JVA were conducted under the close supervision of the Government, primarily the Ministry of Energy and Mineral Resources, which intervened at various stages normally through Petrobangla, and gave directions, as described in Section 3 of this Decision. In the course of these negotiations the Ministry of Energy and Mineral Resources prepared a Procedure for Development of Marginal/Abandoned Gas Fields which was submitted to the Prime Minister.¹⁴⁰ Eventually the draft JVA was approved by the Prime Minister and BAPEX, again through Petrobangla, was instructed to sign the JVA with Niko.¹⁴¹
218. Similarly, the negotiations for the GPSA, including in particular those for the price of the gas, were conducted in close coordination with the Ministry.¹⁴²
219. The Tribunal concludes that the Government of Bangladesh played a central role in the elaboration of the project and the negotiations of the two contracts.

6.2 Petrobangla and BAPEX as agencies or instrumentalities of the Government of Bangladesh

220. **Petrobangla** is a statutory corporation created by the Bangladesh Oil, Gas and Mineral Corporation Ordinance, 1985.¹⁴³ As explained at the Hearing by the Respondents' Counsel:

¹³⁹ Respondents' Exhibit 11, Appendix B to R-CMJ.1.

¹⁴⁰ Respondents' Exhibit 14, Appendix B to R-CMJ.1.

¹⁴¹ For details and quotations of the relevant directions see above Section 3.1.

¹⁴² See above Section 3.3.

¹⁴³ Exhibit G to RfA II; the Ordinance dissolved the previous Petrobangla and transferred its assets and debts to the new corporation.

“The Petrobangla Ordinance is also a special piece of legislation creating Petrobangla and apportioning functions between the Government, Petrobangla and enabling the formation of the companies.”¹⁴⁴

221. Petrobangla is created as a “body corporate”, with power to hold and dispose of property and the capacity to sue and be sued. It is governed by a Board of Directors, the members of which are appointed by the Government or specified Ministries.

“The Board in discharging its functions shall act on commercial considerations having due regard to public interest generally and shall be guided on questions of policy by such instructions as may be given to it by the Government from time to time.”¹⁴⁵

222. The functions of Petrobangla include research in the fields of oil, gas and minerals; the preparation and implementation of programmes for the exploration, development, production, and selling of those resources; and any other functions the Government may from time to time assign to it.¹⁴⁶

223. The 1985 Ordinance expressly authorises Petrobangla “with the previous approval in writing of the Government, [to] sponsor the formation of subsidiary companies for exploration and exploitation of oil, gas and mineral resources and may hold an interest therein ...”¹⁴⁷

224. The status, functions and powers of Petrobangla were set out in the preamble to the JVA:

“3. Petrobangla has the power to exercise rights and powers of the Government to explore, develop, exploit, produce, process, refine, market petroleum in the territory, continental shelf and economic zone of Bangladesh and also to enter into Petroleum Agreements with any person/company for the purpose of any Petroleum Operation”.

¹⁴⁴ HT 1, p. 46.

¹⁴⁵ Section 5(2) of the Ordinance.

¹⁴⁶ Section 9(1) of the Ordinance.

¹⁴⁷ Section 10 of the Ordinance.

225. **BAPEX** is a wholly-owned subsidiary of Petrobangla incorporated under the Companies Act of 1994.¹⁴⁸ Its powers, functions and objects are governed by its memorandum of association and articles of association.¹⁴⁹

226. In the JVA BAPEX is described as

“a wholly owned Company under Bangladesh Oil, Gas, and Mineral Corporation (hereinafter called ‘PETROBANGLA’), a statutory corporation wholly owned and established by the Government of the People’s Republic of Bangladesh (hereinafter called the Government)”.

227. The preamble of the JVA also sets out the position of BAPEX:

“12. BAPEX is vested with all rights free from all encumbrances and liabilities whatsoever to assign, develop, produce, process, refine and distribute 100% (One hundred percent) of all Petroleum resources from or within the territory of the Marginal/Abandoned gas fields of Chattak & Feni.

[...]

15. BAPEX warrants that it has acquired from Petrobangla and the Government the requisite approvals to execute this JVA. The responsibilities and obligations of Petrobangla and the Government in all relevant Articles, Annexes and Amendments under this JVA has been assign [sic] to Bapex.”

228. These factors indicate that Petrobangla and BAPEX exercise functions which are vested in the Government and which the Government has delegated to them. The Tribunal concludes that both entities are agencies or instrumentalities of the Government of Bangladesh in the sense of Article 25 of the ICSID Convention.

¹⁴⁸ HT 1, pp. 42-43.

¹⁴⁹ R-CMJ.1, paragraphs 9–11; Respondents’ Exhibit 4.

6.3 The separate legal identity of Petrobangla and BAPEX

229. The Claimant argues that Petrobangla and BAPEX “*are mere instrumentalities or agents of the Government in respect of the subject contracts*” and that such situation can be viewed as “*a lack of separate identity*” of the two entities. The consequence, in the Claimant’s position, is, as mentioned above, that “*the GPSA is Bangladesh’s contract, accordingly Bangladesh is compellable to arbitrate as party thereto*”.¹⁵⁰ According to the Claimant, the same conclusion applies with respect to the JVA.¹⁵¹
230. Both Petrobangla and BAPEX are creations of the legal order of Bangladesh. Their identity and legal status must be considered first of all under the law of that State.
231. It follows from the legal provisions in the law of Bangladesh which created Petrobangla and which govern its activities that it has the essential attributes of legal personality. It is clearly a distinct legal entity under the law of Bangladesh. The same applies with respect to BAPEX, incorporated under the Companies Act of 1994.¹⁵²
232. The situation under the law of Bangladesh has been summarised by the Respondents’ counsel:

*“... so we see that the Government is born of the constitution, a statutory public authority such as Petrobangla is recognised by the constitution as distinct from the Government and then when we go to the other part, that is the Companies Act, to the statute under which there is authority given to Petrobangla to form a company, there is another regime created and that is the company law regime, the companies regime, where Petrobangla may have an interest in equity but Bapex would be governed entirely by the Companies act and not by the statute under which it was born.”*¹⁵³

¹⁵⁰ C-MJ.2, paragraph 81.

¹⁵¹ C-MJ.2, paragraph 85.

¹⁵² See also the explanations of the Respondents’ counsel on distinct legal entities under Bangladesh law at HT 1, pp. 40 et seq.

¹⁵³ HT1, pp. 42-43.

233. The Claimant insists on the control exercised by the Government over Petrobangla. It is correct and undisputed that the Government of Bangladesh exercises a high degree of control over Petrobangla. This control clearly results from the text of the 1985 Ordinance and other evidence produced. The Government subscribed to the authorised capital, its Board is composed of high ranking officers of, or other persons appointed by, the Government, and the Government may give instructions on questions of policy; as shown above the Government has exercised these powers in the context of the contract with Niko.
234. Similarly, BAPEX, as wholly owned subsidiary of Petrobangla, is fully under the control of that corporation and thus, indirectly, by the Government. Here, too, the Government has exercised its control, normally through Petrobangla.
235. However, control by one legal entity over another does not extinguish the separation in law. Control by the Government over these two entities does not deprive them of their separate legal personality. They remain legally distinct from the Government.

6.4 Petrobangla and BAPEX as agents for Bangladesh

236. The Claimant also argues that “*private law principles of agency could be applied to find that the Government is a party to the Agreement*”.¹⁵⁴ It describes BAPEX and Petrobangla as “*agents of the Government in respect of the subject contracts*”.¹⁵⁵
237. At the hearing the Claimant explained that with respect to the JVA the “*party is Bapex in its capacity [as] the agent for the Government*” and the same *mutatis mutandis* with respect to the GPSA.¹⁵⁶
238. The Respondents deny that there is any statutory or contractual agency role of either Petrobangla or BAPEX.¹⁵⁷

¹⁵⁴ C-MJ.1, paragraph 118.

¹⁵⁵ C-MJ.2, paragraph 81.

¹⁵⁶ HT 1, p. 38.

¹⁵⁷ HT 1, p. 56.

239. The Tribunal has concluded that BAPEX and Petrobangla are separate legal entities under the law of Bangladesh. If they had acted as agents for the State of Bangladesh, the party to the agreements would be that State and not the agent. At some stage the Claimant accepted this conclusion: “*We would acknowledge that if they are agents of the Government, then the result would be that the Government is the party and the agents are just the agents. They would not be liable as principals ...*”¹⁵⁸
240. This is indeed the correct position: Petrobangla and BAPEX can either be party to the agreements as principals, acting in their own name, or else act as agents for the Government and then it is the Government as the principal which is the party.
241. Since both BAPEX and Petrobangla have been clearly identified as “party” to the agreements and not as agents for the Government, the Tribunal concludes that Petrobangla and BAPEX did not act as agents for and on behalf of the Government when concluding the JVA and the GPSA.

6.5 Attribution

242. The Claimant relies on a theory of attribution with the objective of establishing jurisdiction with respect to the Government of Bangladesh. The Claimant writes:

*“Niko submits that the acts of Petrobangla and Bapex in making and breaching the GPSA should be attributed to the Government for the purposes of this arbitration ...”*¹⁵⁹

243. In this context the Claimant referred to the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission as “*helpful in assessing the matter*”.¹⁶⁰
244. Since it has been accepted that Petrobangla and BAPEX are agencies or instrumentalities of Bangladesh, their acts may well be attributed to the State of Bangladesh, creating international responsibility of that State. It is on this basis that, for instance

¹⁵⁸ HT 1, p. 28.

¹⁵⁹ C-MJ.1, paragraph 107.

¹⁶⁰ C-MJ.1, paragraph 117.

the arbitral tribunal in the case *Saipem S.p.A. v. Bangladesh*¹⁶¹ considered that, at first sight at least, Petrobangla appeared to be part of the State under Bangladeshi law, despite its distinct legal personality.¹⁶²

245. Such attribution is relevant when it comes to determining the question of whether a State has violated its international obligations under general public international law or under a treaty. In that context, the question is relevant also for determining jurisdiction under a treaty by which the State accepts to arbitrate disputes concerning the violation of its treaty obligations; i.e., violations committed by itself or by conduct attributed to it.
246. However, the issue to be considered here is not the responsibility of Bangladesh for acts by Petrobangla and BAPEX but the question whether Bangladesh has consented to arbitrate with the Claimant. This is a matter for which the arbitration agreement must be considered and the entities which are party to it.
247. The Tribunal is aware that another ICSID tribunal, appointed not in a treaty but a contract dispute,¹⁶³ applied rules on attribution in the context of its analysis on jurisdiction. That tribunal, relying on the conclusions of the *Saipem* tribunal and other considerations, concluded that Petrobangla was an organ of the State¹⁶⁴ and that “*Petrobangla’s actions are attributable to Bangladesh*”¹⁶⁵ and found that it had jurisdiction with respect to a contract to which Petrobangla but not Bangladesh was a party. The question whether and under what circumstances attribution may be a sufficient basis for assuming jurisdiction in a contract dispute was not critical to the decision in the *Chevron* case, since the Government had concluded with the investor a contract containing an ICSID clause and the *Chevron* tribunal found that the contract which the investor had concluded with

¹⁶¹ *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7 (Kaufmann-Kohler, Schreuer, Otton), Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, ICSID Review (2007).

¹⁶² *Ibid.*, paragraphs 145-146 .

¹⁶³ *Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/06/10, Award of 17 May 2010 (Buergenthal, Beechey and Nariman), ICSID Review (2011), pp.256-294.

¹⁶⁴ *Ibid.*, paragraph 148.

¹⁶⁵ *Ibid.*, paragraphs 148, 171.

Petrobangla was related to the contract concluded by the Government.¹⁶⁶

248. In the present case the Government has not signed any agreement with the investor and has not on its own behalf agreed to ICSID arbitration. The Tribunal finds no basis on which an attribution of actions of BAPEX and Petrobangla to Bangladesh could justify the conclusion that the State of Bangladesh has agreed to arbitrate the present contract disputes with Niko.

6.6 Consent

249. Finally, the Claimant argues that, alternatively, “*the circumstances demonstrate an objective intention by the parties that the Government would be bound to the Agreements*”.¹⁶⁷ This argument seems to be based on “legitimate expectations” that the JVA obligations, “*which only the Government and Petrobangla could give*”, would be met. The Claimant states:

*“These expectations override countervailing considerations such as that the Government was not explicitly named as a Party in the GPSA. The reality is that the JVA contains many obligations on the part of the Government, leading inexorably to the conclusion that it was in substance the Government’s agreement. [...] the Government’s control and approval of the Agreements also constitutes the Government’s agreement to be bound by the Agreements and/or to arbitrate disputes connected with them.”*¹⁶⁸

250. The Tribunal accepts that the Government was closely involved in the negotiations of the agreements. The subject matter fell within the domain of its prerogatives, and it had control over the two entities. It also expressly approved the agreements.

251. However, the Government chose to implement the project through agreements which it did not conclude itself. Instead, it delegated the necessary powers to Petrobangla and BAPEX. These entities, legally distinct from the Government, concluded

¹⁶⁶ Ibid., paragraph 134.

¹⁶⁷ C-MJ.1, paragraph 136.

¹⁶⁸ Ibid.

the Agreements. Through this choice of the contracting parties the Government clearly showed its intent not to be party to the Agreements. The delegation has been expressed in a particularly clear fashion in the preamble to the JVA, as quoted above.

252. Paragraph 14 of the Preamble is of particular importance both for the question of jurisdiction and for the implementation of the JVA. It demonstrates that the parties to the JVA were aware that BAPEX was exercising functions vested in the Government of which some had been delegated to Petrobangla. BAPEX gave assurances that this was the case and the Government approved the Agreement, including these assurances.
253. The Claimant was fully aware of this situation when it concluded the agreements. Paragraph 14 of the Preamble makes it quite clear that the Agreement is concluded with BAPEX, as the assignee of the “*responsibilities and obligations of Petrobangla and the Government*”, and not with the Government. This gives meaning to BAPEX’s warranty that “*it has acquired from Petrobangla and the Government the requisite approvals to execute this JVA*”.
254. The JVA, as it was concluded, entitles the Claimant to rely on the warranty of BAPEX, in particular with respect to the scope of the obligations assumed by it. But it also prevents the Claimant from disregarding the assignment of responsibilities and obligations to BAPEX and from arguing that the true party to the agreement is the Government and Petrobangla.
255. The Claimant accepted this structure of the agreements, just as the Bangladeshi parties have accepted that the Canadian group concluded the agreements through a subsidiary registered in Barbados. The Tribunal has already held¹⁶⁹ that, in the absence of any abuse of this corporate structure, the contracting parties are bound by their acceptance of the chosen contracting partners. This goes for the Respondents with respect to the Claimant’s company in Barbados; it also goes for the choice of the contracting parties on the Bangladesh side.
256. The Tribunal concludes that the Claimant has failed to show any intent of the Government of Bangladesh to be bound by the

¹⁶⁹ See Section 4.

ICSID arbitration agreement; nor may any such intent be implied in the circumstances. Bangladesh has not consented to ICSID arbitration. The Tribunal, therefore, does not have jurisdiction over the State of Bangladesh in the present case. The People's Republic of Bangladesh will no longer be a Respondent in these proceedings.

7. JURISDICTION WITH RESPECT TO BAPEX AND PETROBANGLA – THE ISSUE OF DESIGNATION

7.1 The issue and the Parties' positions

257. Petrobangla is a named party to and has signed the GSPA; BAPEX is a named party and has signed both the GSPA and the JVA. The Respondents do not question that both have consented in writing to arbitrate with Niko under the respective agreements. Rather, the Respondents' principal objection to jurisdiction specific to BAPEX and Petrobangla concerns a particular requirement under Article 25 the ICSID Convention that relates to the capacity of BAPEX and Petrobangla to be party to an ICSID arbitration.
258. On the side of the host State, jurisdiction of ICSID is limited by Article 25(1) of the ICSID Convention to Contracting States and to "*any constituent subdivision or agency of a Contracting State*". However, the extension to subdivisions and agencies is qualified by the words "*designated to the Centre by that State*". Moreover, Article 25(3) requires that the Contracting State must approve the consent of such designated agencies or constituent subdivisions in each case, unless the Contracting State has notified the Centre that no such approval is necessary.
259. In the present case, the Respondents accept that the consent of BAPEX and of Petrobangla to ICSID arbitration was approved by Bangladesh, but argue that there was no designation. They argue that four conditions must be met for a designation to become effective: (i) there must be a written designation, (ii) it must emanate from the State and specifically the Ministry of Foreign Affairs, (iii) there must be a clear intention to designate and (iv) the designation must be sent to the Centre.¹⁷⁰ The Respondents nevertheless concede that the document containing the designation may be "*physically sent by the state or by someone else*".¹⁷¹ According to the Respondents these requirements were not met in the case at hand.

¹⁷⁰ HT 1, pp. 95-99.

¹⁷¹ HT1, p. 99. The passage continued as follows: "Then that could be the case where one of the two parties to the agreement, to the contract, to the investment contract could send it to the Centre but it must be a document from the State."

260. The Claimant on its side accepts that designation is required under Article 25(1), but submits that the Government’s approval of the JVA and the GPSA “*amount to the designation*”.¹⁷² According to the Claimant, this designation may then be communicated to the Centre by the filing of the request for arbitration, as this was done in the present case by the two RfAs.¹⁷³
261. The status of Petrobangla and BAPEX under the law of Bangladesh has been discussed in the previous Section of this Decision. Both are legal entities distinct from the Government, but they are controlled by the Government and perform some functions within domains reserved for the Government. In the discussion about designation for the purposes of Article 25(1) of the ICSID Convention their status as agencies of Bangladesh has not given rise to serious controversy and is not contested by the Respondents.
262. The Tribunal has considered the circumstances under which the two agreements concluded by BAPEX and Petrobangla were negotiated and executed. It noted that both agreements were explicitly approved by the Government of Bangladesh in writing.¹⁷⁴ No exception was made in the approval which thus extended to the arbitration clause. Since the Respondents have not questioned that Bangladesh approved the consent to arbitration by Petrobangla and BAPEX, the Tribunal has no difficulty in accepting that the requirement of approval by the State under Article 25(3) has indeed been complied with.
263. The requirement of Article 25 which remains controversial specifically in relation to Petrobangla and BAPEX is that of their designation as agencies of Bangladesh. The controversial issues are (i) what is meant in Article 25(1) by “*designated to the Centre by that State*” and (ii) whether in the present case the requirements have been met.

¹⁷² HT 1, p. 90.

¹⁷³ HT 1, p. 91.

¹⁷⁴ See above paragraphs 41, 42 and 82.

7.2 The requirement of designation

264. With respect to the first question, that concerning the meaning of Designation in Article 25(1), it is necessary to consider, as a matter of law, the proper construction to be placed on the requirement of “designation”. This must be approached applying the canons of treaty interpretation found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969,¹⁷⁵ namely (to paraphrase): natural and ordinary meaning, object and purpose, context, and, where necessary to resolve an ambiguity, reference to the preparatory documents.

7.2.1 The term “designation” as distinguished from “notification”

265. The ordinary meaning of the term “designation”, as defined in the Oxford English Dictionary, is: “*the action of choosing someone to hold an office or post*”. Similarly, the Merriam Webster Dictionary proposes as definition: “*to indicate and set apart for a specific purpose, office, or duty <designate a group to prepare a plan>*”.

266. The ICSID Convention uses the term “designation” on a number of occasions to denote official actions undertaken by the Contracting States vis-à-vis the Centre in relation to the treaty rights and obligations of the States. Thus, Contracting States may *designate* a representative to the Administrative Council;¹⁷⁶ they may *designate* persons to the ICSID Panels of Arbitrators and Conciliators under Articles 12 to 16; and they may also *designate* courts or authorities competent for the enforcement of arbitral awards under Article 54.

267. Thus, the critical element, so far as concerns the ordinary meaning of the term and the use in the ICSID Convention, is the action of choice or selection. The act of designating requires both a subject and an object.

¹⁷⁵ 1155 U.N.T.S. 331.

¹⁷⁶ According to Article 4 each governor and alternate governor of the Bank appointed by a Contracting State shall be ex officio its representative and alternate representative, in the absence of a contrary “designation”.

268. Within Article 25(1), the subject is the Contracting State. The object is its “*constituent subdivision or agency*”; since the two entities considered here are agencies, this term will be used for simplification when reference is made to the designation of constituent subdivisions and agencies under Article 25(1).
269. The purpose for which the agency is chosen or selected, as stated by Article 25(1), is to engage the jurisdiction of the Centre in respect of a “*legal dispute arising directly out of an investment ... which the parties to the dispute consent in writing to submit to the Centre*”; or, more simply, to designate the agency as capable of becoming itself a party to an ICSID arbitration.
270. The use of the expression “designate” in Article 25(1) corresponds to that in Chapter I, Section 4, Articles 12 to 16. These articles repeatedly use the expression “*designate to*” in various forms, for instance “*designate to each Panel*” or “*designated to a Panel*” (Article 13(1) and (2)) or “*designate to serve on the Panels*” (Article (14(1))). In this context, it seems clear that, “designate to” means choosing a person for the function of serving on a Panel; it does not concern the communication of this choice. Indeed, when Article 13(1), for instance, provides that a “*State may designate to each Panel four persons ...*”, what is meant obviously is not that the State makes a communication to each Panel; it merely means that the designated persons have been chosen by that State to appear on the lists described as “Panel” and to serve in this function.
271. In Chapter I, Section 4 of the Convention, a different expression is used for the act of communicating the State’s choice to ICSID. Article 16(3) provides:
- “All **designations** shall be **notified** to the Secretary-General and shall take effect from the date on which the notification is received.” (emphasis added)
272. Thus, a clear distinction is made in Chapter I, Section 4 of the Convention between “designated” and “notified”. The first of these terms concerns the choice of the person for a specific function (Articles 12 to 16(2) deal with this choice); a different term is then used with respect to the communication of this choice in Article 16(3). The act of communicating the choice to

the ICSID Secretary-General is not included in the term “designation” as used in this Section.

273. The same distinction can be found in Article 54(2) which provides:

*“Each Contracting State shall **notify** the Secretary-General of the **designation** of the competent court or other authority ...”* (emphasis added)

274. Here, too, two different terms are used and indicate a clear distinction between the designation of a court or authority, i.e. the choice for a certain function, and the communication of this choice to the Centre by way of a notification.

275. The terms “notify” and “notification” appear at a number of other places in the Convention, describing a formal act of communication. Indeed, the term appears at several occasions in Article 25. Thus, when a Contracting State intends to dispense with the requirement of having to approve the consent of a constituent subdivision or agency, it “notifies the Centre” that no such approval is required. Similarly, if a Contracting State wishes to make known that it would or would not consider submitting to the jurisdiction of the Centre a class or classes of disputes, it may “notify” this position to the Centre and the Secretary-General transmits such “notification” to all Contracting States (Article 25(4)).

276. With respect to agencies, Article 25(1) uses the term designation but does not mention notification. If the term designation is understood as being distinct from notification, the question arises whether notification or any other form of communication to the Centre is required, a question that shall be addressed later in this section.

7.2.2 The purposes of designation under Article 25(1)

277. When the concept of designation first arose during the preparation of the ICSID Convention, it was related to the idea of informing investors about the entities on the side of the State with which they could contract. The idea was first introduced by a proposal of the representative for the United Kingdom at

the Legal Committee Proceedings, 25 November 1964. The proposal contained the following passage:

*“... each State party to the Convention could deposit a list indicating the bodies regarded by it as ‘political subdivisions’ for the purposes of this Convention.”*¹⁷⁷

278. Summarising the discussions that led to the inclusion of the designation requirement, Schreuer explains:

*“The primary purpose of the requirement to designate entities that might become parties in ICSID proceedings to the Centre is to give an investor an assurance that he or she is dealing with an authorized entity. In other words, investors are given advance notice of with whom they may deal.”*¹⁷⁸

279. While information to potential investors may be a useful objective for publicising the identity of designated agencies, in the view of this Tribunal, this objective can hardly justify a requirement of designation as it is provided by Article 25(1). Assurance of “*dealing with an authorised entity*” and “*advance notice*” may well be obtained by other means and it is difficult to see what interest investors could have in the restriction on eligibility of an agency by the requirement of designation.

280. The text of Article 25(1) suggests that the principal purpose of designation in the context of that article is a different one: designation enables the agency to become party to “*a legal dispute [...] which the parties to the dispute consent in writing to submit to the Centre*”, i.e., to become party to an ICSID arbitration proceeding. In the list of “*Designations by Contracting States Regarding Constituent Subdivisions and*

¹⁷⁷ Proposal of the representative for the UK at the Legal Committee Proceedings of 25 November 1964, quoted in *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18 (Kaplan, Beechey and Landau), Decision on Jurisdiction of 22 March 2011 (hereinafter **Cambodia Power Decision**), p. 247; see also History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II (hereinafter **History of the ICSID Convention**), pp. 667, 702; Schreuer at Article 25, paragraph 247.

¹⁷⁸ Schreuer at Article 25, paragraph 248; in the same context Schreuer also mentions a possible “*secondary purpose*”; but immediately discards it as not very plausible: “*A secondary purpose of designation may be a desire on the part of the State to preserve control over semi-autonomous entities in their dealings with foreign investors. But this purpose is more readily achieved by withholding approval of consent to jurisdiction under Art. 25(3) ...*”

Agencies”, published by ICSID (the **List of Designations**),¹⁷⁹ it is stated that the subdivisions and agencies have been designated “*as competent to become parties to disputes submitted to the Centre*”. In the Tribunal’s understanding it is this “competence” (one may also use the term “capacity”) which is created by the designation.

281. The Convention is concluded by States, acting as subjects of international law. It provides for arbitration of certain types of disputes between these Contracting States and nationals of other Contracting States. Constituent subdivisions and agencies of these States normally are not subjects of international law and thus are not “competent” to conclude, on the side of the host State, arbitration agreements containing an ICSID dispute settlement clause and become party to an ICSID arbitration. It was therefore necessary for the Convention to provide expressly for the possibility that constituent subdivisions and agencies, as entities existing under domestic law, could acquire such competence or capacity to become party to ICSID arbitration proceedings.
282. Designation of an agency thus has as a very important consequence that the distinct legal personality of the agency under domestic law is recognised at the level of ICSID.
283. By creating in favour of an agency of domestic law a distinct capacity at the level of the Convention, designation has the advantage for the State of limiting its legal and financial exposure with respect to contracts concluded by the agency. The distinct legal personality of the agency thus is recognised in a similar manner (and with similar limitations) as the recognition of a distinct legal personality of a corporation on the investor’s side.¹⁸⁰

¹⁷⁹ ICSID Official Document ICSID/8-C, part of ICSID Official Document ICSID/8, “*Contracting States and Measures Taken by Them for the Purpose of the Convention*”, available on the ICSID website.

¹⁸⁰ This does not exclude that the host State, as a Contracting Party to the Convention, may have a general obligation under Article 53 to ensure compliance with ICSID awards. In this sense, see Schreuer at Article 53, paragraph 15, citing Broches, “*Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*”, 2 ICSID Review (1987) 287, 298.

7.2.3 Types of designation – General and *ad hoc* designation

284. Article 25(1) does not prescribe how a designation, i.e., a designating act, must be made. In particular it does not specify whether designation must occur specifically for each arbitration agreement concluded by an agency on an *ad hoc* basis, or whether it can be made generally for certain categories of projects or for all agreements concluded by the agency in question.
285. The matter was addressed during the preparations of the Convention. The question was raised whether designations should be made for a particular purpose or in general. Mr Aron Broches responded that this should be left to the State concerned.¹⁸¹ This can be taken as an indication that the lack of determination in Article 25(1) is intentional. It is left to the State whether it wishes to designate an agency for a specific investment or generally.
286. This conclusion is confirmed by the practice of States to the extent to which this practice is known. Some information about this practice is provided by the Secretariat of ICSID. On its List of Designations one finds both territorial subdivisions of the designating States and State corporations such as national petroleum corporations, utilities, mining corporations, etc.
287. The entities on the List of Designations all seem to have been designated in a general manner for an unlimited number of agreements. However, the List of Designations concludes by a Note indicating:
- “Ad hoc designation and notification made by Contracting States pursuant to Article 25(1) and 25(3) are excluded from this listing.”*
288. One must conclude that there are cases in which States indeed choose to proceed not by general designation but in an *ad hoc* manner, designating an agency for a specific project or in an otherwise limited manner, such as a particular dispute or a particular contract.

¹⁸¹ History of the ICSID Convention, vol. II, p. 857.

289. The List of Designations does not indicate that any reservations were made against the practice of *ad hoc* designations mentioned in the list; nor is there any other indication that this practice has given rise to any objections or expression of doubt. Schreuer confirms - and supports by examples - that it is “*open to states to make designations not only in general terms but also on the occasion of specific investment projects*”.¹⁸² He adds that “*it is entirely possible for the designation to be made after consent is given or even after a dispute has arisen*”; but it must occur before proceedings are instituted.¹⁸³
290. The Tribunal concludes that *ad hoc* designations, limited to a specific investment and the corresponding arbitration agreement, meet the requirements of Article 25(1).
291. This conclusion leads to another: By their very nature and as shown by the absence of their publication in the List of Designations, *ad hoc* designations are not given general publicity which, as mentioned above, is considered by some as one of the purposes of designation.¹⁸⁴ Since *ad hoc* designations are accepted as a valid form of designation, one must conclude that the publicity objective may be useful, but is not a necessary feature of designation.

7.2.4 The form of designation and the question of implicit designation

292. Article 25(1) does not specifically prescribe any requirement of form which a State must observe when designating an agency in the sense understood here. As is the case with respect to the choice between general and *ad hoc* designation, the choice of the form is left to the State concerned.

¹⁸² Schreuer, paragraph 255 at Article 25.

¹⁸³ Schreuer at Article 25, paragraph 258. At Article 25, paragraphs 260-261, Schreuer qualifies this statement by referring to the *Klöckner v. Cameroon* case where, under unusual circumstances after the commencement of the arbitration, Cameroon designated an entity which originally had been under the control of the investor but, during the course of the arbitration, became a constituent subdivision of Cameroon and was then designated as such.

¹⁸⁴ This is not to say, however, that *ad hoc* designations are not accessible to the public. The ICSID website reveals that *ad hoc* designations are accessible upon request to the ICSID Secretariat. See the ICSID website (www.worldbank.org/icsid). In the “Members States” section under the sub-navigation menu “Search Membership”, there are hyperlinks for each State, and under these, the following statement is found under the tab entitled “*Designations and Notifications* “*For information of any ad hoc designation or notification made by this Contracting State pursuant to Article 25(1) and (3) of the Convention, please contact the Secretariat.*”.

293. This question of the form of the designation is distinct from that about who can make a designation. In this respect there is little doubt possible and apparently no controversy: the designation in the sense of the designating act has to be made by the relevant Contracting State.
294. Concerning the form in which the designation is made, there seems to be little information available about the manner which States adopt for the act of designation. ICSID's List of Designations indicates the date of the designation but does not provide any indication about the form which it took.
295. It is not inconceivable that a State may designate an agency at the time of its creation, as part of the powers conferred upon it by the State. Thus, when an agency is granted the powers to conclude investment agreements, the designation to enter into ICSID arbitration agreements might be included in these powers. Schreuer refers to a law in Sri Lanka as an example of such designation by legislation. Schreuer also mentions the possibility of including a general designation of an agency in a bilateral investment treaty.¹⁸⁵
296. Other forms of designation may be found. The choice may differ in cases of general and *ad hoc* designations. Such other forms may include informal methods, since Article 25(1), as just explained, does not prescribe any particular formality for the designating act.
297. Some confirmation for the absence of strict requirements of form may be found in the Institution Rules 2(1)(b) and (c) which require that a request for arbitration shall

“(b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention;

(c) indicate the date of consent and the instrument in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data

¹⁸⁵ Schreuer at Article 25, paragraph 252.

on the approval of such consent by that State unless it had notified the Centre that no such approval is requested.”

298. This Tribunal is aware that this Rule concerns simply the requirements which must be met so that the Centre registers a request for arbitration. The Rule does not regulate the criteria which must be applied by an arbitral tribunal to which the case will be referred to establish its own jurisdiction. It is nevertheless significant to note the difference, at the stage of the commencement of the arbitration, in the treatment between *designation* and *consent*. With respect to consent by an agency, the request for arbitration must identify both the specific instrument in which consent is recorded and the instrument which records the State’s approval. With respect to designation, the requirements are simpler: it is sufficient that the request for arbitration state that designation occurred; no specific instrument recording designation is required.
299. The absence of a prescribed form for designation must have a further consequence: since neither Article 25(1) of the ICSID Convention nor the Institution Rules, nor any other text governing the requirement of designation prescribes a specific form for designation, implicit designation must be possible. Such implicit designation may be accepted when the intention to designate clearly appears under the circumstances and is not contradicted by other indications.
300. Since, as mentioned above, designations are made by the Contracting States, it is the conduct of the State which is relevant and not that of the agency which is designated. As pointed out by Schreuer, “*the entity concerned cannot designate itself*”.¹⁸⁶
301. In the view of the present Tribunal, a particularly strong case of implicit designation occurs when the State expressly and formally approves in writing that one of its agencies enters into an investment agreement containing an ICSID clause. Since designation has as its purpose and objective to confer on the agency the competence or capacity to become party to an ICSID arbitration, the approval by the State of an ICSID arbitration commitment by one of its agencies presupposes that this agency

¹⁸⁶ Schreuer at Article 25, paragraph 252.

has the capacity to conclude such a commitment, which means that it must be capable to be a party to an ICSID arbitration.

302. If the State has not already conferred this capacity on the agency by an earlier (general) designation, the approval necessarily must include the intention to confer this capacity on the agency by an *ad hoc* designation. Assuming the contrary would mean that the State, when granting its approval of the agency's consent, intended to leave this approval without effect. It would require very strong evidence to establish that a State intended to act in such contradictory fashion. Even then, it is doubtful that such a contrary intention should be given effect in view of the overriding principle requiring good faith conduct.

7.2.5 Communicating the State's designation to the Centre

303. Designations, as stated in the ICSID List of Designations, render agencies "*competent to become parties to disputes submitted to the Centre*". Such competence is exercised in the course of specific proceedings, when a request for arbitration is submitted to the Centre and the agency appears before an arbitral tribunal. In order to be effective, the competence must be known by the Centre before it is exercised. This competence therefore must be made known to the Centre.
304. When the designation is notified by a Contracting State by way of an official communication to the Centre and entered on the List of Designations, the issue is not problematic. These designations demonstrably have been communicated to the Centre and entry on the List is a record that such communication occurred. However, entry on the List of Designations is not a requirement under Article 25(1). The question therefore is whether and under what circumstances an arbitral tribunal may find that a designation was validly brought to the Centre's attention in a form different from official communication.
305. It seems that in some cases "general notoriety" of the designation was considered as an admissible form of communication. Thus Schreuer wrote that designation "*can take any form that gives it general notoriety and comes to the*

Centre's attention".¹⁸⁷ That sentence suggests that the designation requirement of Article 25(1) would be met for instance by (1) an enactment of a Contracting State which confers on a national agency power to conclude investment agreements including ICSID arbitration clauses, provided that (2) the enactment has "general notoriety", for instance by publication in the official gazette of that State, and (3) that as part of investment legislation of a Contracting State this publication may be assumed to have come to the Centre's attention.

306. An example of "*public notoriety*" was given in the case of *Manufacturers Hanover Trust Company v. Arab Republic of Egypt General Authority for Investment and Free Zones*.¹⁸⁸ The tribunal held that the designation was contained in an investment law (Law No. 43). Its publication conferred "*public notoriety*" to the designation and thus brought the designation to the Centre's attention.¹⁸⁹

307. Given the circumstances of the present case, the Tribunal need not decide whether "*public notoriety*" is an adequate or admissible form of "*communication*". What is relevant here is that the views expressed in this context require that the designation must come "*to the Centre's attention*".

308. The question has been examined in some detail by Chittharanjan Felix Amerasinghe, a well-known international lawyer who during his three decades of employment at the World Bank was involved in the early development of ICSID. In an article that appeared in 1979 he clearly distinguished between designation and communication and, when considering the words "designated to the Centre", explained that:

*"Normally, this would mean that there should be some kind of formal communication of the designation to the Centre."*¹⁹⁰

¹⁸⁷ Schreuer at Article 25, paragraph 252.

¹⁸⁸ ICSID Case No. ARB/89/1, Order Noting Discontinuance of 24 June 1993 (Seidl-Hohenveldern, Abdel A'al and Bucher).

¹⁸⁹ For the concept of "public notoriety" in the *Cambodia Power* case, see below.

¹⁹⁰ Amerasinghe, "*The Jurisdiction of the International Centre for the Settlement of Investment Disputes*", 19 *Indian Journal of International Law* 166, 188 (1979) (hereinafter **Amerasinghe**).

309. After considering some situation which in his view did not meet the requirement of Article 25(1) he continued:

“On the other hand, it is a moot question whether there must always be an official communication of the designation to the Centre. It is arguable that where there was a clear intention on the part of the Contracting State to file the designation with the Centre at the time the designation was made but the actual communication is not made by that State to the Centre, it is adequate if instead of there being a formal communication of the designation to the Centre by the State it is brought to the attention of the Centre in some way whether by the State concerned or by one of the parties to the consent agreement provided this is done before the initial intention is changed.”¹⁹¹

310. As a foundation for his conclusion, Amerasinghe notably referred to the drafting history of the Convention. He remarked that early drafts had proposed the grant of *locus standi* to political subdivisions or agencies of a State *without a requirement of designation by that State*. Exploring why that had not been thought sufficient, he noted that delegates had perceived that a designation would be useful to avoid “*disputes as to whether an entity was a ‘political subdivision’*” and that it was “*difficult to see how a party that was not a Contracting State could be included in the jurisdiction of the Centre*” by leaving it to the Centre, or to arbitrators, to decide the matter in the absence of a confirmation by the State. He also referred to the comment that States could “*avoid the risk of consent by a political subdivision*” by requiring designation.¹⁹²

311. When concluding that “formal communication” could be replaced by some other way in which designation can be brought to the attention of the Centre, Amerasinghe assumes the predicate of “*a clear intention on the part of the Contracting State to file the designation*”.¹⁹³ It is a question of fact which shall be considered below whether, in the circumstances of the present case such a clear intention is found to have existed. When determining whether such an intention existed, the conduct of the State must be considered and interpreted in good faith. As explained above, such an intention cannot be denied by the State in a case when it proposes and approves the

¹⁹¹ Amerasinghe, p. 188.

¹⁹² Amerasinghe, p. 187.

¹⁹³ Amerasinghe, p. 188.

conclusion of an ICSID arbitration clause by its agencies. Such proposal and approval by the State can be understood only in the sense that the State ensures to the investor that, on its side, there are no obstacles to the effectiveness of the arbitration agreement.

312. These explanations by Amerasinghe have been referred to by Schreuer who wrote:

*“The notification of an agreement with the investor containing the designation is enough. It has been argued that where there is a clear intention to designate, it does not matter how and through whom the communication reaches the Centre.”*¹⁹⁴

313. Schreuer does not seem to disagree with this position. In the quoted passage he seems to take the view that designation can take any form but must come “*to the Centre’s attention*”.¹⁹⁵

314. Amerasinghe’s view has been confirmed by the arbitral tribunal in the *East Kalimantan* case. Relying on the quoted passage in Schreuer’s book, the tribunal there found:

“The form and channel of communication do not matter, provided that the intention to designate is clearly established.

[...]

*Consequently, the designation requirement may in particular be deemed fulfilled when a document that emanates from the State is filed with the request for arbitration and shows that State’s intent to name a specific entity as a constituent subdivision of agency for the purposes of Article 25(1).”*¹⁹⁶

¹⁹⁴ Schreuer at Article 25, paragraph 252.

¹⁹⁵ Schreuer at Article 25, paragraph 252; the reference to the position of Amerasinghe is immediately followed by a reference to the view of Broches who stated that designation could be dispensed with if it is proven that the entity is an agency or constituent subdivision of the State. When Schreuer adds that it “*seems that this goes too far*”, he obviously means the opinion of Broches and not that of Amerasinghe.

¹⁹⁶ *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal, Rio Tinto PLC and others*, ICSID Case No. ARB/07/3 (Kaufmann-Kohler, Hwang, van den Berg), Award of 28 December 2009 (hereinafter **East Kalimantan Award**), paragraphs 192-193.

315. The opinion expressed by Amerasinghe and shared by the *East Kalimantan* tribunal also has implications for the second of the two aspects that must be considered here: *who* must communicate the designation to the Centre?
316. The relevant passage of Article 25(1) reads “*designated to the Centre by that State*”. It is clear that the agency must be designated “by the State”. It is also clear that the designation must get “to the Centre”. However, given the distinction operated by the Convention between “designated” and “notified” and the manner in which the term “notified” is used in Article 25 and elsewhere in the Convention,¹⁹⁷ it cannot be assumed that, in Article 25(1) the word “designated” includes the word “notified” while in Article 4 and in Article 54 designation and notification are two distinct acts.
317. One must conclude that the words “*designated to the Centre*” do not prescribe the method of implementation, i.e. the manner in which the designation is communicated to the Centre and in particular by whom this is done.
318. In other words, the intervention of the State is required for the designation but is not necessarily required for the communication to the Centre. Understood in this sense, the designation requirement in Article 25(1) is complied with if the agency in question is “designated by the State and such designation is communicated to the Centre”. This conclusion is in line with the text of the provision and with the authors and cases which have been brought to the attention of the Tribunal¹⁹⁸ and to which reference has been made above.
319. In case of *Cambodia Power Company and Kingdom of Cambodia and Electricité du Cambodge* the tribunal reached a different conclusion. That tribunal first expressed the view that “*designation cannot be dispensed with altogether*” and that

¹⁹⁷ See above Section 7.2.1.

¹⁹⁸ Schreuer at Article 25, at paragraph 252, records the argument that “*it does not matter how and through whom the communication reaches the Centre*”. This is in line with the conclusion reached by this Tribunal. However, Schreuer adds later in the same paragraph that “[t]here must be some communication by the host-State to the Centre,” which would seem to indicate that it must be through the host State that the communication must reach the Centre. If that were the view of the distinguished author, the Tribunal would not share it insofar as it requires that the communication must be made through the host State.

“there must be some form of communication”.¹⁹⁹ In so doing, it did not part company with the tribunal in *East Kalimantan*, or indeed with the present arbitrators.

320. However, the *Cambodia Power* tribunal set a very high standard for this communication. It declared that “a structured and standardised system of notification is obviously necessary”.²⁰⁰ Communication must be in the written form and must either be made through a direct and formal communication by the State to the Centre or achieve “public notoriety”. The *Cambodia Power* tribunal then concluded that “public notoriety of a designation cannot be achieved through the Claimant’s communication to the Centre of a private investment contract annexed to the Request for Arbitration”.²⁰¹

321. When considering this case, one should bear in mind that the *Cambodia Power* tribunal was seized of this issue on materially different facts to the present case. At the time when the relevant contracts were concluded, the Kingdom of Cambodia was not a party to the ICSID Convention. The *Cambodia Power* tribunal therefore concluded that commitments concerning designation made prior to Cambodia’s adherence to the Convention did not meet the requirement of Article 25(1).

322. The *Cambodia Power* tribunal reached the conclusion that the communication of a designation must be made by the State on the ground that (i) Article 25(1) refers to designated “*by that State*”, (ii) that “*it is obviously essential that communications be the sole preserve of the State itself and not a function which investors can discharge*” and (iii) that the designation serves a “*gate-keeping*” function that allows the Contracting State to control any given agency’s dealings with foreign investors.²⁰² In that sense, the *Cambodia* tribunal expanded the understanding of “designation” in Article 25(1) by declaring that “*communication is inherent in the very notion of ‘designation’ used*” in Article 25(1).²⁰³

¹⁹⁹ Cambodia Power Decision, paragraphs 220-221.

²⁰⁰ Ibid., paragraphs 227 and 232

²⁰¹ Ibid., paragraph 269.

²⁰² Cambodia Power Decision, paragraphs 249, 250.

²⁰³ Cambodia Power Decision, paragraph 225.

323. For the reasons discussed above, this Tribunal understands the meaning of Article 25(1) to be different. It considers that the *Cambodia Power* tribunal’s analysis elides two concepts, each of which is a separate element of Article 25(1): the State’s act of designation and the communication of that act to the Centre. This Tribunal considers the two steps separately: designation, for this Tribunal, as for the *Cambodia Power* tribunal, is “*the sole preserve of the State itself*”; but this Tribunal takes a more nuanced position with respect to the communication of designation to the Centre where in case of ad hoc designation other forms of communication are not necessarily excluded. The *Cambodia Power* tribunal itself, elsewhere in its decision, accepts that “*formal notification to the Centre*” is not necessarily “*the only means by which a designation might be brought to the Centre’s attention*”; it also accepts “*the use of other channels of communication*” and mentions specifically that designation may be “*given public notoriety by the Contracting State such as to come to the Centre’s attention*”.²⁰⁴
324. The present Tribunal has explained that it need not decide whether “public notoriety” is an adequate or admissible method of communication for the purpose of Article 25(1), ensuring that a designation in a particular case will effectively come to the Centre’s attention.²⁰⁵ It simply notes that, even for the *Cambodia Power* tribunal “other channels of communication” are admissible which do not necessarily amount to a “*structured and standardised system of notification*”. Moreover, this Tribunal does not agree that the requirement of designation has the “*gate-keeping*” function which the *Cambodia Power* tribunal attributes to it and which, in that tribunal’s view, justifies a requirement that the communication must come from the State. As explained above, such gate-keeping is achieved straightforwardly by the approval of the agency’s consent pursuant to Article 25(3).²⁰⁶

²⁰⁴ Cambodia Power Decision, paragraphs 239, 240.

²⁰⁵ Above paragraph 307.

²⁰⁶ Above paragraph 278 and footnote 178.

7.2.6 Conclusions concerning the requirement of “designation” under Article 25(1)

325. Designation, as required under Article 25(1), refers to an act by a Contracting State by which the State confers upon the agency the capacity to conclude a valid ICSID arbitration agreement and become a party to an ICSID arbitration. Designation may be expressed by the State in a general form or specifically for a particular project or dispute.
326. Article 25(1) does not prescribe a particular form for the designating act. In particular in the context of *ad hoc* designations, these may be expressed implicitly, for example by the State’s approval of the conclusion by the agency of an ICSID arbitration agreement.
327. The requirement in Article 25(1) of designation “by the State” does not necessarily apply to the manner in which designation is made known “to the Centre”. Article 25(1) does not prescribe any form for this communication. Therefore, an arbitral tribunal may give effect to an existing *ad hoc* designation which may be made known to ICSID by an investor when filing a Request for Arbitration by a statement pertaining to a specific dispute, particular facts, and in accordance with Institution Rule 2.
328. In particular, if an *ad hoc* designation is expressed implicitly in the form of the State’s approval of the ICSID arbitration agreement concluded by the agency, communication may take place by bringing this approval to the attention of the Centre with the Request for Arbitration in the form in which it was expressed.
329. This understanding of the designation requirement ensures that the principal objective, that of conferring limited international capacity on a particular agency, is met. It permits the State to use designation for purposes of public notification, if it so desires, but it does not require that this be done. The objective of protecting the State against poorly considered commitments by agencies is achieved above all by the requirement of approval according to Article 25(3).

7.3 Designation in the present case

330. In RfA I, under the heading “Designation of parties who are a constituent subdivision or agency of a Contacting State”, the Claimant stated that “*Bangladesh has designated Petrobangla and BAPEX for purposes of the Article 25 of the Convention as a result of the making and execution of the Joint Venture Agreement made and entered into on October 16, 2003*”.²⁰⁷ In the course of the demonstration which follows this statement, the Claimant added:

*“(e) By directing and authorising Bapex to execute the JVA, containing consent to arbitrate under the Convention, Bangaldesh has designated Bapex and Petrobangla to the Centre pursuant to Article 25 of the Convention,”*²⁰⁸

331. The same statement appears in RfA II.²⁰⁹

332. The directions on which the Claimant relies have been quoted above.²¹⁰ With respect to the JVA, these directions were contained in the letter of 11 October 2003 which communicated to Petrobangla, with copy to BAPEX, the approval of the Prime Minister.²¹¹ This approval was communicated to Niko in the form of BAPEX letter of 13 October 2003 stating:

*“In accordance with the approval accorded by the Government of the Peoples Republic of Bangladesh to sign the “JOINT VENTURE AGREEMENT FOR THE DEVELOPMENT AND PRODUCTION OF PETROLEUM FROM THE MARGINAL/ABANDONED CHATTAC & FENI GAS FIELDS” between Bangladesh Petroleum Exploration & Production Company Ltd (BAPEX) and Niko Resources (Bangladesh) Ltd, you are requested to send your Authorised representative with due authorisation to sign the said contract on 16th October, 2003 at 12.00 Noon to the Register office of BAPEX, Dhaka, Bangladesh.”*²¹²

²⁰⁷ RfA I, p. 3.

²⁰⁸ RfA I, p. 3.

²⁰⁹ RfA II, p. 3.

²¹⁰ See Sections 3.1 and 3.3 above.

²¹¹ RfA I, Clarification, Exhibit 7.

²¹² RfA I, Clarification, Exhibit 8.

333. The GPSA was approved by the Government, acting through the Ministry of Power, Energy and Mineral Resources, Energy and Mineral Division, Development Section-3. On 20 December 2006 it addressed a letter to the Chairman of Petrobangla in the following terms:

“You are informed on the above subject and reference that the draft Purchase and Sale Agreement (GPSA) for the produced gas from the Feni Gas Field as per agreement of Bapex with NAICO [sic] sent through abovementioned memo under reference has been approved by the government.

*2. Under the circumstances the undersigned is directed to request you to take necessary action in the due pursuance of the existing rules and regulations on the above mentioned subject.”*²¹³

334. On the following day, 21 December 2006, Petrobangla wrote to Niko and BAPEX and, referring to the letter of the Government just mentioned, informed them that the Government had approved the GPSA.²¹⁴

335. Bangladesh has not only approved the consent of the two agencies and indeed directed the execution of the agreements, but was also directly involved in the introduction of the arbitration clause in the Agreements: on the basis of the evidence produced with respect to the negotiations of the agreements, the Tribunal concluded that the arbitration clause was introduced by Petrobangla and BAPEX;²¹⁵ given the close control of the Government over the negotiations of the agreements, the introduction of the ICSID arbitration clause was intended if not initiated by the State.

336. The situation is even clearer in the case of the GPSA. Based on the testimony at the hearing the Tribunal concludes that the arbitration clause was introduced by Petrobangla with the approval, if not at the instruction, of the Government.²¹⁶

²¹³ RfA II, Attachment B.

²¹⁴ RfA II, Attachment B.

²¹⁵ See paragraph 47 above.

²¹⁶ See paragraphs 89, 90 above.

337. The Respondents have explained that designation in Bangladesh must be made by the “competent authority” adding that, “*in this case it would be the Ministry, in the case of Bangladesh, in accordance with the rules of business in Bangladesh. It would have to be the Ministry of Foreign Affairs*”.²¹⁷ Later in the argument at the hearing, the Respondents referred to the extract of these Rules of Business produced in the arbitration. These rules allocate functions among different parts of the Government.²¹⁸
338. The extract of the Rules of Business that has been produced concerns the Ministry of Energy and Mineral Resources. It shows that this ministry deals with “*all policies and matters relating to Petroleum, Natural Gas and Mineral Resources*”; the functions of the energy division specifically include “*Liaison with international organisations and matters relating to treaties and agreements*”; matters relating to Petrobangla are specifically mentioned. One must conclude that designation with respect to Article 25(1) is a function of this Ministry.
339. The State of Bangladesh established Petrobangla and BAPLEX by legislation and executive decision as the agencies responsible for contracting with investors for the exploitation of gas fields in Bangladesh. With respect to the JVA this has been presented in particular detail in the Preamble of this agreement which contains the following passages:
- “Petrobangla has the power to exercise rights and powers of the Government [...] and also to enter into Petroleum Agreements with any person/company for the purpose of any Petroleum Operations.”*²¹⁹
- and
- “BAPLEX warrants that it has acquired from Petrobangla and the Government the requisite approvals to execute this JVA ...”*²²⁰
340. When considering above the interpretation of Article 25(1), the Tribunal concluded that, in the absence of clear evidence to the contrary, the approval by the State of the consent by one of its

²¹⁷ HT 1, p. 96.

²¹⁸ HT 1, p. 317, referring to RfA II, Exhibit H.

²¹⁹ Whereas Clause 3.

²²⁰ Whereas Clause 14.

agencies to an ICSID arbitration clause necessarily implies that this agency has been granted capacity to conclude such an arbitration clause and to become a party to an ICSID arbitration, i.e. that it has been designated for that purpose.

341. While it cannot exclude that Petrobangla and BAPEX might have been designated at some earlier time by a separate act or in the context of some other agreement, the Tribunal concludes that, in the circumstances of the present case, designation occurred at the latest when the Government approved the consent of the agencies to arbitration under the JVA and the GPSA. There is no indication that the Government of Bangladesh, during the negotiations or at any time prior to the conclusion of the agreements or prior to the commencement of these arbitrations, objected to the designation of these two agencies or to their consent to ICSID arbitration.
342. In this respect, there is a fundamental difference between the present case and the facts in *East Kalimantan*, where the tribunal found that the evidence relied upon by the claimant was insufficient to demonstrate the State's intent to designate,²²¹ and where the Government of Indonesia had clearly denied any authorisation to East Kalimantan and firmly stated that this provincial administration had “no capacity/qualification/authority and legal standing” to file a claim in ICSID.²²²
343. Similarly, in the case of *Cable TV of Nevis v. St Kitts and Nevis*, the arbitral tribunal found that not only was there no designation but also no approval by the State.²²³
344. In the present case, the agreements concluded by Petrobangla and BAPEX which contained the ICSID clause were expressly approved by the Government and the letters by which Niko was informed of the approval by the Government were submitted to the Centre with the Requests for Arbitration.
345. On the basis of the evidence before it and for the above reasons, the Tribunal is satisfied that, by authorising BAPEX and

²²¹ East Kalimantan Award, paragraphs 194-198.

²²² East Kalimantan Award, paragraph 199.

²²³ *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2 (Davis, Maynard, McKay), Award of 13 January 1997, paragraph 2.33.

Petrobangla to conclude the agreements containing the ICSID arbitration clauses, in terms previously proposed by the Bangladeshi agencies, the State of Bangladesh not only approved consent to ICSID arbitration by these two agencies in terms of Article 25(3) but also designated, implicitly but necessarily, BAPEX and Petrobangla as agencies in the sense of Article 25(1), if such designation had not occurred earlier. The designation was communicated to the Centre by the Claimant's Requests for Arbitration. The Respondents' objection relying on an alleged failure of Bangladesh to designate BAPEX and Petrobangla must therefore be dismissed.

346. The Tribunal adds that, if it had not concluded that the requirement of designation had been complied with in the present case, it would have had to consider whether the Respondents' objection based on the asserted absence of designation could have been reconciled with the overriding obligation of good faith conduct of the Parties. When a State chooses a mode of execution where the conclusion of the investment agreement is delegated to an agency and, upon proposal of the State, that agreement provides for ICSID arbitration, the investor may be entitled to expect that the State takes the steps prescribed by Article 25(1) to give effect to the agreement. For the State to rely on its failure to take these steps with the objective of preventing the effectiveness of the arbitration clause may be contrary to good faith.
347. However, since the Tribunal concluded that Bangladesh did designate BAPEX and Petrobangla in a manner which complied with the requirement of Article 25(1), the Tribunal need not consider this question any further.
348. On the basis of these considerations the Tribunal finds that BAPEX and Petrobangla, the Second and Third Respondent, have validly consented to ICSID arbitration and are bound by the arbitration clauses in the agreements to which they are party.

8. THE DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT

349. The Convention restricts jurisdiction of the Centre to legal disputes “*arising directly out of an investment*”. The Respondents deny that this requirement has been met.
350. The project to which this dispute relates concerns several marginal or abandoned gas fields which were to be evaluated and, if found promising, to be developed for production. The work required the commitment of financial and other resources for a long period of time at the risk of no recovery. The circumstances, and in particular the potential contribution to Bangladesh’s energy supply as well as the engagement of the Government of Bangladesh, indicate that the project had significance for the development of the country.
351. **With respect to the JVA**, the Claimant explained in RfA I that, by the time the Request was filed, its total “*capital/investment pursuant to the JVA*” was approximately US\$147 million,²²⁴ an amount that has not been contested by the Respondents in this arbitration. The JVA made it quite clear that Niko had to provide the funding of the operation, the profits were to be shared between BAPEX and Niko, and the losses had to be assumed by Niko which bore the full risk of the operation. Articles 2.3, 2.4 and 2.6 of the JVA are particularly relevant in this respect:

“2.3 BAPEX shall not be required to fund the Joint Venture operations.

2.4 All capital/Investment including operating expenses shall be provided by [Niko] and BAPEX shall not have to make any investment. The revenue derived from petroleum produced and sold under this JVA shall be distributed on the basis of the Investment Multiple (IM) achieved as provided for in Articles 23.3 under JVA.

[...]

²²⁴ RfA I, paragraph 6.22.

2.6 *If there is no Commercial Production in the JVA Area or if the production achieved from the JVA Area developed by [Niko] is insufficient to recover [Niko's] investment, [Niko] shall bear all its losses."*

352. It is readily apparent that the project meets the criteria which normally are identified as constitutive of an investment, as they have been discussed by learned writers and arbitral tribunals.²²⁵ Since this Tribunal concludes that the criteria are met, it does not need to address the controversy whether these criteria must be treated as "jurisdictional requirements".²²⁶

353. Indeed, the Respondents accept that Niko made an investment in Bangladesh. They stated:

*"With respect to the first alleged investment, Niko Bangladesh no doubt had an investment in the hydrocarbon sector of Bangladesh. The Joint Venture with BAPEX may constitute a qualifying investment under the ICSID Convention."*²²⁷

354. Consequently, Niko's activities pursuant to the JVA qualify as an investment. A dispute concerning Niko's rights and obligations under this agreement is therefore a "*legal dispute arising directly out of an investment*".

355. The difference between the Parties in this respect essentially concerns **the GSPA**. While accepting that the JVA relates to an investment, the Respondents contest that the GPSA "*qualifies as an autonomous investment in Bangladesh*". According to the Respondents:

"The contract must be an investment contract. Each contract must qualify as an investment contract in order to

²²⁵ Schreuer at Article 25, paragraph 158, concludes from his study of legal writers and arbitral awards that four criteria are most frequently relied upon when determining whether an operation may be characterised as investment: "a (substantial) contribution, a certain duration of the operation, risk and contribution to the host State's operation". These criteria, often referred to as the "*Salini* criteria" have been applied recently also by an arbitral tribunal in a case to which Bangladesh was a party. In the *Chevron* case referred to above the tribunal referred to the "*criteria identified by the Salini Tribunal*" and on that basis determined whether the Claimants had made an investment in the sense of Article 25(1).

²²⁶ See e.g. *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10 (Schwebel and Tomka, Shahabuddeen dissenting), Annulment Decision of 16 April 2009, in particular paragraph 77.

²²⁷ R-CMJ.1, paragraph 40.

*fulfil the requirements of the phrase in Article 25.1 that says a claim arising directly out of an investment.”*²²⁸

356. According to the Respondents, the Joint Venture Partners as the Sellers contracted “*to sell and deliver Gas to the Buyer*”. They argue that neither the sale of gas nor the potential expenditures that the Claimant may have incurred in carrying out the commercial transaction and for delivering the gas can be construed as an “investment”.²²⁹
357. The Claimant responds by arguing that “*the GPSA was part of the investment*”; it “*was the mechanism by which the parties fulfilled their commitments and expectations under Art. 24 of the JVA to sell the production and recoup the investment*”.²³⁰
358. The Tribunal notes first of all that, contrary to what the Respondents argue, the GPSA is not just a “*sales contract*”.²³¹ It is not limited to the simple sale of a defined quantity of gas against an agreed price. It is a long term agreement, in principle for a period of five years. It may be terminated earlier in case of depletion of the Feni field and it may be prolonged by mutual agreement.²³² The Sellers guarantee to sell a minimum quantity and the Buyer guarantees to purchase an annual minimum quantity.²³³ Ultimately the quantities delivered and purchased depend on the “*final deliverability of the Feni gas field*”.²³⁴
359. In order to perform this long term delivery contract, the Sellers (and specifically Niko as one of the Joint Venture Partners) had to make substantial expenditures, at the risk of not fully recovering it in case of insufficient “deliverability” of the Feni field. Obviously, the gas delivered made a contribution to the economy of Bangladesh. Thus the GPSA, taken alone, may qualify as an investment agreement and disputes arising out of it meet the requirement of Article 25(1).

²²⁸ HT 1, p. 128.

²²⁹ R-CMJ.1, paragraphs 43, 45.

²³⁰ C-MJ, paragraphs 95, 96.

²³¹ R-CMJ.2 – Payment Claim, paragraph 18.

²³² GPSA, Articles 2, 3.

²³³ GPSA, Articles 5.1, 5.2.

²³⁴ GPSA, Article 5.1.

360. The question whether the transaction regulated by the GPSA, taken in isolation, would qualify as an investment as required by the Convention need not, however, be finally decided here since the Respondents' objection must be rejected on more general grounds:
361. Contrary to the Respondents' argument, Article 25(1) does not require that the dispute arise out of "*an investment contract*" but "*out of an investment*". An investment is an economic operation and contracts regulate the rights and obligations relating to this operation. Investments of any complexity often consist of a variety of different components. These components may be regulated in a single legal instrument or in separate contracts.
362. In the case of an operation like the one considered here, it may well be possible to settle the rights and obligations of the investor in relation to the natural resource in question in a single legal instrument. The investor's undertakings to develop and deliver products, and its remuneration therefore, all form part of the investment; disputes with respect to them must be deemed to arise "*directly out of the investment*".
363. For these reasons, the Tribunal sees no justification for distinguishing, in the context of the characterisation as investment dispute, between those investments where the entire project is subject to a single instrument and those where different aspects of the project are regulated by separate contracts.
364. It is indeed now widely accepted that an investment must be seen as a coherent unit, even if it is implemented through a number of different projects. In the very first ICSID arbitration the concept of "*the general unity of an investment*" was already confirmed, integrating "*a number of juridical acts of all sorts*".²³⁵
365. In their argument concerning the unity of an investment the Parties referred to the decisions in the arbitration *Československa obchodní banka A.S. (CSOB) v. Slovak Republic*. In *CSOB*, the arbitrators gave a clear definition of the unity principle in their first decision:

²³⁵ *Holiday Inns S.A. and others v. Morocco*, ICSID Case. No. ARB 72/1 (Lagergren, Reuter, Schultsz), Decision of 12 May 1974, quoted from Lalive, "*The First 'World Bank' Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*", 51 *British Yearbook of International Law* (1980), 123, 159.

*“An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.”*²³⁶

366. At the hearing in the present case the Respondents argued that in a subsequent decision the CSOB tribunal restricted this general principle, stating that *“in order to incorporate disputes under other contracts, they must be the same parties in the dispute”*.²³⁷

367. The present Tribunal noted that, in its decision on further objections to jurisdiction of 1 December 2000, the CSOB tribunal referred to its earlier decision in which it held that *“CSOB’s claim and the related loan facility made available to SI qualify as investments ...”*. In its subsequent decision, that tribunal qualified its earlier decision by adding:

*“This does not mean, however, that the Tribunal thereby automatically acquires jurisdiction with regard to each agreement concluded to implement the wider investment operation. Other requirements have to be met for such jurisdiction to be established.”*²³⁸

368. The CSOB tribunal went on to refer to the requirement of consent, refusing to extend the scope of the agreement to arbitrate to other contracts²³⁹ to which the Slovak Republic was not a party. The decisive difference, therefore, was the absence of consent to arbitration by the Slovak Republic.

²³⁶ *Československa obchodní banka A.S. (CSOB) v. Slovak Republic*, ICSID Case No. ARB/97/4 (Buerghenthal, Bernardini and Bucher), Decision on Jurisdiction of 24 May 1999 (hereinafter **CSOB v. Slovak Republic**), paragraph 72, 14 ICSID Review (1999) 251, 275.

²³⁷ HT 1, p. 134.

²³⁸ *CSOB v. Slovak Republic*, Decision on Respondent’s Further and Partial Objection to Jurisdiction of 1 December 2000, paragraph 28, 15 ICSID Review (2000) 544, 554.

²³⁹ The so called CSOB/SI Agreements (see paragraph 6).

369. In the present case, the investment project, consisting in the development of marginal and non-producing gas fields, was the subject of a number of different agreements and other legal instruments, some of which were named in the JVA and attached to it. The JVA provides for the development of the Chattak and Feni fields and then addresses, in its Article 24, “Petroleum Sale and Transmission” (the Agreement defined petroleum as including gaseous hydrocarbons):

“OPERATOR [i.e. Niko] and BAPEX (hereinafter referred to as Seller) agree to sell the produced Petroleum to the Bangladesh domestic market under this JVA. BUYER of JV’s gas shall be Petrobangla or a designee of Petrobangla (hereinafter referred to as BUYER). BUYER & SELLER shall enter into a Gas Purchase and Sales Agreement (GPSA) under which the Buyer shall agree to purchase the Petroleum to which the Seller is entitled to under this JVA, subject to deliverability and testing and proof of such Petroleum. OPERATOR shall be free to find a market outlet within the Country if a market outlet is not given by Petrobanla within six months after a request is made.”

370. The GPSA, in turn, makes express reference in its Preamble to the JVA under which the Seller (i.e. the Joint Venture Partners) “is authorised to produce and sell Natural Gas”. It then continues:

“Under Article 24 of the JVA and upon the terms and conditions as set in this Agreement, the Seller has proposed to sell and deliver Natural Gas as produced from the Feni gas field and the Buyer has agreed to purchase and receive the same from the Seller for consumption in the domestic market”.

371. These two provisions confirm and underline the commercial logic of the operation: the sale of the gas produced by the Joint Venture Partners is a necessary component of the investment.

372. The Tribunal concludes that the GPSA is a constituent part of the investment operation. Given the function assigned under the law of Bangladesh to Petrobangla, an agreement for the sale and purchase of gas produced from this investment was a necessary element of this operation. The GPSA forms part of

the legal instruments through which Niko's investment in Bangladesh has been implemented. Disputes arising out of the GPSA, like those arising out of the JVA, are legal disputes "*arising directly out of an investment*" in the sense of Article 25(1).

9. ILLEGAL ACTS, GOOD FAITH AND CLEAN HANDS

373. The Respondents argue that Niko has committed acts of corruption and that therefore it may not benefit from the agreements in general and from the ICSID arbitration clause in particular. The Claimant denies that, apart from the acts which formed the subject of the decision in Canada (the Canadian conviction),²⁴⁰ it has committed any illegal act.

9.1 The Parties' positions

374. When this objection was first presented, the Respondents submitted:

“... jurisdiction must be denied because the Claimant has violated the principles of good faith and international public policy.

This Tribunal is empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law.”²⁴¹

375. Citing extracts from two ICSID awards²⁴² the Respondents continued:

“(i) the obligation to act in good faith, and (ii) the requirement of legality of the investment in accordance with the law of the host State, apply both to the initiation of the investment and its performance. As noted by the Phoenix tribunal, ‘the purpose of the international protection is to protect legal and bona fide investments’. Thus when there is an allegation of fraudulent conduct by the foreign investor, tribunals should examine all the circumstances surrounding the lifespan of the investment, having direct relation to the investment claim. As stated by the Phoenix tribunal, one function of an ICSID tribunal is ‘to prevent an abuse of the system of international investment protection

²⁴⁰ See below Section 9.2.

²⁴¹ R-CMJ.1, paragraphs 54 and 55.

²⁴² *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05 (Stern, Bucher and Fernández-Armesto), Award of 15 April 2009 (hereinafter **Phoenix Action Award**), paragraph 106; *Gustav F W Hamester GmbH Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24 (Veeder, McRae and Crawford), Award of 18 June 2010 (hereinafter **Hamester Award**), paragraph 123.

*under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected’.*²⁴³

376. Later they developed their position and argued that:

*“... jurisdiction should be denied because the Claimant has violated the principles of good faith and international public policy, in a manner intimately linked to the alleged investment. The Tribunal is empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law. The Claimant does not bring this claim with clean hands. That is not affected by the question whether or not its bribery achieved its admitted purpose.”*²⁴⁴

377. Responding to a question of the Tribunal, the Respondents summarised their position as follows:

“(1) An admitted aim of the two acts of bribery set out in the Agreed Statement of Facts was ‘to persuade the Bangladesh Energy Minister to exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement acceptable to Niko’ (the other being ‘to ensure the company was dealt with fairly in relation to claims for compensation for the blowouts’): para. 58.

(2) As defined in domestic and international law, an act of bribery is complete when the benefit is provided to the public official, with the intention of influencing that official’s performance of his or her functions. Whether or not the bribe in fact causes the official to act as the briber desired is not within the briber’s control, and does not affect the gravity of the briber’s conduct.

(3) Whether or not the bribe had a causal link with the conclusion of the contract may be relevant where one party to the contract argues that it is void or voidable.

(4) The Respondents do not intend to argue that the contract is void or voidable, by reason of corruption or

²⁴³ R-CMJ.1, paragraph 57 (references omitted).

²⁴⁴ R-CMJ.2 – Payment Claim, paragraph 53.

otherwise. They would, of course, revisit this position if further disclosure made it appropriate to do so.

(5) The question in this case is whether ICSID jurisdiction should be denied to a claimant which attempts to procure a contract by bribery, or only to one which succeeds.

(6) The Respondents intend to argue that the Tribunal should decline jurisdiction because, in attempting to procure by bribery the very agreement on which its jurisdiction would be based, the Claimant has violated the principles of good faith and international public policy, in a manner intimately linked to the alleged investment. The Tribunal is empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law. The Claimant does not bring this claim in good faith or with clean hands. That is not affected by whether or not, on the facts, the bribery achieved its admitted purpose.

[...]

The Respondents submit that the fact that the Claimant's proven bribery was intended to procure the conclusion of that Agreement [the GPSA] suffices as a bar to the admissibility of the claim.”²⁴⁵

378. In response the Claimant argued that:

“The Respondents’ contention that requirements of good faith and legality apply throughout the life of the investment, overstates the scope of the principle and incorrectly applies rulings based on particular bilateral investment treaties explicitly requiring ongoing compliance with local law.”²⁴⁶

379. Pointing out that in the present case there is no bilateral investment treaty at issue, the Claimant continued, relying essentially on the same ICSID awards as the Respondents:

²⁴⁵ Respondents’ letter of 29 August 2011, responding to the Tribunal’s letter of 26 August 2011.

²⁴⁶ C-MJ.2, paragraph 51.

“Absent special requirements imposed by treaty, the international law requirements of good faith relate to the creation of the investment, and in some instances the acquisition of an investment for an improper purpose. Obviously, in some instances bad faith performance is relevant, in that rights arising from illegal acts will not be recognized where a BIT requires ongoing compliance with local law. Also, contracts which have corruption as their objective are not enforceable.

It is apparent from these cases that there must be a nexus between the alleged corruption or bad faith and the contract sought to be enforced. As the tribunal in World Duty Free, supra, plainly put the rule:

... Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld ...”²⁴⁷

380. The question which the Tribunal must examine therefore is whether any instance of bribery and corruption in which the Claimant has been or may have been involved deprives the Claimant from having its claims considered and ruled upon by the present Tribunal.

9.2 The Canadian conviction of Niko Canada on account of bribes to the Minister of Energy in 2005

381. The Respondents rely on several incidents of alleged corruption in which the Claimant and its parent company were, according to the Respondents, implicated.
382. One of these incidents is in substance uncontested. It concerns two acts between February and June 2005, providing benefits to Mr Mosharaf Hossain, the then Bangladesh State Minister for Energy and Mineral Resources. These acts were the subject of a criminal investigation in Canada, leading to the conviction of Niko Canada on 24 June 2011.²⁴⁸ The conviction was based on an Agreed Statement of Facts, signed by officers of that company.²⁴⁹ The following account is based on this text.

²⁴⁷ C-MJ.2, paragraphs 53 and 54.

²⁴⁸ Claimant’s Exhibit 16.

²⁴⁹ Claimant’s Exhibit 15.

383. The Agreed Statement describes the difficulties of Niko as a result of having signed the JVA without securing the contract for the sale of the gas. When gas became available, Niko commenced delivery of the gas but had not reached agreement with Petrobangla about the price for the gas. The difficulties were aggravated by the blowouts.
384. In February 2005 Niko Bangladesh made a down payment for the purchase of a Toyota Land Cruiser at the price of Canadian \$190,984. Niko Bangladesh had originally been requested to purchase the Land Cruiser pursuant to the terms of the JVA which allowed for assets to be purchased by the Operator (Niko Bangladesh) for use by the JVA partner (BAPEX). The vehicle was registered to BAPEX but not given to it. BAPEX instructed Niko Bangladesh to deliver the vehicle to the Minister. In the presence of two representatives of Niko the Land Cruiser was delivered to the home of the Minister on 23 May 2005.²⁵⁰
385. In June 2005 the Minister travelled to Calgary to attend the Gas & Oil Exposition as a guest of Niko Canada. The “*non-business related portion of the travel and expenses*” were quantified in the Agreed Statement at Canadian \$5,000.
386. No other acts of corruption are related in the Agreed Statement.
387. The delivery of the vehicle to the Minister soon became known in Bangladesh and was publicised in the press. On 18 June 2005 the Minister resigned. On 20 June 2005 the vehicle was returned to BAPEX.
388. As explained above, the GPSA was signed on 27 December 2006.
389. The sentence in the Canadian proceedings provided as punishment of Niko Canada the amount of Canadian \$8.26 million plus a 15% “*Victim Fine Surcharge*”, leading to a total of Canadian \$9.499 million. The Agreed Statement of Facts describes the considerations for the amount of the fine:

“The fine reflects that Niko Canada made these payments in order to persuade the Bangladeshi Energy Minister to

²⁵⁰ Agreed Statement of Facts, Claimant’s Exhibit 15, paragraphs 28-34; the correspondence relating to these events has been produced at the Hearing as Hearing Exhibit C-4.

exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement acceptable to Niko, as well as to ensure the company was dealt with fairly in relation to claims for compensation for the blowouts, which represented potentially very large amounts of money. The Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister.

[...]

In addition the Probation Order takes into consideration steps already taken by Niko Canada to reduce the likelihood of it committing a subsequent related offence.

In addition the sentence takes into consideration the fact that the company has never been convicted of a similar offence nor has it been sanctioned by a regulatory body for a similar offence.

[...] *The Probation Order also puts Niko Canada under the Court's supervision for the next three years to ensure audits are done to examine Niko Canada's compliance with the Corruption of Foreign Officials Act.*"²⁵¹

390. The Claimant disclosed that the United States Department of Justice conducted an investigation related to the investigation in Canada. On August 2011 it informed Niko Canada that it "determined that it will discontinue its inquiry into potential violations of the Foreign Corrupt Practices Act (FCPA) by Niko Resources Ltd. (Niko)". It explained that "*prosecution is not necessary at this time in light of Niko's guilty plea in Canada*". It pointed out that it "*may decide to restart this enquiry at any time*".²⁵²

391. The Claimant also disclosed: "Although the criminal charges in Canada against Niko Resources Ltd appear to have been resolved with the guilty pleas on June 24, 2011, other regulatory investigations appear to remain outstanding. Further, two Canadian law firms widely known for class action law suits announced in late June 2011 that they were investigating Niko's disclosures, stock option practices and foreign business practices".

²⁵¹ Claimant's Exhibit 15, paragraphs 58, 62, 63 and 64.

²⁵² Exhibit D to the Claimant's letter to the Tribunal of 6 September 2011.

392. The Claimant stated that it was not aware of any criminal investigations other than those in Canada and the United States just described and the investigation in Bangladesh to be discussed below.²⁵³ There is no indication that any other convictions or investigations against the Claimant or the Niko Group occurred in Canada or the United States in relation with the project in Bangladesh.

9.3 Other indications of possible acts of corruption and the Respondents' disclosure request

393. The Respondents made reference to a number of investigations and proceedings in Bangladesh and abroad as possible indications of acts of corruption by the Claimant and its group.

9.3.1 Investigation by the Bangladesh Anticorruption Commission (ACC)

394. The first of these proceedings concerned an investigation which the Bangladesh Anticorruption Commission (**ACC**) initiated in 2007. The Respondents explained that the ACC filed at "*Tejgaon Police Station Case No. 20 of 2007 against government officials under the provisions of the Prevention of Corruption Act 1047 and the Penal Code 1860, and there continues to be a pending charge against one former Prime Minister*".²⁵⁴

395. The Tribunal asked the Respondents about this investigation. The Respondents confirmed that the investigation was commenced and invited the Tribunal to order the Claimant to disclose any relevant documents.²⁵⁵

396. The Claimant responded that it had received requests for information from the ACC and that it was informed that the ACC was investigating whether public officials of the Government of Bangladesh accepted bribes in respect to investments in Bangladesh. The investigations also concerned Mr Qasim Sharif who was "*at one time an officer of Claimant*".

²⁵³ Letter to ICSID of 22 September 2011, paragraph b; HT 2, pp. 43-50.

²⁵⁴ R-CMJ.1, paragraph 59.

²⁵⁵ Respondents' letter to ICSID of 29 August 2011, in response to the Tribunal's questions of 26 August 2011.

The Claimant added that according to its information “most, if not all, of the charges were stayed. The Claimant understands that no further proceedings have yet been taken on any charges that were not stayed, if in fact any charges remain outstanding.”²⁵⁶

397. The Claimant declared that it “*was not told that it was a target of the investigation*”.²⁵⁷

398. The Tribunal pursued this matter further at the hearing. Mr Adolf confirmed that ACC had approached Niko, requesting access to its files, and were provided such access. He added that he did not think that “*there is any further action taking place*”.²⁵⁸ Mr Imam Hossain, named as witness by the Respondents, confirmed that his knowledge about the investigation was “*the same as Mr Adolf*”, but added that “*one investigation is going on by the ACC and they have seized some files from Petrobangla*”.²⁵⁹

399. Towards the end of the hearing the Claimant’s counsel made reference to documents emanating from the ACC and containing the charges investigated by the Commission. He delivered these documents to the Respondents’ counsel who introduced them in the arbitration.²⁶⁰ The documents contained detailed discussions relating to the negotiations with Niko, the award of the JVA and alleged illegalities committed in this context. One of these documents, dated 5 May 2008, stated that a “*memo was filed with recommendation to file charge sheet*” against 11 persons, including a former Prime Minister, several Ministers and civil servants as well as Mr Qasim Sharif.²⁶¹ The other, dated 7 May 2008, is entitled “*Charge Sheet*”.²⁶²

400. The Respondents’ counsel stated that they had been unaware of the charge sheets prior to their delivery by the Claimant’s counsel towards the end of the hearing; they could not provide any information about the status of these investigations.

401. Apart from the comments referred to above, no further evidence was provided about the investigations by the ACC.

²⁵⁶ Claimant’s letter to ICSID of 22 September 2011, paragraph (a).

²⁵⁷ Claimant’s letter to ICSID of 22 September 2011, paragraph (a).

²⁵⁸ Brian Adolf, HT 2, pp. 209-210.

²⁵⁹ Imam Hossain, HT 2, p. 210.

²⁶⁰ Recorded as Hearing Exhibits R-2 and R-3; HT 2, p. 229.

²⁶¹ Hearing Exhibit R-3.

²⁶² Hearing Exhibit R-2.

9.3.2 The BELA proceedings

402. One of the claims raised in the legal action brought in the BELA proceedings²⁶³ was that the JVA was “*a nullity having been procured through flawed processes and resorting to fraudulent means and forged documents by Niko*”.

403. This case was concluded by the decision of the Supreme Court of Bangladesh, High Court Division of 2 and 3 May 2010, i.e. two years after the ACC Charge Sheet. The decision contains an examination of the process which led to the conclusion of the JVA. The Court concluded:

*“From the above, we do find that the JVA was not obtained by flawed process by resorting to fraudulent means.”*²⁶⁴

404. At the hearing Mr Adolf referred to the BELA proceedings stating that this case concluded “*that the contracts were awarded properly and that they were valid*”.²⁶⁵ He was not contradicted by the Respondents or their witness.

405. The decision in the BELA proceedings is the only court decision in Bangladesh brought to the Tribunal’s attention which makes a finding with respect to the legality of the Claimant’s conduct and the conclusion of the agreements.

9.3.3 The proceedings against Stratum

406. Respondents made reference to another investigation relating to the JVA, stating:

*“It has been reported that a consulting firm (Stratum) and one of its employees hired by Niko Canada in Bangladesh were also charged by the ACC after the agency investigated ‘details surrounding Niko’s joint venture contract with the Bangladesh government’.”*²⁶⁶

²⁶³ See above Section 3.6.

²⁶⁴ RfA II, Attachment M, p. 40.

²⁶⁵ HT 2, p. 231.

²⁶⁶ R-CMJ.1, paragraph 59.

407. The only support provided by the Respondents for this allegation was an article on the Trade Lawyers Blog.²⁶⁷ The article is dated 18 January 2009 and starts by reporting on the Canadian investigation considered above. It continues by mentioning the investigation of the ACC, leading to a filing of charges in December 2007 against a former Prime Minister for failing to recover from Niko “*compensation for environmental damage caused by a fire at a Niko drilling site in northeastern Bangladesh in 2005*”, presumably the blowouts in 2005.
408. The article concludes by stating that the ACC charged Stratum “*after the ACC looked into details surrounding Niko’s joint venture contract with the Bangladesh government*”. The article neither states what the charges were, nor does it provide particulars as to how Niko was said to have been involved.
409. In any event, the article on which the Respondents rely was written prior to the finding of the High Court Division of May 2010, quoted above. In the Tribunal’s view, this article is not sufficient to justify conclusions of corruption as suggested by the Respondents.

9.3.4 The action of Mr Harb

410. Finally there is reference to an investigation against Mr Marc Harb, a Canadian Senator. Mr Harb had been retained by Niko as consultant assisting in “*resolving the compensation claims and the Feni gas price issue*”.²⁶⁸
411. At the hearing Mr Adolf testified that Mr Harb visited Bangladesh in 2006 and that he “*was performing his services for us in an ethical way that was approved by the Ethics Commissioner for the Government of Canada*”.²⁶⁹
412. During the course of his testimony Mr Adolf produced a press release of Mr Harb which contained the following passages:

²⁶⁷ Available at http://tradelawyersblog.com/blog/archive/2009/january/article/canadas-anti-corruptioninvestigation-niko-resources/?tx_ttnews%5Bday%5D=18&cHash=74f3115aea, referred to in R-CMJ.1, fn. 46.

²⁶⁸ Claimant’s letter to ICSID of 22 September 2011, paragraph 2.

²⁶⁹ Brian Adolf, HT 2, pp. 211-212;

“I am aware of the investigation that has been undertaken by the RCMP [Royal Canadian Mounted Police] into Niko Resources and I have cooperated fully with the RCMP.

I disclosed to the Senate Ethics Officer in a timely manner the information regarding my work with Niko as I was required to declare confidentially under the Conflict of Interest Code for Senators. Moreover, I did not make any representations to federal government officials nor did I use my position as a Senator for personal gain or to further the private interests of Niko.

As a city councillor, a Member of Parliament and as a Senator, I have always put the public interest first. This investigation has therefore caused me grave concern and I have cooperated fully with the authorities. I am confident that there will be no finding of wrongdoing [...].”²⁷⁰

413. There is no indication that the intervention of Mr Harb constituted in any way an illegal act by him or by the Niko Group.

9.3.5 The Respondents’ request for document production

414. The Respondents argue that there may have been other relevant acts of corruption. In order to develop their argument in this respect, the Respondents request that the Claimant be ordered to produce the relevant documents. The Parties were given the opportunity to argue the issue. Their arguments may be summarised as follows:
415. In their Counter-Memorial dated 16 May 2011, the Respondents referred to the Canadian investigation and, in a footnote to these explanations, made the following request:

“Pursuant to Procedural Order No. 1, the Respondents request disclosure from the Claimant of all documents, records and information in its control relating to such allegations, investigations, charges, and proceedings”.²⁷¹

²⁷⁰ Hearing Exhibit C-1.

²⁷¹ R-CMJ.1, fn. 45.

416. In response, the Claimant objected to the request, stating that “*it goes far beyond what is reasonable*” and that it “*complies with few, or none, of the usual conditions for document production*”.²⁷² The Claimant added that, nevertheless it was “*prepared to make voluntary disclosure of any criminal convictions relating to the alleged bribery allegations*”.²⁷³
417. The Claimant explained that there was “*one such conviction*”; it provided explanations and disclosed documents with respect to the Canadian investigation and criminal conviction.²⁷⁴
418. In an application of 16 August 2011, the Respondents requested “*access to the record of the criminal investigation carried out by the Royal Canadian Mounted Police*”.
419. In response to a number of questions addressed on 26 August 2011 by the Secretariat to the Parties on instruction of the Tribunal, the Respondents stated on 29 August 2011 that they believed that “*the Claimant may have committed further acts of corruption in relation to its operation in Bangladesh*” and referred to three corruption investigations: (i) the Canadian investigation, (ii) the ACC investigation against the Claimant and others and (iii) the proceedings against Stratum. They invited the Tribunal to order the Claimant “*to disclose any relevant documents regarding all three investigations*”.
420. The Claimant responded on 6 September 2011, objecting to the wide range of the request and argued that the matters concerned were irrelevant, sensitive and subject to privilege. In a letter of 27 September 2011, the Respondents insisted on the disclosure requests concerning investigations in Canada, the United States and Bangladesh.
421. The Claimant has disclosed the conviction of Niko Canada and the Agreed Statement of Facts on which it was based and provided information about the investigation in the United States. The Claimant declared that it was not aware of any other investigations, apart from those in Bangladesh. The Tribunal sees no need for any further disclosure concerning these proceedings in Canada and the United States.

²⁷² C-MJ.2, paragraphs 56, 60.

²⁷³ C-MJ.2, paragraph 74.

²⁷⁴ C-MJ.2, paragraphs 75 *et seq.*

422. With respect to the proceedings in Bangladesh, the Tribunal is of the view that the Respondents themselves were best placed to provide all relevant information. They have failed to do so. The Tribunal sees no justification for ordering the Claimant to produce information which, if it existed, was surely available to the Respondents.

9.3.6 Conclusion on the Claimant's acts of corruption

423. The Tribunal has carefully examined the evidence before it and concluded that the Claimant has committed the acts of corruption which were sanctioned in the Canadian conviction.

424. The Tribunal is aware that acts of corruption are often difficult to prove, and arbitral tribunals have only very limited means to reach their conclusions. While they must bear in mind these difficulties they must also be aware that findings of corruption are a serious matter which should not be reached lightly. As the tribunal put it in *Hamester v. Ghana*, a tribunal would “*only decide on substantiated facts, and cannot base itself on inferences*”.²⁷⁵

425. In the present case, the acts of corruption of which the Claimant was convicted were committed in Bangladesh. If there were any other such acts committed they must have concerned persons making decisions in Bangladesh. Therefore, the authorities of Bangladesh were best placed to investigate and collect proof of corruption relevant for the present case.

426. The ACC, the competent authority in Bangladesh, commenced its investigations in 2008 or even earlier. Judging from the evidence before the Tribunal, these investigations have not led to any trial, let alone conviction for acts of corruption that may be attributed to the Claimant and its group. Quite to the contrary, in the BELA proceedings the Supreme Court of Bangladesh concluded, as quoted above, that “*the JVA was not obtained by flawed process by resorting to fraudulent means*”.

²⁷⁵ Hamester Award, paragraph 134.

427. The Tribunal also had before it the considerations which determined the sentence imposed in the Canadian proceedings. These considerations include findings such as: “*the company has never been convicted of a similar offence nor has it been sanctioned by a regulator body for a similar offence*”. In addition “*the Probation Order [took] into consideration steps already taken by Niko Canada to reduce the likelihood of it committing a subsequent related offence*”; it put Niko Canada “*under the Court’s supervision for the next three years to ensure audits are done to examine Niko Canada’s compliance with the Corruption Foreign Public Officials Act*”.²⁷⁶
428. In view of these circumstances, the Tribunal has no reason to conclude that, apart from the acts subject of the Canadian conviction, other acts of corruption were committed by the Claimant or its group.
429. Finally, as concerns the effect of the acts of corruption, the Tribunal notes that the Canadian authorities were “unable to prove that any influence was obtained as a result of providing the benefits to the Minister”. No allegation to the contrary was made in this arbitration. Bearing in mind the quoted finding of the Supreme Court of Bangladesh concerning the absence of “fraudulent means” in the making of the JVA, the Tribunal has no reason to believe that corruption had any influence in the conclusion or the content of the JVA or the GSPA.

9.4 Corruption and international public policy

430. The Respondents state that “*Corruption is unlawful in domestic and international law*”, adding that “*bribery is illegal under the law of Bangladesh*” and that “*corruption is condemned throughout the world*”.²⁷⁷ These statements are uncontested by the Claimant. They are obvious and there is no need for further development on the point.²⁷⁸

²⁷⁶ Claimant’s Exhibit 15, paragraphs 62-64.

²⁷⁷ R-CMJ.2 – Payment Claim, title III.C 1 and paragraphs 31-32.

²⁷⁸ See for instance United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), Resource Material Series No. 71, March 2007, Country Report: Bangladesh by Golam Shahriar Chowdhury, District Anti-Corruption Officer, Anti-Corruption Commission, Bangladesh; available at www.unafei.or.jp/english/pages/RMS/No71.htm.

431. In their objections to jurisdiction the Respondents take this point a step further and argue that “*corruption is contrary to the principles of good faith, clean hands and international public policy*”.²⁷⁹ It is widely accepted that the prohibition of bribery is of such importance for the international legal order that it forms part of what has been described as international or transnational public policy.²⁸⁰
432. Arbitral awards and learned writers have supported this position. The matter was considered in particular detail and with admirable erudition in the *World Duty Free* case²⁸¹ by a distinguished tribunal. This tribunal concluded that “*bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy*”.²⁸² The tribunal reached this conclusion on the basis of an analysis of a large number of international conventions, the decisions of national and international courts and tribunals, and legal writings.
433. The present Tribunal is not aware of any contrary position and none has been brought to its attention by the Parties in the course of this proceeding. The Tribunal therefore accepts without further development that the prohibition of bribery forms part of international public policy.

9.5 Contracts of corruption

434. The consequence of this conclusion is that, as a principle of international public policy, the prohibition of bribery overrides the general principle of party autonomy which is widely recognised in international and comparative law. Normally, arbitral tribunals respect and give effect to contracts concluded by the parties which agreed on the arbitration clause from which they derive their powers. However, party autonomy is not without limits. In international transactions the most important of such limits is that of international public policy. A contract

²⁷⁹ R-CMJ.2 – Payment Claim, title III. C 2.

²⁸⁰ See generally Lalive, Report to the 1986 ICCA Congress in New York on the subject of “Transnational (or Truly International) Public Policy and International Arbitration”, ICCA Congress Series, No 3, 1987 (hereinafter **Lalive Report**), pp. 257 to 318.

²⁸¹ *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7 (Guillaume, Rodgers and Veeder), Award of 4 October 2006 (hereinafter **World Duty Free Award**).

²⁸² *World Duty Free Award*, paragraph 157.

in conflict with international public policy cannot be given effect by arbitrators.

435. Thus, contracts which have as their object the corruption of civil servants have been denied effect by international arbitrators. One of the earliest and best known examples is the award by Judge Gunnar Lagergren in ICC Case 1110 of 1963.²⁸³ Judge Lagergren found that the agreement on which the claims before him were based “*contemplated the bribing of Argentinian officials*”. He relied on “*the general principles denying arbitrators the power to entertain disputes of this nature*”. Parties to such contracts “*have forfeited the right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.*”²⁸⁴
436. Courts in a number of countries²⁸⁵ and arbitral tribunals²⁸⁶ have found that contracts having influence peddling or bribery as their objectives or motives were void or unenforceable. Legal writers have supported these conclusions.²⁸⁷ In this context reference is often made to the adages such as *Ex injuria jus non oritur*²⁸⁸ or *Nullus commodum capere potest de sua injuria propria*²⁸⁹ or the Roman law principle *Nemo auditur propriam turpitudinem allegans*.²⁹⁰

²⁸³ *Mr X, Buenos Aires v. Company A*, 10 Arbitration International (1994) 282.

²⁸⁴ *Ibid.*, at 294.

²⁸⁵ See e.g. *Swiss Federal Supreme Court in National Power Corp. v. Westinghouse*, 1994 ASA Bulletin, 244, 247; *European Gas Turbines v. Westman*, Paris Court of Appeal, Decision of 30 September 1993, in 1994 Revue de l'arbitrage, 359.

²⁸⁶ See e.g. ICC case 3913, Award of 1981, quoted in Derains, Note on ICC case 4145, Award of 1984, Journal du droit international (Clunet), 985, 989; ICC Case 7664, *Frontier AG & Brunner sociedade v. Thomson CSF*, Award of 31 July 1996, quoted in Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer, 2004), 306-307; ICC case 8891, Award of 1998, 2000 Journal du droit international (Clunet), 1080. See also *Himpurna California Energy Ltd. v. PT Perusahaan Listrik Negara*, UNCITRAL (Paulsson, de Fina, Setiawan), Award of 1999, Yearbook Commercial Arbitration 200, vol. XXV, p. 44, stating that the arbitrators “*would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption*”.

²⁸⁷ See e.g. Cremades, “Corruption and Investment Arbitration” in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* (ed. Asken et al., ICC), 203, 205, 208, describing *inter alia* the findings of ICC tribunals which rejected claims “*on the grounds that the contracts were null and void as they had an illicit purpose contrary to morality or public policy*”.

²⁸⁸ *Ibid.*, p. 214. Cremades sees this adage as an expression of the “doctrine of ‘clean hands’”.

²⁸⁹ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London 1953, 149-158. He also mentions as another manifestation of this principle *Ex delicto non oritur action*, at p. 155.

²⁹⁰ Codex Justinianus 7, 8, 5 (Alexander Severus); Philippe Le Tourneau, “*La règle “Nemo auditur ...”*”, Paris 1970, 10-20 ; Fouchard Gaillard Goldman on International Commercial Arbitration, 353-354.

437. There has been some controversy about the question whether Judge Lagergren was correct in denying jurisdiction to claims contrary to international public policy or whether the correct conclusion would have been for the international arbitrator to accept jurisdiction and declare that the claims were contrary to international public policy and therefore must be denied by a decision on the merits of the claims.²⁹¹ The matter need not be considered further here since the present case is fundamentally different from those cases in which a claimant seeks to enforce a contract which, directly or indirectly, has corruption as its object.
438. In the present case, the agreements on which the claims are based have as their object the development of marginal/abandoned gas fields and the sale of gas from such fields. It has not been argued that there is anything illegal about the object and the content of these contracts. The Tribunal has not been made aware of any such illegality. The reasons which lead to the unenforceability of contracts for corruption do not apply to the agreements considered in the present case.
439. The question therefore is whether the acts of corruption committed by the Claimant affect the validity of the otherwise legal agreements or the arbitration clause contained in them.

9.6 Contracts obtained by corruption

440. The *World Duty Free* tribunal stated that

*“... claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”*²⁹²

441. This passage has been quoted by other tribunals and learned writers. In this arbitration both Parties have made reference to it.
442. The discussion in the preceding section of this Decision has shown that the conclusion in the quoted sentence with respect

²⁹¹ Lalive Report, p. 294.

²⁹² World Duty Free Award, paragraph 157.

to the first category of contract is a direct consequence of the application of international public policy to contracts of corruption. The conclusion with respect to the second category requires further consideration.

443. There is indeed a fundamental difference between the two types of situations. In contracts of corruption, the object of the contract is the corruption of a civil servant and this object is intended by both parties to the contract. In contracts obtained by corruption, one of the parties normally is aware of the corruption and intends to obtain the contract by these means. But this is not necessarily the case for the other side. As explained in the *World Duty Free* award, bribes normally are covert. In that case the bribe was received not by the Government or another public entity but by an individual, the then President of the country. As the *World Duty Free* tribunal held, the receipt of the bribe is “*not legally imputed to Kenya itself. If it were otherwise, the payment would not be a bribe*”.²⁹³
444. In the case of covert bribes the other side, innocent of the corruption, may have a justified interest in preserving the contract.
445. In public international law the rule for dealing with this type of situation is incorporated in Article 50 of the Vienna Convention on the Law of Treaties. The provision reads as follows:

*“Article 50
Corruption of a representative of a State*

If the expression of a State’s consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.”

446. In other words, a treaty may be avoided by invalidating the consent of the victim of corruption. This principle may be taken as a general principle not only of public international law but as a general principle of law and as such applicable to contracts

²⁹³ Ibid., paragraph 169.

concluded by States. The United Nations Convention against Corruption²⁹⁴ provides guidance in Article 34:

“With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address the consequences of corruption. In this context, State Parties may consider a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.”

447. The essential elements to be taken from this provision are first of all that rights of third parties acquired in good faith must be protected and second that the consequences of corruption may lead to the annulment or rescission of a contract, the withdrawal of such rights as a concession; but these consequences are not automatic. They must be considered as “a relevant factor in legal proceedings”.

448. The position taken in domestic law of various countries is quite similar. English law, for instance, resembles that expressed in Article 50 of the Vienna Convention:

*“... a contract procured by bribery is voidable at the instance of the party whose agent was bribed”.*²⁹⁵

449. The situation has been considered by Lord Mustill in the opinion which he presented in the *World Duty Free* case. Describing the position of English law he wrote:

“If, in the course of negotiating a contract between X and Y, an improper inducement is offered by B (acting on behalf of Y) to A (acting on behalf of X) which causes or contributes to the making of a contract; and if this fact is afterwards discovered, to what extent is X bound by the contract thus made?”

I answer this question, in terms of English law, as follows:

(a) X is entitled at his option to rescind the contract; and in any event to regard it as no longer binding for the future;

²⁹⁴ (2004) 43 I.L.M. 37.

²⁹⁵ Legal opinion of Lord Mustill quoted in *World Duty Free Award*, paragraph 117.

*(b) X is not however compelled to take this course. He may choose to waive this right to rescind the contract; keep the contract alive and enforce it according to its terms.”*²⁹⁶

450. Lord Mustill continued by referring to “*the considerable, and rather amorphous, body of case-law often informally grouped under the heading of illegality*” and then referred to “*a succinct statement of English law on the topic as it now stands*” in the words of Justice Millett. He described him as “one of the most authoritative Chancery Judges of recent times” and quoted him with the following words:

*“It is well established that a principal who discovers that his agent in a transaction has obtained or arranged to obtain a bribe or secret commission from the other party to the transaction is entitled, in addition to other remedies which may be open to him, to elect to rescind the transaction ab initio or, if it is too late to rescind, to bring it to an end for the future.”*²⁹⁷

451. This rule of English law expresses a fundamental principle of fairness: the innocent victim of an illegality must have the choice whether it accepts the otherwise legal transaction in the terms as concluded or wishes to avoid it. Obviously, the victim should not be sanctioned for the other party’s illegality by being deprived of the bargain struck which it might find to its advantage.

452. The Respondents have not argued that under the law of Bangladesh contracts concluded under the influence of bribery are invalid. They have not addressed this aspect of the law. As shall be discussed, the Respondents do not rely on the avoidance of the Agreements.

453. Before considering this aspect of avoidance, the question of causation must be addressed briefly.

454. The case of bribery which has been established in the present case did not procure the contracts on which the claims in this arbitration are based. The JVA had been concluded long before

²⁹⁶ Ibid., paragraph 164.

²⁹⁷ Ibid., quoting the decision in *LogiRose v. Southend United Football Club* [1988] 1 W.L.R. 1256, at 1260.

the acts of corruption. The Minister who received the benefit of the vehicle and of the invitation to the United States was forced to resign quickly thereafter in June 2005. The GPSA was concluded only some 18 months later, in December 2006.

455. Thus, there is no link of causation between the established acts of corruption and the conclusion of the agreements, and it is not alleged that there is such a link. Instead, the Respondents argue that an attempt to obtain a contract by bribery is sufficient to deny recourse to ICSID arbitration to the party having made such an attempt.²⁹⁸

456. More importantly, the Respondents have not sought to avoid the agreements nor did they state that the Agreements were void *ab initio*. In response to the Tribunal's questions prior to the hearing, they stated:

*"The Respondents do not intend to argue that the contract is void or voidable, by reason of corruption or otherwise. They would, of course, revisit this position if further disclosure made it appropriate to do so."*²⁹⁹

457. At the hearing the Respondents confirmed this position. They explained that the issue arising from the objections they raise *"is the clean hands issue. It is independent of the status of the contracts themselves"*.³⁰⁰

458. The position was again confirmed shortly thereafter:

*"We are not saying that anything is void or voidable, we are saying that in these circumstances it is a question of the integrity of the system as a whole in these circumstances."*³⁰¹

459. While the Respondents rely *inter alia* on the decision of the arbitration tribunal in the *World Duty Free* case, it deserves noting that the position just described is quite different from that taken by the Republic of Kenya in that case. Kenya avoided the contract in issue by a formal declaration and did so

²⁹⁸ R-CMJ.2 – Payment Claim, paragraph 54: *"The question in this case is whether ICSID jurisdiction should be denied to a claimant which attempts to procure an investment contract by bribery, or only to one which succeeds."*

²⁹⁹ The Respondents' letter of 29 August 2011, in response to the Tribunal's questions, question 2.3, item 4.

³⁰⁰ HT 1, p. 165.

³⁰¹ HT 1, p. 166.

“unequivocally and timeously”.³⁰² Throughout the proceedings in the present case the Respondents made no such declaration; to the contrary, as the statement at the hearing quoted above shows, the Respondents did not intend to treat the agreements as avoided.

460. Towards the end of the hearing new circumstances arose, which may have brought about a change in the Respondents’ position, as they had reserved to do in their response to the Tribunal quoted above. These new circumstances arose when Claimant’s counsel made reference to documents emanating from the ACC and containing the allegations made before this commission.³⁰³ As explained above, he delivered these documents to the Respondents’ counsel who decided, after having examined the documents, to introduce the documents in the arbitration.³⁰⁴ The Respondents’ counsel then argued:

*“MS MACDONALD: Yes, the key allegation is that the JVA was obtained by – well there are a number of allegations but for our purposes the relevant one is that the JVA was obtained by bribery on the part of, among others, Mr Qasim Sharif so we think this is quite fundamental and certainly, as far as we are concerned, fundamentally changes the complexion of the case and some of our arguments.”*³⁰⁵

461. In their closing argument, the Respondents referred to the newly produced documents, stating that:

*“... it would not be responsible for us to let pass if we are confronted with documents suggesting that the JVA was obtained by bribery. Responsibly we need to ask for an opportunity to deal with that if that becomes necessary in due course.”*³⁰⁶

462. However, neither at that occasion nor at any time thereafter did the Respondents declare the JVA, the GSPA or the arbitration clauses contained in them as avoided. To the knowledge of this Tribunal, the Respondents continue to enjoy the benefit of these agreements.

³⁰² World Duty Free Award, paragraph 183.

³⁰³ HT 2, p. 222.

³⁰⁴ HT 2, p. 226; the documents were produced as Hearing Documents R-2 and R-3; see HT 2, p. 229.

³⁰⁵ HT 2, p. 226.

³⁰⁶ HT 2, p. 302.

463. The Tribunal concludes that the Respondents do not rely on the proven nor on the alleged acts of corruption as grounds for avoiding the agreements and the arbitration clauses contained therein. Their defence is that, even though the agreements are still in force, the Claimant may not rely on their respective ICSID arbitration clauses.
464. Therefore, the Tribunal is of the view that, in the absence of a clear declaration by the Respondents and given that there is no illegality in the content of the Agreements or in their performance, it may not treat the Agreements as avoided or invalid. It will now consider the Respondents' argument that the Claimant nevertheless should be deprived of relying on the agreement to arbitrate in ICSID proceedings disputes arising from the Agreements.

9.7 Denial of jurisdiction despite an otherwise binding arbitration agreement

465. Since the agreements and with them the arbitration clauses have not been avoided, they remain in force and binding. The Respondents nevertheless argue that, because of the act of bribery linked to the investment and for which Niko Canada has been convicted, ICSID jurisdiction should be denied to the Claimant. If this position were accepted, Petrobangla and BAPLEX could invoke the arbitration clauses but Niko could not.
466. In support of their position the Respondents invoke several lines of argument: (i) the offer of ICSID arbitration applies only to investments made in good faith, (ii) accepting jurisdiction would jeopardise the integrity of the ICSID dispute settlement mechanism and (iii) the doctrine of clean hands.

9.7.1 Arbitration offer applicable only for good faith investment

467. The first line of arguments refers to a number of awards in ICSID arbitration proceedings.³⁰⁷ In one of these cases the Tribunal stated that:

³⁰⁷ R-CMJ.1, paragraphs 54 *et seq.*

“... States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investment not made in good faith.”³⁰⁸

468. Other cases which the Respondents cite relate not specifically to the dispute settlement mechanism but more generally to substantive rights granted to the investor under the treaty; awards in some of these cases state that the protection of the treaty does not apply to investments not made in good faith or in violation of the law of the host State.
469. The quoted observation, as similar other references to which the Respondents refer, relates to treaties in which a State makes a commitment to another State, offering to nationals of that other State to abide by certain rules, including the settlement of investment disputes by ICSID or other forms of arbitration. The offer is made to an unknown number of unidentified foreign investors. In the context of such treaties, the circumstances might justify the conclusion that the host State offers access to the dispute settlement regime provided by the treaty only subject to certain conditions.
470. However, in the present case jurisdiction is not based on such a treaty but on two agreements. The arbitration clause in these agreements is not merely an offer subject to conditions which may or may not be accepted. Rather it contains a firm agreement binding both parties to submit their disputes to ICSID arbitration.
471. The question whether the investment was made in good faith or not and, if not, what consequences would have to be drawn from it, are matters which must be resolved in the agreed manner. In a contractual dispute as the present one, alleged or established lack of good faith in the investment does not justify the denial of jurisdiction but must be considered as part of the merits of the dispute.
472. In this context the Respondents also make reference to the *World Duty Free* award,³⁰⁹ issued in a contract case. The reasons developed in that award are of no assistance to the Respondents, precisely because in that case, as explained

³⁰⁸ Phoenix Action Award, paragraph 106.

³⁰⁹ R-CMJ.2 – Payment Claim, paragraphs 38-39.

above, the Government of Kenya had avoided the agreement; the tribunal had accepted jurisdiction; and in the exercise of that mandate denied the claim on the merits.

9.7.2 Protecting the “integrity of the system”

473. In another line of argument, the Respondents submit that it “*would violate the principles of international public policy to afford the Claimant access to ICSID*”.³¹⁰ In this context the Respondents speak of the Tribunal’s power “*to protect the integrity of the ICSID dispute settlement mechanism*”.³¹¹
474. The Tribunal is mindful of the importance of the ICSID dispute settlement mechanism and its integrity. In the Tribunal’s view, such integrity is promoted, and not violated, by the adjudication of disputes submitted to the Centre under a valid consent to arbitrate. Faced with a binding arbitration agreement and subject to the specific requirements under the ICSID Convention, considered elsewhere in this decision, the Tribunal must address the substance of the dispute. In so doing, the integrity of the system is protected by the resolution of the contentions made (including allegations of violation of public policy) rather than by avoiding them.
475. In the present case ICSID arbitration is invoked not in pursuit of a claim for corruption nor for claims under an otherwise illegal contract. The Claimant seeks performance of agreements which, despite the Respondents’ knowledge about the sanctioned cases of bribery, have not been avoided and from which the Respondents continue to benefit. The Tribunal cannot see why hearing and resolving these claims under the given circumstances would affect the integrity of the ICSID system.

9.7.3 The “clean hands” doctrine

476. Finally, the Respondents state that the Claimant “*does not bring this claim with clean hands*”.³¹² In a footnote of its First

³¹⁰ R-CMJ.2 – Payment Claim, paragraph 54.

³¹¹ R-CMJ.1, paragraph 54; R-CMJ.2 – Payment Claim, paragraph 53.

³¹² R-CMJ.2 – Payment Claim, paragraph 53.

Counter-Memorial it had explained that the “*clean hands’ principle is well recognised in common law*” and referred to a decision of the High Court of Australia.³¹³ The Respondents also quote from the Individual Opinion which Judge Manley Hudson delivered in the case before the Permanent Court of International Justice (PCIJ) and concerning the *Diversion of Water from the Meuse*.³¹⁴ That opinion relies on a legal principle described by various expressions including the maxim “*He who seeks equity must do equity*”; it is often referred to as a particularly important manifestation of the “clean hands” principle.³¹⁵

477. The principle of clean hands is known as part of equity in common law countries. The question whether the principle forms part of international law remains controversial and its precise content is ill defined. The situation has been analysed in great detail in a recent award in the case of *Guyana v. Suriname* by an Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). That UNCLOS Tribunal³¹⁶ found:

“No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries of the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms. The ICJ has on numerous occasions declined to consider the application of the doctrine, and has never relied on it to bar admissibility of a claim or recovery. However, some support for the doctrine can be found in dissenting opinions in certain ICJ cases, as well as in opinions in cases of the Permanent Court of International Justice (‘PCIJ’). [...] These cases indicate that the use of the clean hands doctrine has been

³¹³ R-CMJ.1, fn. 44.

³¹⁴ (*Netherlands v. Belgium*) (1937) PCIJ, Series A/B, No. 70, p. 73 *et seq.*

³¹⁵ See e.g. Moloo, “A Comment on the Clean Hands Doctrine in International Law”, *Transnational Dispute Management*, vol. 8, Issue 1 (February 2011), p. 2; Dumberry and Dumas-Aubin, “The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights”, *Transnational Dispute Management*, vol. 10, Issue 1 (January 2013), p. 2.

³¹⁶ *Guyana v. Suriname*, PCA, Award of 17 September 2007 (under UNCLOS Ch VII). The Tribunal was composed of Judge Dolliver M. Nelson, Professor Thomas Franck, Dr Kamal Hossain, Professor Ivan Shearer and Professor Hans Smit.

*sparse, and its application in the instances in which it has been invoked has been inconsistent.*³¹⁷

478. While the ILC Special Rapporteur Crawford concluded (quoting Rousseau³¹⁸) that “it is not possible to consider the ‘clean hands’ theory as an institution of general customary law”,³¹⁹ others are of the view that, primarily because of its recognition in the domestic orders of many States, it must be qualified as a general principle of law.³²⁰

479. Concerning the substantive content of the principle in international law, it has been summarised by Fitzmaurice:

*“He who comes to equity for relief must come with ‘clean hands’. Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short were provoked by it.”*³²¹

480. As shown by this quotation, the application of the principle requires some form of reciprocity, so much so that, in his Individual Opinion in the *Diversion of Water from the Meuse* case, Hudson assimilated it to the Roman law principle of the *exceptio non adimpleti contractus*.³²² In that case, the claimant State sought to prevent the defendant State from making use of waters from the Meuse which it considered contrary to a treaty; but the claimant State itself was making use of the waters in a similar manner. Similarly, the case of unclean hands to which Judge Schwebel referred in his dissenting opinion in the *Military and Paramilitary Activities* case concerned acts of aggression

³¹⁷ Ibid., paragraph 418 (references omitted).

³¹⁸ Rousseau, *Droit international public*, tome V: les rapports conflictuels, (1983), p. 170.

³¹⁹ Crawford, Second Report on State Responsibility, Yearbook of the International Law Commission, vol II (part 2) (1999), p. 83.

³²⁰ Dumberry and Dumas-Aubin, op. cit., p. 3, referring to Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine”, Essays in honour of Ulf Franke, 2010, p. 317, and to the opinions of Judges Schwebel and Anzilotti in cases of the ICJ and the PCIJ, respectively.

³²¹ Fitzmaurice, “The General Principles of International Law”, 92 *Recueil des Cours* (1957) 119 (citations omitted).

³²² (*Netherlands v. Belgium*) (1937) PCIJ, Series A/B, No. 70, Individual Opinion by Mr Hudson, p. 77.

which he saw on the side of the claimant State in relation to those of the defendant State.³²³

481. When considering the defendant State's admissibility argument based on clean hands, the UNCLOS Arbitral Tribunal, dealing with this doctrine "*to the extent that such a doctrine may exist in international law*", referred to three criteria which it had extracted from those cases in which reference to the doctrine had been made, in particular the developments in the opinion of Judge Hudson: (i) the breach must concern a continuing violation, (ii) the remedy sought must be "*protection against continuance of that violation in the future*", not damages for past violations and (iii) there must be a relationship of reciprocity between the obligations considered.³²⁴
482. In a wider sense, it has been argued that the clean hands doctrine, without express mention of the term, has found application in a number of other cases where claims were dismissed for lack of jurisdiction or as inadmissible because they were obtained fraudulently or were not in accordance with the law of the host State.³²⁵
483. Applying these considerations to the present case and the Respondents' objection based on the clean hands doctrine, it is obvious that this objection does not meet the criteria which Judge Hudson and the UNCLOS Arbitral Tribunal identified for the application of the doctrine in international law. Here the violation on which the Respondents rely is not continuing, but consisted in two acts that have been completed long ago; the remedy which the Claimant seeks does not concern protection against this past violation; and there is no relation of reciprocity between the relief which the Claimant now seeks in this arbitration and the acts in the past which the Respondents characterise as involving unclean hands.
484. More generally, when the events sanctioned by the Canadian judgment occurred, the JVA had already been concluded. The events were widely publicised in Bangladesh and, shortly after

³²³ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel, ICJ Reports 1986, p.25.

³²⁴ *Guyana v. Suriname*, Award of 17 September 2007, paragraphs 420-421.

³²⁵ For details see Moloo, *op.cit.*, p. 6 *et seq.* and Dumberry and Dumas-Aubin, *op. cit.*, p. 3 *et seq.*

they had become public the Minister concerned resigned. Petrobangla and BAPEX, with the approval of the Bangladesh Government, nevertheless entered into the GPSA. If and to the extent the Claimant or its parent company had unclean hands, the Respondents disregarded this situation. They may not now rely on these events to deny jurisdiction under an arbitration agreement which they then accepted. The additional details of which the Respondents may have learned subsequently through the account in Canadian judgment do not aggravate the offence in any substantial manner compared to what was publicly known in Bangladesh when the GPSA was concluded.

485. In these circumstances, the Tribunal may not rely on the events subject of the Canadian judgment as grounds for refusing to examine the merits of a dispute which the parties to the agreements have accepted to submit to ICSID arbitration. The Respondents' objection based on acts of corruption must be dismissed.

10. JURISDICTION WITH RESPECT TO CLAIMS UNDER THE JVA (THE COMPENSATION DECLARATION AND THE COOPERATION CLAIM)

10.1 The position of the Parties

486. The claims brought under the JVA concern primarily what the Claimant calls the “*Compensation Claims*” pending in a court of Bangladesh. The Claimant describes these claims as relating to the proceedings commenced in June 2008 in the Court of District Judge, Dhaka, No 224 of 2008 (the Money Suit) in which Petrobangla and Bangladesh claim from Niko and others “*damages alleged to arise from the blowouts of 2 wells in the Chattak field which were being drilled under the JVA*”.³²⁶
487. In the Notices of Arbitration with respect to the Compensation Claims which the Claimant served on the three Respondents on 8 January 2010, the Claimant sought that the following disputes be arbitrated:

“(a) All claims held jointly or severally by any of Bapex, Petrobangla and Bangladesh to damages or losses alleged to arise from the blowouts of two wells which were then being drilled under the JVA in the gas fields in Bangladesh known as the Chattak gas field, including those arising from the matters alleged in either the Legal Notice dated May 27, 2008 issued on behalf of Petrobangla to Niko and/or in the pleadings filed on behalf of Petrobangla in the suit filed June, 2008 by Petrobangla and the Government of Bangladesh against Niko and others in the court of District Judge, Dhaka Bangladesh, no. 224 of 2008;

*(b) Whether Niko is liable for any of the Compensation Claims in whole or in part, and if it is liable, determination of the amount of liability;”*³²⁷

³²⁶ RfA I, paragraph 6.8.

³²⁷ RfA I, Attachment C I.

488. In RfA I the Claimant referred to this notice and repeated the description of the dispute which it sought to arbitrate.³²⁸

489. The Preliminary Procedural Consultation clarified that the Claimant sought essentially a declaration of non-liability which then was described in this arbitration as the “Compensation Declaration”. The relief requested by the Claimant was defined as consisting essentially in:

*“... a declaration that [the Claimant] has no liability for any damage that may have arisen from the two well blowouts which occurred on the Chattak wells and that it owes no compensation for such damage”.*³²⁹

490. In addition to the Compensation Declaration, the Claimant seeks under the JVA a declaration concerning the obligation to cooperate, which according to the Claimant, BAPEX owes under the JVA, now referred to as the **Cooperation Claim**. The Claimant expressed this Cooperation Claim in the form of the following question:

*“... whether Bapex is obliged under the JVA to cooperate and agree with Niko to (i) commence arbitration proceedings with Petrobangla under the [GPSA] and (ii) terminate the GPSA and shut in all production from the Feni gas field until such time as Petrobangla pays all amounts invoiced for gas delivered to Petrobangla under the GPSA and a new GPSA is made.”*³³⁰

491. The Respondents raise, in addition to the jurisdictional objections concerning the two cases in general, the following further objections to the jurisdiction of this Tribunal specifically with respect to the request for the Compensation Declaration:

- (i) The dispute relating to the well blowouts falls outside the scope of the JVA.
- (ii) Petrobangla is not a party to the JVA.

³²⁸ RfA I, paragraph 6.65.

³²⁹ Procedural Order No. 1, opening paragraph 2.

³³⁰ RfA I, paragraph 6.65 (c).

(iii) Bangladesh is under no obligation under the JVA to force BAPEX to cooperate with the Claimant in pursuing claims under the GPSA.

(iv) Deciding on claims concerning the well blowout claims “*would involve determining the legal interests of third parties (Petrobangla, Bangladesh and/or potential private parties affected by the blowout) who are not before the Tribunal*”.³³¹

492. The Claimant responds that “*Niko merely seeks to settle through arbitration the claims arising from the blow outs that have been advanced against it by parties to the JVA (that is, Bangladesh and Petrobangla, the only plaintiffs in the Money Suit)*”.³³²

493. The Tribunal will consider separately each of the specific objections and the Claimant’s defence against them.

10.2 Jurisdiction *ratione materiae*

494. The Respondents refer to the passage in the arbitration clause which describes the type of dispute to which it applies: “*any dispute arising in connection with the performance or interpretation of any provision of this JVA ...*”. They argue that the arbitration clause applies only “*if the rights invoked derived from a contractual commitment owed by one party to the other under the JVA*”.³³³ They explain that the liability of Niko, in particular with respect to the claims made in the Money Suit, arises essentially not out of the JVA but from “*tort and statute law*”, “*criminal or statutory liability*”³³⁴ and concerns “*loss and damage caused by negligence, lack of skill and proper supervision*”;³³⁵ as well as “*environmental damage, loss of gas and negligence relating to the two blowouts*”.³³⁶ In the Respondents’ position, claims on such bases are not of a contractual nature and are outside the subject matter jurisdiction of this Tribunal.

³³¹ R-CMJ.2 – Compensation Declaration, paragraph 4.

³³² C-MJ.3, paragraph 32.

³³³ R-CMJ.2 – Compensation Declaration, paragraph 17.

³³⁴ R-CMJ.2 – Compensation Declaration, paragraph 16.

³³⁵ R-CMJ.2 – Compensation Declaration, paragraph 13.

³³⁶ R-CMJ.2 – Compensation Declaration, paragraph 14.

495. The Claimant relies on the same words in the arbitration clause in the JVA which covers “*any dispute arising in connection with the performance or interpretation of any provision of this Agreement ...*”. It argues that the arbitration clause must be construed broadly and that the “*JVA extensively addresses the Operator’s standard of care and duties*” and other matters concerning the conduct of Petroleum Operations.³³⁷
496. The Tribunal notes that the JVA regulates important matters which relate to Niko’s obligations as Operator. In particular, Article 26 concerns the “Rights and Obligations of Operator”, Article 27 “Health, Safety & Environment (HSE)”; other aspects are regulated in Articles 6 (Business of Operator) and 20 (Indemnities) and in the annexes to the JVA, including the Procedure for Development of Marginal/Abandoned Gas Fields.
497. There can be no doubt that the Tribunal has jurisdiction to determine whether Niko has any liability for the two blowouts under the JVA and to make the requested declaration if it deemed it to be well founded.
498. However, the declaration which the Claimant seeks is broader. By referring to “*any liability*” the Claimant seems to extend the declaration beyond the liability under the JVA to other grounds for liability, such as those mentioned by the Respondents.
499. While the basis for arbitral jurisdiction is contractual, the subject matter jurisdiction of arbitral tribunals need not be limited to contractual claims. Other grounds of liability may be included, depending on the scope of the arbitration agreement and limits on arbitrability.
500. Arbitrability normally is governed by the law applicable to the arbitration or the arbitration clause. In ICSID arbitration the relevant law is the ICSID Convention and public international law. The principal restriction on arbitrability in ICSID arbitration has been discussed already: only disputes “*arising directly out of an investment*” are arbitrable under the ICSID Convention. The Tribunal found that this requirement has been met for both agreements. No other objection to arbitrability has been raised.

³³⁷ C-MJ.3, paragraphs 7 *et seq.*, 16.

501. Concerning the scope of the arbitration clause in the JVA, the definition of the scope refers to the origin of the dispute: “*arising in connection with the performance or interpretation ...*”. It does not contain any limit as to the legal basis on which claims are made. What is required is that the dispute be in connection with the performance of the JVA.
502. The performance of the JVA, as has just been mentioned, touches on a variety of substantive matters which are regulated not in the agreement itself but by laws, regulations and practices concerning Petroleum Operations. This appears from a number of provisions in the JVA and is set out in a general provision in Article 26.2.4 which prescribes that Niko as the Operator shall:
- “conduct all Petroleum Operations in a diligent, conscientious and workmanlike manner, in accordance with the applicable law, this JVA and generally accepted standards of international Petroleum industry designed to achieve efficient and safe development and production of Petroleum and to maximize the ultimate economic recovery of Petroleum from the JVA Area.”*
503. One may argue that compliance with these laws and standards has a contractual basis in the JVA. To this extent, a dispute concerning compliance with these laws and standards may be considered of a contractual nature in a wider sense. However, the laws to which reference is made in Article 26.2.4 and other applicable laws and regulations apply not just because they are included in the Operator’s obligations under the JVA; but they have a direct application. This application also may have to be considered as connected to the performance of the JVA.
504. When the Respondents argue the contrary and assert that the arbitration clause is limited to contractual disputes they do not use the term contractual disputes in the wider sense just mentioned. Rather they state that the rights invoked must derive “*from a contractual commitment*” and not from “*different normative sources*”.³³⁸ However, they do not explain on what basis they seek to justify their position. In particular they do

³³⁸ R-CMJ.2 – Compensation Declaration, paragraph 27.

not give any reason why claims “*in connection with the performance*” of the JVA must by necessity be contractual claims in the narrow sense in which the Respondents use the term.

505. In view of this wide scope of Niko’s obligations under the JVA and the difference in the origin of these obligations, extending beyond specific prescriptions in the agreement itself, the Tribunal understands disputes “*in connection with the performance*” of the JVA in a wider sense, which may include sources of liability other than the agreement itself. The question what these sources are and which obligations, contractual or other, fall to be considered concerns the substance of the dispute and is not determined at this stage of the arbitration.
506. The Tribunal concludes that it may well be possible that it can make findings concerning liability on grounds other than the JVA. A more precise determination depends on an analysis of the claim made. This will be undertaken when the Tribunal considers the merits of the dispute.

10.3 Jurisdiction *ratione personae*

507. The Claimant argues that not only BAPEX but also Petrobangla and Bangladesh are party to the JVA and that, for this reason, the Tribunal has jurisdiction with respect to JVA claims also against Petrobangla and Bangladesh.³³⁹
508. The Respondents contest that Petrobangla and Bangladesh are party to this agreement. Claims based on the JVA therefore cannot be brought against these two Respondents.³⁴⁰
509. Petrobangla and Bangladesh are not named as party to the JVA and have not signed this agreement. The Tribunal has explained above the reasons why it does not accept jurisdiction over Bangladesh. The remaining question is whether it has jurisdiction over Petrobangla in respect of claims under the JVA.

³³⁹ C-MJ.3, pp. 9-11.

³⁴⁰ R-CMJ.2 – Compensation Declaration, pp. 10-12.

510. The arguments of the Claimant in support of its position that Petrobangla is a party to the JVA and that jurisdiction with respect to JVA claims should extend to it are largely similar if not identical to those concerning jurisdiction over Bangladesh.
511. The Claimant argues that “BAPEX acted on behalf of both the other Respondents in making the JVA. All the other Respondents are parties to the agreement”. It adds that “the Respondents, each of whom had a role in the making of the JVA by approving it, did not appear to give any weight to their supposed separate identities when approving the JVA commitments to the foreign investor about tax concession, priority on Petrobangla’s delivery system, and the price and sales specifications of the gas. The necessary and proper implication from the facts is that the parties necessary to give effect to these promises, which include Petrobangla, intended to be bound to the JVA”.³⁴¹
512. The Tribunal has decided that, in the circumstances of this case, the distinct legal personality of BAPEX and Petrobangla and their status of agencies of the Government, designated as such to ICSID, must be respected. The JVA itself clearly distinguishes between the three entities, specifying that BAPEX is a “wholly owned Company” of Petrobangla which in turn is “wholly owned and established” by the Government. The Preamble states that “BAPEX warrants that it has acquired from Petrobangla and the Government the requisite approvals to execute this JVA”.
513. The Claimant argues that the Respondents “have not adequately explained the source of Bapex’s rights to grant Niko rights to conduct broadly defined Petroleum Operations over the gas fields owned by Bangladesh, and purportedly subject to various authority of Petrobangla”.³⁴² It adds that the Respondents did not adequately explain how BAPEX could grant such rights to Niko. It concludes that “the common sense explanation is that Bapex acted on behalf of both the other Respondents in making the JVA”.
514. The question whether BAPEX did indeed have the rights on which some of the provisions of the JVA depend is not a matter

³⁴¹ C-MJ.3, p. 11.

³⁴² C-MJ.3, paragraph 23.

of jurisdiction. If the matter became controversial (which at present does not seem to be the case), it would have to be addressed in the next phase of this arbitration.

515. The Tribunal concludes that it has not seen any argument to justify treating Petrobangla with respect to the JVA any different than it treated Bangladesh with respect to both agreements. Petrobangla is not party to the JVA and therefore the Tribunal has no jurisdiction over Petrobangla with respect to claims based on the JVA.

10.4 Impact on legal interests of third parties

516. The Respondents refer to the Compensation Claim brought by Petrobangla and the Ministry of Energy against the Claimant in a court in Bangladesh. They argue that *“a finding in the Claimant’s favour concerning responsibility over the blowouts would inevitably impact on the rights of Petrobangla, the Ministry of Energy and the citizens of Bangladesh, over all of whom this Tribunal lacks jurisdiction under the JVA”*.³⁴³ They add that the *“relief sought by the Claimant will undoubtedly affect the legal rights of Petrobangla, Bangladesh, and private third parties and is, therefore, not within the jurisdiction of this Tribunal.”*³⁴⁴
517. The Claimant contest this argument with respect to Petrobangla and Bangladesh since, in its view, these two Respondents are not *“third parties”* to the JVA. The Claimant also denies that any *“private third parties”* are affected.
518. The Tribunal is aware that Petrobangla and Bangladesh, represented by the Secretary, Ministry of Energy & Mineral Resources, are claiming in a court of Bangladesh damages from Niko arising from the blowouts.³⁴⁵ It may well be that, although, as a result of the Tribunal’s findings in section 10.3 above, there is no identity of parties between these disputes, this is nevertheless an overlap in subject-matter between these claims. Whether and to what extent any findings in one tribunal are relevant to the proceedings in the other is a matter that may have to be considered at the merits stage.

³⁴³ R-CMJ.2 – Compensation Declaration, paragraph 28.

³⁴⁴ R-CMJ.2 – Compensation Declaration, paragraph 32.

³⁴⁵ The claims have been presented in the Money Suit, produced as RfA I, Attachment F.

519. The Respondents nevertheless go further and argue that such an impact would be contrary to the principle in international law according to which “*an international tribunal should refuse to exercise its jurisdiction over a dispute between the parties before it if the subject matter of the decision would determine the legal interests of non-parties to the dispute*”.³⁴⁶
520. The Respondents find support for this principle in the Judgment of the International Court of Justice in the *Monetary Gold*³⁴⁷ case and a PCA Award.³⁴⁸ Yet the principle applied in the *Monetary Gold* case, in the words of the ICJ, did not relate to the determination of “*legal interests of non-parties*”, but was a case where the Court would have had to “adjudicate upon the international responsibility” of a State which had not consented to such adjudication.
521. In the present case the Tribunal is not called upon to adjudicate upon the responsibility of Petrobangla and Bangladesh. Its task is rather to determine the rights and duties of Niko and BAPEX in connection with the performance of the JVA. However, in the course of such a determination, it may have to consider issues in matters which Petrobangla and Bangladesh have assigned to BAPEX.
522. As the Claimant points out, the Bangladesh and Petrobangla have assigned to BAPEX rights and obligations which otherwise are theirs. This can be seen in the terms of some provisions of the JVA which was concluded with the express approval of the Government of Bangladesh. The assignment has been recorded in very clear terms in paragraph 14 of the JVA Preamble. There BAPEX warrants that it has the necessary approvals and then continues:

“The responsibilities and obligations of Petrobangla and the Government in all relevant Articles, Annexes and Amendments under this JVA has been assign [sic] to BAPEX.”

³⁴⁶ R-CMJ.2 – Compensation Declaration, paragraph 29.

³⁴⁷ *Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, ICJ Reports 1954.

³⁴⁸ *Lance Paul Larsen v. The Hawaiian Kingdom*, PCA, Award of 5 February 2001.

523. Given this assignment, the Tribunal, when addressing the merits of the claim for a Compensation Declaration, may well have to deal with responsibilities and obligations which otherwise are those of the Government and Petrobangla and which have been assigned to BAPEX in the context of the JVA. Whether such decisions have to be made, again, is a matter of the merits. Even if such decisions do have to be made, that would not make this a case in which the Tribunal assumes jurisdiction to adjudicate upon the responsibility of third parties. Rather, its task would be to determine responsibilities and obligations assigned to BAPEX, a party to the JVA and as such subject to the Tribunal's jurisdiction.
524. As far as the people of Bangladesh or private third parties are concerned the Tribunal does not have jurisdiction, and therefore has no intention to adjudicate any claims they may have.

10.5 BAPEX cooperation with respect to the GPSA claims (the Cooperation Claim)

525. The Cooperation Claim, as defined above, concerns an obligation of BAPEX to cooperate with the Claimant in commencing arbitration against Petrobangla under the GPSA and in terminating that agreement. The Claimant bases this claim on the JVA.
526. The Respondents deny that the Government has an obligation "*to force Bapex to cooperate*".³⁴⁹ The question whether the Government has such an obligation is not relevant here since the Tribunal has no jurisdiction to adjudicate with respect to it.
527. The Respondents also deny that BAPEX has a duty to cooperate in collecting amounts due under the JVA or in terminating the JVA in the event of non-payment. They argue that the Claimant has not provided a sufficient basis for such a claim. But they do not deny that the Tribunal has jurisdiction to determine it.
528. The question whether BAPEX, a party to the JVA, owes a duty under the JVA to cooperate in the sense described, to Niko, another party to the JVA, clearly concerns a dispute "*arising in*

³⁴⁹ R-CMJ.2 – Compensation Declaration, paragraph 25.

connection with the performance or interpretation of any provision of this JVA". This Tribunal has jurisdiction over the Cooperation Claim.

11. JURISDICTION WITH RESPECT TO CLAIM UNDER THE GPSA (THE PAYMENT CLAIM)

11.1 The Position of the Parties

529. In ARB/10/18, the Claimant seeks “to resolve all claims to payment under the GPSA and to recover payment of amounts due for gas delivered”.³⁵⁰ It argues that under the GPSA Petrobangla owes to Niko and BAPEX US\$27.16 million and US\$8.55 million, respectively.³⁵¹ It presents two versions of the claim: in one version Niko seeks to “recover the amounts owing to Niko” and the other version, pursued alternatively, the Claimant seeks “payment for both Niko and Bapex”.³⁵² The Claimant adds that “[b]ecause Bapex refused to cooperate in the arbitration, Niko joined Bapex as a Respondent to this arbitration”.³⁵³
530. The Respondents object that the Claimant’s payment claim “by itself or on behalf of BAPEX should be rejected and this Tribunal should not assume jurisdiction over it”.³⁵⁴ They argue that the Claimant cannot act alone as “the sole voice and representative of the partnership (Niko-BAPEX)”. Relying on the award in the *Impregilo* arbitration, the Respondents argue that “one member of a partnership or joint venture, may not claim for the entire loss suffered by the corporate entity or group”. The Respondents further argue that an award for payment under the GPSA would also benefit BAPEX, and that by making such an award, the “Tribunal would effectively be giving investment protection to a national of Bangladesh”.³⁵⁵
531. The Claimant responds that “Niko’s request to arbitrate included determination of the net amount owed to Niko, or alternatively, the Seller under the GPSA”. BAPEX would not necessarily be “co-beneficiary” of a monetary award, since Niko’s and BAPEX’ shares would be calculated and paid separately under the GPSA. It added: “While Bapex might incidentally benefit from such an award, the determinative factor favouring jurisdiction is

³⁵⁰ RfA II, paragraph 6.10.

³⁵¹ RfA II, paragraph 6.20.

³⁵² C-MJ.2, paragraph 29.

³⁵³ RfA II, paragraph 6.26.

³⁵⁴ R-CMJ.1, paragraph 101.

³⁵⁵ R-CMJ.1, paragraphs 97-100.

that the remedy was sought by and will be awarded to the foreign investor."³⁵⁶

532. The issues to be considered here concern (i) the question whether Petrobangla agreed to arbitrate with the two Joint Venture Partners or with the Joint Venture as such and (ii) if it is the Joint Venture Partners, whether they have to act jointly rather than each partner being able to act individually.

11.2 Has Petrobangla agreed to arbitrate with Niko?

533. At this stage of the proceedings, the Tribunal need not decide whether the claim should be rejected in one or both of its versions but whether it has jurisdiction to make a decision on granting or rejecting the claim.
534. For this decision on jurisdiction the Tribunal must take as the starting point the fact that, in Article 13 of the GPSA, Petrobangla agreed to ICSID arbitration of "*any dispute arising in connection with the performance or interpretation of any provision of this Agreement*". The Claimant pursues claims for determining the amounts owed under the GPSA and claims "*to recover payment of amounts due for gas delivered*".³⁵⁷ Such claims clearly are connected to the performance of the GPSA. Subject matter jurisdiction for the claims cannot be at issue and has not been questioned by the Respondents.
535. As explained above, the requirements specific to the ICSID Convention have been met. The remaining question is with whom Petrobangla agreed to arbitrate.
536. The title page of the GPSA identifies as the parties Petrobangla, as the "Buyer", and the "Joint Venture Partners Bangladesh Petroleum Exploration & Production Company Limited (BAPEX) and Niko Resources (Bangladesh) Ltd.", as the "Seller". It deserves to be noted that here it is not the Joint Venture as such which is identified as the Seller but the "Joint Venture Partners". This expression is repeated on the opening page on which the parties are presented in greater detail. There the

³⁵⁶ C-MJ.2, paragraphs 40, 41 and 44.

³⁵⁷ RfA II, paragraph 6.10.

presentation of the Seller commences again by the expression “Joint Venture Partners”, Niko and BAPEX, and concludes by stating “BAPEX-NIKO jointly hereinafter referred to as the ‘Seller’, of THE OTHER PART”.

537. On the signature page, BAPEX and Niko signed each for itself with no reference to a joint venture or even the Seller.
538. The Tribunal concludes that in the GPSA the expression “Seller” does not identify a distinct entity, but is used to refer collectively to two of the parties to the Agreement.
539. This conclusion is not affected by the definition of the “Seller” in Article 1.13. This definition refers to the “BAPEX-NIKO Joint Venture”; but continues by stating “*as described in the Preamble of this Agreement*”. In other words, the Seller is understood as the two “Joint Venture Partners” identified in the preamble, BAPEX and Niko.
540. The Respondents state that the “*Seller has no legal personality under Bangladesh law and is not a juridical person under Article 25 of the ICSID Convention*”.³⁵⁸ The Tribunal agrees. However, the observation does not contradict the conclusion reached by the Tribunal; to the contrary, it confirms that the arbitration clause applies to the two Partners individually and not to an entity distinct from them.
541. Since the GPSA and with it the arbitration clause apply to the two Partners individually, the Tribunal accepts that Petrobangla has agreed to arbitrate with Niko GPSA disputes as defined in Article 13 of that agreement.
542. The remaining question is whether the Tribunal’s jurisdiction is limited to cases in which Niko acts jointly with BAPEX.

11.3 Is Niko precluded as a matter of principle to claim for both Joint Venture Partners?

543. The Respondents object to the claim made by Niko “*on behalf of itself and BAPEX as the Seller*”. They refer to the decision on

³⁵⁸ R-CMJ.1, paragraph 98.

jurisdiction of 22 April 2005 by an ICSID tribunal³⁵⁹ in the case of *Impregilo S.p.A. v. Islamic Republic of Pakistan*.³⁶⁰ In particular, they rely on a principle stated in that decision in the following terms:

*“Indeed, there is an established principle of international law that a shareholder of a company, or one member of a partnership or joint venture, may not claim for the entire loss suffered by the corporate entity or group.”*³⁶¹

544. The Tribunal has considered this statement in the context of the case in which it was made. In that case *Impregilo* had acted as the Leader of a Joint Venture formed under Swiss law (GBC) and, in this function as the Leader, concluded two contracts with a Pakistani authority. It brought the action against Pakistan under the BIT between Pakistan and Italy, stating that it was acting on its own behalf and on behalf of the Joint Venture and the other joint venture members, which were nationals of Germany and of Pakistan.³⁶²
545. The arbitral tribunal in the *Impregilo* case concluded that it had “no jurisdiction in respect of claims on behalf of, or losses incurred by, either GBC itself, or any of *Impregilo*’s joint venture partners”. It found that its conclusion was “in line with a number of decisions of ICSID tribunals, as well as other international courts and arbitral tribunals”. It continued by the passage just quoted.
546. The question whether a joint venture partner is entitled to claim for the entire loss suffered by the joint venture is essentially a matter concerning the substance of the dispute. It does, however, have implications with respect to subject matter jurisdiction. The Tribunal is of the view that the question whether the claim to payment for the gas is a claim to which the Joint Venture Partners are entitled individually or jointly should be considered in the proceedings on the merits. It does, however, believe that it should not proceed with the merits on

³⁵⁹ Composed of Judge Guillaume, B. Cremades and Landau.

³⁶⁰ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (Guillaume, Cremades and Landau), Decision on Jurisdiction, 22 April 2005, produced as Claimant’s Exhibits, Authorities, vol. C, No. 3.

³⁶¹ *Ibid.*, paragraph 154.

³⁶² A fifth member of the Joint Venture, a French company had withdrawn from the Joint Venture before the arbitration commenced.

that claim if it is apparent from the case made in this phase of the proceedings that a claim by Niko alone cannot succeed.

547. When considering the quoted passage from the *Impregilo* award, it must be borne in mind that the tribunal there considered claims under the Pakistan/Italy BIT. The tribunal found that treaty did not extend to claims by nationals other than those of Italy: under that treaty Pakistan had not accepted to arbitrate claims by German or Swiss entities, nor any claims of Pakistani entities.
548. In the present case the arbitration is based not on a treaty but on a contract subject to the law of Bangladesh. The jurisdictional requirements under the ICSID Convention are governed by public international law, which does not, however, necessarily apply to the question of entitlement to contractual claims and to their pursuit in an arbitration. The Tribunal therefore must turn to the GPSA, as the contract which governs the relations between the Buyer and the Seller, and the JVA, which regulates the relations between the Joint Venture Partners referred to as the Seller.

11.4 The position under the agreements

549. Neither the JVA nor the GPSA deal expressly with the question of how the Joint Venture Partners must act with respect to the rights of “the Seller”. They do not provide expressly that one of the Joint Venture Partners may act for both Partners, nor do they contain a provision that requires joint action or joint liability.
550. The JVA identifies Niko as the “Operator” and states in its preamble that “*BAPEX and OPERATOR mutually agree to enter into this JVA with respect to the JVA Area and form a joint venture on the basis of and to implement this JVA for petroleum operations*”. Article 2 of the JVA is entitled “JVA Scope” and defines the object of the Joint Venture:

“This is a Joint Venture Agreement, the object of which is the Development and Production of Petroleum from the Marginal/Abandoned gas fields Chattak and Feni as specified in Article 3 at OPERATOR’s sole risk and expense.”

All actions taken and operations conducted shall be in consideration to the requirement and applicability of such operation for a Marginal/Abandoned field.”

551. The JVA does not provide that the Joint Venture has separate personality, nor does it contain any provision indicating that an entity distinct from that of the Parties is being formed. Nor does it contain any provision on the manner in which the joint venture must act or be represented.
552. The JVA does, however, provide in Article 6.1 for a Joint Management Committee (JMC) composed of six members, three from each party. Article 6.1 provides that JMC has to take its decisions unanimously and contains a procedure for “*the event of not reaching a unanimous decision*”. It also defines the matters with respect to which the parties shall meet and “*take appropriate decisions*”. In addition to the matters listed there, the JVA also contains a large number of other provisions which allocate tasks and responsibilities to one or the other of the parties. Some obligations are assigned to BAPEX, in particular that of assistance and cooperation with respect to matters in Bangladesh and “*relevant Government Ministries, Departments and Agencies*”. The bulk of the obligations, however, are assigned to Niko as the Operator.
553. The Tribunal sees in these provisions a confirmation of the conclusion which it reached when examining the GPSA and the meaning of the term “Seller” in that agreement: the Joint Venture is not an entity separate from the contracting parties with distinct legal personality; rather it is a contract for the cooperation of the two parties.
554. With respect for this cooperation, the JVA does, however, provide for some joint activities. In particular, Article 6.2.2 provides:

“A Joint Bank Account is to be opened in Bangladesh and operated jointly by the representatives of the Operator & BAPEX for receiving sales proceeds and making distribution to the Parties according to their respective Share as per Article 23.3 of the JVA.”

555. Article 24.3 of the JVA provides for the sale of the gas produced as the result of the action of the Joint Venture Partners and in particular of the Operator. Article 24.3 does so at two levels. The first level follows from the principle according to which *“OPERATOR and BAPEX (hereinafter referred to as SELLER) agree to sell the produced Petroleum to the Bangladesh domestic market under this JVA”*. This principle is adopted as a joint decision. The Buyer for the gas at this stage is identified as Petrobangla or a designee. If Petrobangla does not provide a “market outlet” within six months, Article 24.3 provides that *“OPERATOR shall be free to find a market outlet within the Country ...”*. In other words, the decision on the principle is taken jointly; subsequent action may be taken individually by the Operator.
556. Similarly, the agreement that the gas produced must be sold in Bangladesh is adopted as a joint decision. However, there is no provision that regulates the action concerning the implementation of this decision of principle, except that the search for other market outlets is left to Niko as the Operator.
557. Apart from the subject matters which require decisions by the JMC, the JVA allocates a wide range of tasks and obligations to Niko as the Operator. Some of these are set out in Article 25, entitled “Rights and Obligations of Operator”. Further tasks and obligations are set out in other parts of the JVA. For instance the Operator prepares the Work Programme (Article 6.2), procures equipment, material and services (Article 6.2.1.2), prepares the tax returns (Article 11.5), maintains the books and accounts concerning the operations under the JV (Article 12.1 and 14.1).
558. Article 26.1.4 is a general clause. It provides that *“for the efficient conduct of Petroleum Operation” the Operator shall have the right ...:*
- “To undertake all Petroleum Operations pertaining to the JVA and the Petroleum produced there from”.*
559. According to Article 1.47

“Petroleum Operations’ means all operations of Development and Production and all other operations pertaining to Petroleum as provided for in this JVA.”

560. In view of this definition of Petroleum Operations, and in particular the reference to “other operations pertaining to Petroleum as provided for in this JVA”, measures relating to the sale of the gas produced and to the collection of invoices for such sales may well be included in these powers.
561. It seems to result from the evidence produced that, in practice, invoices for the gas were issued by Niko. BAPEX objected to these invoices. However, the objection seemed to have related to the fact that, at least initially, Niko invoiced for its share only, not for the full amount of the payments due to the Seller. In its letter of 11 December 2005, BAPEX wrote to Niko complaining that:

“... you have been sending Invoices to Petrobangla for payment of 80% share of NIKO to Niko’s Bank Account which is in clear violation of Clause No. 6.2.2 of Joint Venture Agreement (JVA) executed between BAPEX and NIKO. ..”³⁶³

The letter concludes:

“In view of the foregoing, we would again like to bring to your notice that in order to keep everything in conformity with JVA we stand firm to our earlier views and would appreciate that from now onward NIKO will submit invoice to Petrobangla as per article 6.2.2 of the JVA for Gas sales from Feni Gas Field and also refrain itself from submitting invoice to Petrobangla for its share only.”

562. One must conclude from this passage that, at that time, BAPEX was of the view that Niko was entitled to issue invoices for the payment for the gas but had to do so for the full amount due to both Joint Venture Partners.
563. A similar conclusion seems to flow from some of the correspondence in the file of documents produced in the

³⁶³ Claimant’s Exhibit 6, p. 377.

arbitration. It appears from these documents that the correspondence with Petrobangla was sent by Niko “*on behalf of the Bapex/Niko Joint Venture*”³⁶⁴ or “*on behalf of our partner Bangladesh Petroleum Exploration & Production Co. Ltd. (Bapex) and as the Operator of the Bapex/Niko Joint Venture ...*”.³⁶⁵ This latter formula was even used in the “Notice of Default” which Niko addressed to Petrobangla on 30 September 2007.³⁶⁶ On 25 October 2009 Niko, “*as the operator of the Feni Gas Field and on behalf of the JV partners requests Petrobangla to temporarily suspend the Feni GSPA till litigation and other issues relating to outstanding and future payments are resolved*”.³⁶⁷

564. All of these communications were copied to BAPEX. There appears to have been no protest by Petrobangla or by BAPEX against Niko acting on behalf of the Joint Venture Partners. In turn, letters expressly referencing the Feni GPSA were addressed by Petrobangla not to the Joint Venture or to the Joint Venture Partners but to Niko alone, with a copy to BAPEX.³⁶⁸
565. The Tribunal concludes that it may well be that both BAPEX, as the other Joint Venture Partner, and Petrobangla, as the Buyer under the GPSA, accepted that Niko could act on behalf of the Joint Venture or of both Joint Venture Partners.
566. However, this conclusion seems to be contradicted by other evidence. In particular, the Tribunal notes that at the JMC meeting of 25 March 2008, Niko proposed a resolution recorded in the Minutes in the following terms:

*“That arbitration under the GPSA immediately be commenced for recovery of outstanding amounts and amounts invoiced in future under the GPSA, and that Niko and Bapex take all reasonable steps to move the arbitration to conclusion as quickly as possible.”*³⁶⁹

567. The Minutes record the position of BAPEX as follows:

³⁶⁴ Letter of 21 May 2007 (Claimant’s Exhibit 6, p. 222).

³⁶⁵ See e.g. Letter of 22 May 2007 (Claimant’s Exhibit 6, p. 217), 10 January 2008 (Claimant’s Exhibit 6, p. 211)

³⁶⁶ Claimant’s Exhibit 6, p. 213-214.

³⁶⁷ Claimant’s Exhibit 6, p. 203-204.

³⁶⁸ See e.g. Letters of 1 and 15 November 2009 (Claimant’s Exhibit 6, pp. 201 and 199).

³⁶⁹ Claimant’s Exhibit 12, p. 964, 970.

*“At this point of time Bapex opines that no material gain will result from this arbitration. Bapex feels that there could be a solution in the near future that is more beneficial for all.”*³⁷⁰

568. No agreement seems to have been reached between the Joint Venture Partners on commencing this action. The Claimant explained in RfA II that, “[b]ecause Bapex refused to cooperate in the arbitration, Niko joined Bapex as a Respondent to this arbitration”.³⁷¹
569. At this stage of the proceedings, the Tribunal need not decide whether the JVA and the GPSA, in the understanding of the Parties, as reflected in the quoted correspondence, allowed Niko to act for both Joint Venture Partners and pursue the claim it alleges to have against Petrobangla or whether, as reflected in the proposed JMC resolution, consent of BAPEX is required. The Tribunal simply notes that, in view of the agreements concluded and the conduct of the Parties in respect of them, it cannot be excluded that Niko, acting alone as Claimant, may pursue claims for payment under the GPSA.
570. In the proceedings on the merits the Tribunal will have to decide whether Niko is entitled to claim payment under the GPSA and, if so, whether it may claim payment of the full amount due to the Seller or only of its own share.
571. At that occasion the Tribunal may also have to decide whether, in order to make such claims, Niko needs the consent of BAPEX and, if that consent were required but not given, whether Niko would be entitled to request from this Tribunal a decision by which BAPEX is ordered to give its consent or which replaces such consent. It may then have to decide on the effect of the joinder of BAPEX to the proceedings against Petrobangla.
572. Finally, the Tribunal has considered the Respondents’ objection concerning the possible effects for BAPEX in case Niko’s claim for payment under the GPSA would be awarded. If the Tribunal were to decide that Petrobangla must make payments under the GPSA to the Seller, such a decision would also favour BAPEX.

³⁷⁰ Ibid.

³⁷¹ RfA II, paragraph 6.26.

The Respondents argue that, by such a decision, “*the Tribunal would effectively be giving investment protection to a national of Bangladesh*”. According to the Respondents, such an award “*would be contrary to the purpose of the ICSID Convention and requirements of Article 25*”.³⁷²

573. The Convention and its Article 25 provide for arbitration between a Contracting State and a national of another Contracting State. For the reasons explained, these requirements are met. Neither Article 25 of the Convention nor the “purpose of the Convention” excludes that an award in favour of a foreign national also benefits nationals of the defendant Contracting State. The Tribunal sees no grounds on which the Convention should make such an exclusion and the Respondents do not indicate any. The objection must be rejected.

574. In conclusion, the Tribunal has jurisdiction to decide on claims made by Niko against Petrobangla. It reserves its decision about the question whether such claims, if they exist, must be made for the Joint Venture Partners jointly or for Niko alone; it also reserves the decision concerning the position of BAPEX in the proceedings concerning the GPSA.

³⁷² R-CMJ.1, paragraph 100; R-CMJ.2 – Payment Claim, paragraph 168.

12. DECISION

575. Based on the evidence before it and in view of the considerations set out above, the Arbitral Tribunal unanimously decides that

- (1) It has jurisdiction under the JVA and between the Claimant and BAPEX to decide: (a) the Claimant's request for a Compensation Declaration and (b) the Claimant's Cooperation Claim;
- (2) It has jurisdiction to decide the Claimant's claim against Petrobangla for payment under the GPSA and reserves the questions related to the necessary role (or otherwise) of BAPEX in relation thereto;
- (3) It has no jurisdiction over Bangladesh, which therefore will no longer be a Respondent in this arbitration;
- (4) The Tribunal will give by separate order directions for the continuation of the proceedings pursuant to Arbitration Rule 41(4);
- (5) The decision on costs of the jurisdictional phase of the proceedings is reserved.

[Signed]

Prof. Campbell McLachlan QC
Arbitrator

[Signed]

Prof. Jan Paulsson
Arbitrator

[Signed]

Mr Michael E. Schneider
President