

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

In the arbitration proceedings between

**NIKO RESOURCES (BANGLADESH) LTD.**  
(Claimant)

and

**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**

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DECISION ON IMPLEMENTATION OF THE  
DECISION ON THE PAYMENT CLAIM

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

*Secretary of the Tribunal*  
Ms Frauke Nitschke

*Date of Decision:* September 14, 2015

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## **GLOSSARY**

Bangladesh Bank	Central Bank of Bangladesh
BAPEX	Bangladesh Petroleum Exploration & Production Company Limited, the Second Respondent
BDT	Bangladeshi taka
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
Centre or ICSID	International Centre for Settlement of Investment Disputes
Chattak field	One of the gas fields to which the JVA relates
Claimant's Clarification	Submission of 5 December 2014, responding to the Tribunals' invitation in Procedural Order No 9.
Claimant's Request	Request of 25 November 2014 for Provisional Measures concerning the Decision on the Payment Claim
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 ICSID Case No. 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 glossary
Decision or Decision on the Payment Claim	The Tribunals' Decision of 11 September 2014 concerning the Claimant's Payment Claim
Feni field	One of the gas fields to which the JVA relates

GOB or Government	The Government of the People’s Republic of Bangladesh, the First Respondent until the Decision on Jurisdiction
GPSA	Gas Purchase and Sale Agreement of 27 December 2006 between Petrobangla and the Joint Venture Partners BAPEX and Niko
Joint Venture Partners	BAPEX and Niko
JVA	Joint Venture Agreement between BAPEX and Niko, dated 16 October 2003
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 Decision on Jurisdiction, paragraph 102)
Niko Canada	Niko Resources Ltd., the Canadian parent company of the Claimant
Niko, Niko Bangladesh or NRBL	Niko Resources (Bangladesh) Ltd., the Claimant
Payment Claim	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
Respondents’ Observations	Submission of 25 June 2015
Respondents’ Request	Submission of 6 August 2015 concerning the Implementation of the Decision on the Payment Claim
Revised Submission	The Claimant’s submission of 29 April 2014
Tk	Bangladeshi taka (also BDT)
Tribunals	Collectively, the two Arbitral Tribunals constituted in ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18

## 1. INTRODUCTION

1. These two arbitrations concern an investment project that successfully commenced the development of a marginal and previously abandoned gas field (**the Feni Field**), leading to the production and sale of important quantities of gas. It then ran into two difficulties: during attempts to develop another field, the **Chattak Field**, two blow-outs occurred, causing damage to the well and the environment as to the responsibility for which there is a dispute (which has given rise in these arbitrations to the Claim for a so-called **Compensation Declaration** by which in effect the Claimant seeks to establish its non-liability); and Petrobangla, the buyer of the gas from the Feni Field, failed to make payment under the Gas Purchase and Sales Agreement (**GPSA**).
2. In these arbitrations, the Claimant seeks, in addition to the Compensation Declaration, payment of the sums due under the GPSA (the **Payment Claim**). In a decision of 11 September 2014 the Tribunals confirmed Petrobangla's payment obligation (the **Decision** or the **Decision on the Payment Claim**).
3. However, the Tribunals had noted that, despite the difficulties that had arisen in the Parties' relations, neither the Joint Venture Agreement between the Claimant and BAPEX (**the JVA**) nor the GPSA between the Claimant and Petrobangla were terminated. In a 2009 letter, Niko had stated that the funds owed to it under the GPSA would be reinvested into the Joint Venture "*for drilling of more wells at Feni Gas Field and the development of a commercial gas reserve at Chattak Gas Field*".<sup>1</sup> At the 2014 hearing on the Payment Claim, the Claimant proposed to use the funds owed by Petrobangla in the territory of Bangladesh<sup>2</sup> and confirmed this position as one of the alternatives in its submissions of 29 April 2014 (**Revised Submissions**). Moreover, the Claimant made the commitment not to remove assets from Bangladesh.<sup>3</sup>

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<sup>1</sup> Exhibit R-24, Letter of Niko to State Minister, Ministry of Power, Energy and Mineral Resources, at 1, paragraph 1, (10 February 2009); referred to in WS II Amit Goyal (paragraph 27) and Request paragraph 9.

<sup>2</sup> Confirmed by the Claimant in the Request, paragraph 10, with references to the Transcript.

<sup>3</sup> Decision, paragraph 283(c).

4. Noting the possibility of using the funds owed by Petrobangla in a manner that would have assisted the Parties in resuming their cooperation and the need for gas in Bangladesh emphasised by both sides, the Tribunals were of the view that the Parties should be afforded an opportunity of determining the most effective use of the funds by agreement among themselves.
5. In these circumstances, the Tribunals, rather than simply ordering payment of the funds, found it desirable to afford to the Parties the opportunity of employing the funds for the purposes of the project or otherwise in Bangladesh. They invited the Parties to seek an amicable settlement with respect to the modalities for implementing the Tribunal's decision on the Payment Claim.
6. In order to assist the Parties in their attempts to reach such an amicable settlement, the Tribunals identified "*possible elements of interim arrangements which the Parties may agree or, in the absence of such agreement, the Tribunals may order*".<sup>4</sup>
7. The Parties informed the Tribunals that subsequent to the Decision they had indeed conferred with a view to finding such a solution. Regrettably, however, their efforts were not ultimately successful. The letter dated 6 August 2015, which the Tribunals now received from the Respondents, leaves little hope for an agreement between the Parties as to the use of the funds: Petrobangla states that it wishes to conserve the funds it owes to the Claimant, giving no sign of an intention to seek an agreement with the Claimant as to the employment of these funds.
8. The Tribunals therefore must now decide on the modalities for implementing their Decision by directing how payment is to be made and by addressing certain open issues with respect to interest on the amounts owed by Petrobangla.

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<sup>4</sup> Decision, paragraph 283.

## 2. THE PROCEDURAL HISTORY

### 2.1 The Tribunals' Decision on the Payment Claim

9. A detailed account of the procedural history in these two arbitrations until the Tribunals' Decision on the Payment Claim was set forth in that decision, issued on 11 September 2014.
10. In the Decision on the Payment Claim, the Tribunals held that:
  - (1) *Petrobangla owes Niko USD 25'312'747 plus BDT 139'988'337 as per Niko's invoices for gas delivered from November 2004 to April 2010;*
  - (2) *Petrobangla must pay simple interest on Niko's invoices at the rate of six month LIBOR +2% for the US Dollar amounts and at 5% for the amounts in BDT; interest is due on the amount of each invoice as from 45 days after delivery of the invoice but not before 14 May 2007 and until it is placed at Niko's unrestricted disposition;*
  - (3) *The claim for compound interest on the amount awarded under above item (1) and (2) is reserved;*
  - (4) *The entitlement of BAPEX to payments under the GPSA is not affected by the present decision;*
  - (5) *The Parties are invited to seek an amicable settlement with respect to the modalities for implementing the [11 September 2014] decision and to report by no later than 30 September 2014;*
  - (6) *Failing amicable settlement, any Party may seize the Tribunals for recommendations on provisional measures or a final decision concerning the outstanding amounts;*
  - (7) *The decision on costs of the proceedings concerning the Payment Claim is reserved.*
11. What follows summarises the procedural steps in relation to the Payment Claim which occurred following the Decision.

## **2.2 Developments since the Tribunals' Decision on the Payment Claim**

12. On 30 September 2014, Petrobangla wrote to the Tribunals to report that the Parties were in ongoing discussions regarding the modalities for implementing the Decision on the Payment Claim, and that the Parties planned to meet in October 2014 for further discussions on this subject.
13. On 30 October 2014, the Tribunals invited the Parties to provide an update on the status of their discussions regarding the modalities for implementing the Decision on the Payment Claim. By email of 4 November 2014, the Claimant indicated that the Parties had not yet reached an agreement, but that they continued to explore possible amicable means for resolving the dispute. The Claimant also indicated its agreement that the Parties would provide an update to the Tribunal by 9 November 2014.
14. On 12 November 2014, Petrobangla wrote to the Tribunals and confirmed that the Parties' discussions had not resulted in an agreement.
15. On 25 November 2014, the Claimant filed a Request for Provisional Measures concerning the Decision on the Payment Claim (**Claimant's Request**). The Claimant requested that "the Tribunals order provisional measures that provisionally give effect to the Decision on the Payment Claim pending the Tribunals' decision in the Compensation Declaration." (Claimant's Request, ¶24.) Together with the Request, the Claimant enclosed a calculation of interest through the date of the Decision on the Payment Claim, 11 September 2014, pursuant to paragraph 275 of the Decision. At the same time, the Claimant inquired how the Tribunals wished the Parties to address the question of costs and post-award interest. (Claimant's Request, ¶22.)
16. On 1 December 2014, the Tribunals issued Procedural Order No 9, which invited the Claimant to submit, by 5 December 2014, clarifications to its Request for Provisional Measures and to specify its request for post-award interest. The Tribunals invited Petrobangla to provide a response to the Claimant's Request, including matters addressed in the 5 December 2014



submission, by 18 December 2014. In particular the Tribunal invited Petrobangla to address the following issues:

- (a) *the question whether the Request should be granted as a matter of principle;*
- (b) *the specific measures requested by the Claimant; and, if Petrobangla does not agree with the measures requested by the Claimant,*
- (c) *identify any other measures which Petrobangla would find appropriate, reserving, if it wishes to do so, any objections in principle;*
- (d) *the interest calculation attached to the Request; if it sees the need for any corrections, Petrobangla must provide a corrected calculation by the same date; and*
- (e) *present its position on the Claimant's request for post-award compound interest.*

17. In accordance with Procedural Order No 9, on 5 December 2014 the Claimant submitted clarifications to its request of 25 November 2014 (**Claimant's Clarification**). The Claimant confirmed that "*the relief sought concerns the Tribunal's decision on the merits of the dispute in the Payment Claim*".<sup>5</sup> The Claimant also specified its request for post-award interest compounded monthly at the rate of 5 per cent per year.
18. On 11 December 2014, Petrobangla notified the Tribunals that Mr David Branson of Washington, D.C. had joined the team of legal representatives for the Respondents.
19. On 17 December 2014, the Respondents informed the Tribunals that Messrs Tawfique Nawaz, Imtiaz Farooq, and David Branson were no longer part of the legal team representing the Respondents, and that Mr Luis Gonzalez Garcia and Ms Alison Macdonald would continue to represent the Respondents in these arbitrations.

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<sup>5</sup> Claimant's Clarification, paragraph 2.

20. By letter of 19 December 2014, Petrobangla advised the Tribunals that the Parties were in discussions regarding a possible extension of the deadline for Petrobangla's response to the Claimant's Request, which was originally due by 18 December 2014. On the same day, the Claimant confirmed the Parties' agreement to discuss an extension. The Tribunals subsequently confirmed that they had no objections to the approach proposed by the Parties.
21. On 26 December 2014, Petrobangla notified the Tribunals of the Parties' agreement to extend the deadline for Petrobangla's response until 5 February 2015. The Claimant confirmed this agreement by email of the same date.
22. On 2 February 2015, Petrobangla informed the Tribunals of an agreement reached by the Parties to further extend the deadline for Petrobangla's response until 5 May 2015. On 3 February 2015, the Claimant confirmed the Parties' agreement.
23. Petrobangla did not file its submission by the extended deadline of 5 May 2015. On 6 May 2015, Petrobangla informed the Tribunal that the Parties were in active negotiation for a fourth extension of the deadline for Petrobangla's response to the Claimant's Request and that it would update the Tribunals regarding the outcome of the Parties' discussions. On the same day, the Claimant confirmed the status of the Parties' discussions as described by Petrobangla. The Tribunals informed the Parties that they had no objection to the extension of the deadline for Petrobangla's response until a date to be specified by the Parties at a later time.
24. On 13 May 2015, Petrobangla notified the Tribunals of the Parties' agreement to extend the deadline for Petrobangla's response to the Claimant's Request until 19 May 2015. On the same day, the Claimant confirmed the Parties' agreement regarding the extended deadline.
25. Petrobangla failed to submit its response to the Claimant's Request by the extended deadline of 19 May 2015. On 27 May 2015, the Claimant, noting that the deadline of 19 May 2015 for Petrobangla to submit its response had passed, requested that the Tribunals decide on the Claimant's Request in accordance with ICSID Arbitration Rule 26.

26. On 28 May 2015, Petrobangla and BAPEX informed the Tribunals that Mr Luis Gonzalez Garcia and Ms Alison Macdonald no longer represented the Respondents and that they would inform the Tribunals of their new legal representatives in due course.
27. Having considered the circumstances of the Respondents' change in legal representatives, on 30 May 2015, the Tribunals issued Procedural Order No 10, granting Petrobangla a final extension to submit its response to the Claimant's Request, as reiterated on 27 May 2015, by 11 June 2015. The Tribunals noted that they would rule on the Claimant's Request, including the Claimant's Clarification of 5 December 2014, even in the absence of a response from Petrobangla.
28. On 8 June 2015, Petrobangla, writing on behalf of both Respondents, advised the Tribunals that Petrobangla and BAPEX were in the process of appointing Watson Farley & Williams (Thailand), to serve as the Respondents' legal representatives in these proceedings. On 10 June 2015, the Secretary of Petrobangla confirmed that Watson Farley & Williams (Thailand) would serve as the Respondents' legal representatives for the 11 June 2015 filing.
29. On 11 June 2015, Petrobangla notified the Tribunals that due to its recent appointment of new legal representatives, Petrobangla was in ongoing discussions with the Claimant regarding a further extension of the deadline to submit its response to the Claimant's Request and that it would write to the Tribunals by 15 June 2015.
30. On 15 June 2015, Petrobangla informed the Tribunals that the Parties were unable to agree on an extension and requested an extension from the Tribunals.
31. On 16 June 2015, writing on behalf of both Respondents, Petrobangla informed the Tribunals of appointment of Watson Farley & Williams (Thailand) as counsel for the Respondents in these proceedings.
32. Further to an invitation by the Tribunals, the Claimant provided comments to Petrobangla's 15 June 2015 request for a further extension by letter of 19 June 2015. The Claimant requested that the Tribunals deny Petrobangla's request.

33. On 23 June 2015, the Tribunals informed the Parties of their decision to deny Petrobangla's request for a further extension of the deadline to file its response to the Claimant's Request. The Tribunals noted that Petrobangla had had more than six months to respond to the Claimant's Request before the resignation of its previous legal representatives, and given the Tribunals' responsibility to conduct the proceedings in a manner that is fair to both sides and proceed with reasonable dispatch, the Tribunals concluded that there was no justification for a further extension.
34. On 25 June 2015, the Respondents filed an unsolicited letter with the Tribunals containing observations on the question whether the Claimant's "*Request should be granted as a matter of principle*" and on the request for "*post-award compound interest*" (**Respondents' Observations**).
35. Petrobangla wrote on 9 July 2015 informing the Tribunals that Foley Hoag LLP had been appointed to represent both Petrobangla and BAPEX in the arbitrations and that partners Paul S. Reichler and Derek C. Smith were authorised to communicate on their behalf with ICISID; all previous authorisations for other external counsel were withdrawn. In the letter Petrobangla provided details about the representation about by its previous legal counsel, explaining that it had not been properly informed by its previous counsel about details of the proceedings. It stated in particular: "*We were not initially aware that essentially no case had been presented to the Tribunals on our behalf regarding the Compensation Declaration Claim.*"
36. The newly appointed counsel wrote on the same day announcing the appointment of new experts and requesting an extension of time for the submission concerning the Compensation Declaration. After further correspondence, the matter was dealt with by the Tribunals in Procedural Order No 11 of 19 August 2015.
37. On 6 August 2015 the Respondents requested that the Tribunals decide that the amounts outstanding under the Decision on the Payment Claim be payable only after "*all issues regarding Niko's liability are resolved*" (**Respondents' Request**).

38. The Tribunals deliberated about all issues concerning the Claimant's Request as well as the Respondents' Request. They reached unanimously the present decision.

**3. THE PARTIES' REQUESTS AND THE ISSUES TO BE DECIDED**

39. In its Request of 25 November 2014 and its Observations of 5 December 2014, **the Claimant**

(i) sought measures to give effect to the Tribunals' Decision by referring to different alternative conclusions which had been made in its Revised Submission of 29 April 2014; in these conclusions the Claimant had set out several alternatives for the manner in which the amounts owed by Petrobangla should be paid.

40. The alternatives proposed by the Claimant were as follows:

*In the alternative, Niko respectfully submits that the Tribunals should issue an award in its favor and against Petrobangla and BAPEX:*

*Alternative A*

- a) Declaring that Niko is entitled to bring and capable of bringing a claim to that portion of the Invoices owed to Niko on its own;*
- b) Finding that Petrobangla and Niko have agreed that Petrobangla owes to Niko and should pay to Niko the total amount owing to Niko under the Invoices, being 25,312,747.00 USD plus 139,988,337.00 BDT;*
- c) Finding that this agreement reflects an amicable settlement within the meaning of the BELA injunction of 17 November 2009;*
- d) Ordering Petrobangla to pay to Niko the total amount stated above;*
- e) Ordering Petrobangla to pay interest on any payment awarded under paragraph b above at a simple annual rate of 5 percent through the date of the award;*
- f) Ordering post-award interest at an annual rate of 5 percent compounded monthly until the award is paid in full;*
- g) Awarding Niko costs in accordance with Article 61 of the ICSID Convention; and*

*h) Awarding such other and further relief as the Tribunals deem appropriate.*

*Alternative B*

- a) Declaring that Niko is entitled to bring and capable of bringing a claim to that portion of the Invoices owed to Niko on its own;*
- b) Declaring that Petrobangla owes to Niko the total amount due under the Invoices, being 25,312,747.00 USD plus 139,988,337.00 BDT;*
- c) Declaring that Petrobangla shall pay interest on the amount under paragraph b above at a simple annual rate of 5 percent through the date of the award;*
- d) Declaring that Petrobangla shall pay post-award interest at an annual rate of 5 percent compounded monthly until the amount in full is paid in accordance with paragraph e below;*
- e) Ordering Petrobangla to pay the amounts stated under paragraphs b, c and d to a bank designated by Niko, which bank shall act as account holder and independent escrow agent with respect to such funds pursuant to a standard escrow account agreement of such bank with the following characteristics:*
  - i. Petrobangla and Niko shall appoint the bank as escrow agent;*
  - ii. The funds on account shall bear interest;*
  - iii. The funds shall remain owned by Petrobangla until disbursed;*
  - iv. The funds shall be disbursed only to parties unrelated to Niko and upon presentation by Niko of (a) bank details for such a party; and (b) a certification that the payee is not affiliated with Niko by common ownership or control and that the payment concerns operations or activities in the territory of Bangladesh;*
- f) Ordering that, in the event that Petrobangla fails to make the payment specified in paragraph e within 120 days of*

*the award, Petrobangla shall make payment to Niko directly;*

- g) Awarding Niko costs in accordance with the Article 61 of the ICSID Convention; and*
- h) Awarding such other and further relief as the Tribunals deem appropriate.*

*Alternative C*

- a) Declaring that Niko is entitled to bring and capable of bringing a claim to that portion of the Invoices owed to Niko on its own;*
- b) Declaring that Petrobangla owes to Niko the total amount due under the Invoices, being 25,312,747.00 USD plus 139,988,337.00 BDT;*
- c) Declaring that Petrobangla shall pay interest on the amount under paragraph b above at a simple annual rate of 5 percent through the date of the award;*
- d) Declaring that Petrobangla shall pay post-award interest at an annual rate of 5 percent compounded monthly until the amount in full is paid in accordance with paragraph e below;*
- e) Ordering Petrobangla to pay the amounts stated under paragraphs b, c and d to the International Centre for Settlement of Investment Disputes, which shall hold such sums in an interest-bearing account pending the Tribunals' award in the Compensation Declaration and disbursed by the Centre in accordance with the directions of the Tribunals, it being understood that such sums shall be paid to Niko only if the Tribunals in the Compensation Declaration find that Niko is not liable for the blowouts at issue or only to the extent that Nikos' liability is less than the amount paid by Petrobangla pursuant to paragraphs b, c and d above, and also understood that any moneys not paid to Niko further to the preceding phrase shall be paid at the direction of Petrobangla or BAPEX;*
- f) Ordering that, in the event that Petrobangla fails to make the payment specified in paragraph e within 120 days of the award, Petrobangla shall make payment to Niko directly;*



- g) Awarding Niko costs in accordance with Article 61 of the ICSID Convention; and*
- h) Awarding such other and further relief as the Tribunals deem appropriate.*

Alternative D

- a) Declaring that Niko is entitled to bring and capable of bringing a claim to that portion of the Invoices owed to Niko on its own;*
- b) Finding that Petrobangla and Niko have agreed that Petrobangla owes to Niko and should pay to Niko the total amount owing to Niko under the Invoices, being 25,312,747.00 USD plus 139,988,337.00 BDT;*
- c) Finding that Petrobangla and Niko have expressed in the GPSA their mutual agreement to arrive at an extrajudicial settlement in the present circumstances and have appointed these Tribunals to arrive at, and formally record, the Parties' amicable settlement;*
- d) Ordering Petrobangla to pay to Niko the total amount stated above;*
- e) Ordering Petrobangla to pay interest on any payment awarded under paragraph b above at a simple annual rate of 5 percent through the date of the award;*
- f) Ordering post-award interest at an annual rate of 5 percent compounded monthly until the award is paid in full;*
- g) Awarding Niko costs in accordance with Article 61 of the ICSID Convention; and*
- h) Awarding such other and further relief as the Tribunals deem appropriate.*

41. In addition to this request concerning the payment modalities, the Claimant

- (ii) quantified the interest that, by the time the Decision was notified, had accumulated on the amount owed by Petrobangla;

- (iii) requested that, for the period after the notification of the Decision, the outstanding amounts bear interest at 5% per annum;
- (iv) requested that interest be payable after the notification of the Decision be compounded monthly; and
- (v) requested that the costs of the proceedings be assessed at this point of the proceedings and that these costs be added to the principal, bearing compound interest as part of the total principal.<sup>6</sup>

42. **The Respondents** did not take any position on the Claimant's Request within the procedural time limits set by the Tribunals. As stated above, the Respondents nevertheless submitted Observations on 25 June 2015, concluding that

- (i) *"... it is not appropriate to grant the provisional measure requested by Niko. The most effective way to preserve the status quo, which has existed since the commencement of both ICSID arbitrations, is to refuse to grant Niko's Request and to reserve a final decision concerning the outstanding amounts in the Payment Decision pending resolution of the Compensation Declaration";*
- (ii) the *"post-award annual rate should match the pre-award rates";* and
- (iii) only simple interest should be awarded and, if compound interest were admitted, compounding should not be monthly but annually.

43. In their Request of 6 August 2015 the Respondents requested

- (iv) *"...that the Tribunals decide that the outstanding amounts under the Payment Claim Decision will be payable (to the extent they remain outstanding) only after all issues regarding Niko's liability are resolved."*

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<sup>6</sup> Claimant's Clarification, paragraph 23.

44. With regard to the Respondents' Request, **the Tribunals** first need to examine whether, in view of the timing of this submission, the Respondents' Request should be admitted.
45. On the substance to be addressed by the present Decision, the Tribunals then need to examine the following issues:
- (i) whether the relief requested by the Claimant concerning the payment modalities is admissible;
  - (ii) whether in the circumstances it is appropriate to order any of the measures requested by the Claimant or the Respondents;
  - (iii) the interest rate applicable during the period after the notification of the Decision;
  - (iv) whether compound interest is admissible as a matter of principle and, if so, whether in the circumstances of the Payment Claim it should be awarded and, if so, at what interval;
  - (v) whether costs of the proceedings as claimed in the Claimant's Clarification should be assessed at this stage and, if so, should be added to the principle, bearing interest.
46. In the sections below, the Tribunals will set out in further detail the positions of the Parties and the relief requested by them.

## 4. THE PAYMENT MODALITIES

### 4.1 The measures requested by the Claimant

47. In the Decision on the Payment Claim the Tribunals had determined the amount which Petrobangla owed to Niko under the GPSA and the related interest rate. During the hearing in April 2014, preceding the September 2014 decision, the Parties considered the relationship between the amount due by Petrobangla to Niko and the Compensation Declaration sought by Niko. In this context, the Tribunals noted a commitment by Niko “that, at least for the time being, it will not remove assets from Bangladesh” and an agreement by Niko that the amounts due from Petrobangla “would be used by the Joint Venture to fund further work as prescribed by the JVA”.<sup>7</sup> Niko’s Revised Submissions of 29 April 2014, in some of the alternatives, reflected aspects of this commitment and agreement.

48. In these circumstances, the Tribunals invited the Parties

*... to seek an amicable settlement with respect to the modalities for implementing the present decision and to report by no later than 30 September 2014;*

*Failing amicable settlement, any Party may seize the Tribunal for recommendations on provisional measures or a final decision concerning the outstanding amounts.*<sup>8</sup>

49. In its Request the Claimant explained that, further to this invitation by the Tribunals,

*... the Parties have attempted to reach an amicable settlement with respect to the modalities for implementing the Decision on the Payment Claim.*<sup>9</sup>

50. The Claimant then announced to the Tribunals its conclusion that

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<sup>7</sup> Decision, paragraph 283 (c).

<sup>8</sup> Decision, paragraph 292 (5) and (5).

<sup>9</sup> See Claimant’s Request, paragraph 5 and FN 3.

*... the Parties have failed to reach an amicable settlement with respect to the modalities for implementing the Decision on the Payment Claim.*<sup>10</sup>

51. In its Request the Claimant referred to the relief set out in its revised submission of 29 April 2014, as they have been reproduced above, and requested

*... that the Tribunals adopt provisional measures ordering Petrobangla to pay the outstanding amounts stated in paragraph 292 (1) and (2) of the Decision on the Payment Claim (amounts in principal and pre-award interest) along the lines suggested in Alternatives A to D of Niko's Revised Submissions of 29 April 2014, and as the Tribunals deem fit.*<sup>11</sup>

52. The Claimant added

*... that, in deciding on provisional measures, the Tribunals take into account the position that Niko has taken in this arbitration on the use of funds in the period between the issuance of provisional measures and the decision in the Compensation Declaration.*<sup>12</sup>

53. The Claimant recalled the following positions it had taken with respect to the use of funds:

*... to use the funds owed by Petrobangla for operations in the territory of Bangladesh at large, rather than for operations limited to Chattak and Feni;*

and

*... that Petrobangla shall be ordered to pay the amounts owing to Niko into an escrow account and that the funds shall be disbursed to parties unrelated to Niko for 'operations or activities in the territory of Bangladesh'.<sup>13</sup>*

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<sup>10</sup> Claimant's Request, paragraph 6.

<sup>11</sup> Claimant's Request, paragraph 8.

<sup>12</sup> Claimant's Request, paragraph 9.

<sup>13</sup> Claimant's Request, paragraphs 10 and 11.

54. With respect to the payment mechanism which it requested to be put in place, the Claimant specified its objective as

... ensuring that Niko will be paid the outstanding amounts due to it by Petrobangla once the Tribunals issue an award in the Compensation Declaration. If the outstanding amounts in the Payment Claim are paid into an escrow account or a similar vehicle, these amounts can be used to satisfy any liability of Niko found in the Compensation Declaration (although Niko's position is that it is not liable for the blowouts). The balance of the funds held in escrow, after satisfaction of Niko's liability – if any – to BAPEX pursuant to the Compensation Declaration, would then be paid to Niko.<sup>14</sup>

55. In the Clarification the Claimant explained, in response to the question in the Tribunals' Procedural Order No 9, that the "*relief sought concerns the Tribunals' decision on the merits of the dispute in the Payment Claim*".<sup>15</sup>

#### **4.2 The Respondents' Observations and Request**

56. In their Observations of 25 June 2015 the Respondents' counsel stated:

*... our client is not in a position to offer instructions on the substantive issues raised in the Request.*<sup>16</sup>

57. The Respondents' Observations continued nevertheless by arguing that the requirements under the ICSID Convention for ordering provisional measures are not met so that it is "*not appropriate to grant the provisional measures requested by Niko*".<sup>17</sup>

58. These Observations were made after the time allowed for their submission had expired. The Tribunals nevertheless considered the Observations since they were made at a time when the Tribunals had not completed their deliberations and no delay was caused by their late submission. Since no reply to the

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<sup>14</sup> Claimant's Request, paragraph 19.

<sup>15</sup> Claimant's Clarification, paragraph 2.

<sup>16</sup> Respondents' Observations, paragraph 2.

<sup>17</sup> Respondents' Observations, paragraph 10.

Respondents' submission had been foreseen, the late production of the Observations caused no disadvantage to the Claimant.

59. The Respondents' Request of 6 August 2015 relied on a passage of the Decision quoted above, according to which in the absence of an amicable settlement with respect to implementing the Decision

*... any Party may seize the Tribunal for recommendations on provisional measures or a final decision concerning the outstanding amounts.*

60. The Respondents continued by noting that the

*... negotiations to reach an amicable settlement effectively came to an end in May 2015. In light of the lack of an amicable settlement and mindful of the Claimant's Request for Provisional Measures, Respondents respectfully seize the Tribunals to request a decision that the outstanding amounts under the Payment Claim will be payable (to the extent they remain outstanding) only after the Tribunals reach a final decision regarding Niko's requests for relief in the Compensation Declaration phase.*

61. The Respondents' Request is presented as an application provided by the Tribunals' Decision for which the Tribunals had not fixed a time limit. In substance, however, this request amounts to refuting the Request of the Claimant in all its alternatives and to denying that any effect be given to the Payment Decision prior to the decision on the Compensation Declaration.

62. The Tribunals therefore take the Respondents' Request of 6 August 2015 as a response to the Claimant's Request which requires no further argument and can be decided as part of the decision on the Claimant's Request.

#### **4.3 The admissibility of the measures requested by the Claimant**

63. In its Request the Claimant sought "*provisional measures that provisionally give effect to the Decision on the Payment Claim pending the Tribunals' decision in the Compensation*

*Declaration*".<sup>18</sup> The Claimant also explained that the measures requested were intended to replace the failure of the Parties to reach agreement "*with respect to the modalities for implementing the Decision on the Payment Claim*".<sup>19</sup>

64. Following Procedural Order No 9, the Claimant clarified the nature of the requested measures, stating that "*the relief sought concerns the Tribunals' decision on the merits of the dispute in the Payment Claim*".<sup>20</sup> The Claimant also explained that, with the exception of Alternative C, the measures were not tied to any future relief and requested final relief. Alternative C could be deemed "*interim*" in the sense "*that the final relief depends upon the outcome of the Compensation Declaration*".<sup>21</sup>
65. In their Observations the Respondents contested the admissibility of the measures requested by reference to criteria for the admissibility of provisional measures. They identify the requirements for the granting of such measures, examine whether the relevant criteria are met and conclude that this was not the case.<sup>22</sup> On this basis the Respondents declared that it was not appropriate to grant the measures requested by the Claimant.
66. In their letter of 6 August 2015 the Respondents no longer contested the admissibility of the measures but denied the justification of any such measures before the decision on the Compensation Declaration.
67. The Respondents' reasoning for denying admissibility of the Claimant's Request presumes that the measures requested are indeed "provisional measures". The ICSID Convention provides in its Article 47 for "*provisional measures which should be taken to preserve the respective rights of either party*". Similarly, ICSID Arbitration Rule 39 concerns measures which a party requests "*for the preservation of its rights*".
68. More generally, as defined by KAUFMANN-KOHLER and ANTONIETTI,

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<sup>18</sup> Claimant's Request, paragraph 2.

<sup>19</sup> Claimant's Request, paragraphs 5 and 6.

<sup>20</sup> Claimant's Clarification, paragraph 2.

<sup>21</sup> Claimant's Clarification, paragraph 4.

<sup>22</sup> Respondents' Observations, paragraph 4.



*Interim measures are temporary in nature and are traditionally intended to ‘preserve the respective rights of the Parties pending the decision’ of a tribunal.*<sup>23</sup>

69. In the present case, the right which the Claimant’s Request seeks to protect is that of payment for the invoiced amounts. This right has been confirmed in the September 2014 Decision. The measures which the Claimant seeks by its Request concern the modalities of implementing this right: when and how the Claimant receives the amounts which are due to it. This is obviously the case with respect to Alternatives A and D, by which the Claimant seeks an order that “*Petrobangla pay to Niko the total amount*” due. This request plainly seeks enforcement of the right, not provisional protection until the existence of the right has been accepted by the Tribunals.
70. The situation is no different with respect to those alternatives by which the Claimant accepts that it be paid only at some future time and subject to a condition. Here, too, the right to payment is already established but its implementation is uncertain; the measures are intended to regulate modalities of this implementation, not the right in principle.
70. In conclusion, the measures sought by the Claimant’s Request are intended to give effect to the Claimant’s rights themselves and are not measures intended to protect these rights subject to a future decision by the Tribunals. By their nature, they are not provisional measures in the sense of Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules. The question whether the requirements for the admissibility of such provisional measures are met therefore does not arise.

#### **4.4 The content of the measures implementing the September 2014 Decision**

71. The Tribunals now therefore proceed to examine the relief sought by the Claimant on the basis that it is to be treated not as a provisional measure but rather as the implementation of its September 2014 Decision. Such implementation is plainly within

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<sup>23</sup> Gabrielle KAUFMANN-KOHLER and Aurélia ANTONIETTI, *Interim Relief in International Investment Agreements*, in Katia YANNACA-SMALL, *Arbitration under International Investment Agreements*, 2010, 307 at 314, quoting from the ICJ decision on *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* of 5 July 1951, ICJ Reports 1951, p. 91.

the Tribunals' jurisdiction and foreseen by that Decision in the event that the Parties were not otherwise able to reach agreement on implementation.

72. The measures requested by the Claimant require that the amounts owed by Petrobangla be actually paid, directly to the Claimant or into some form of escrow arrangement. Petrobangla takes the position that, for the time being and until the Tribunals have made their decision on the Compensation Declaration, it should not be required to make any payment.
73. The Tribunals have considered the Parties' positions against the following background: Pursuant to the Joint Venture Agreement of 2003, the Claimant invested significant funds to develop the Feni and the Chattak fields and, starting with November 2004, delivered gas to Petrobangla. The GPSA between Petrobangla and the Joint Venture, which regulates these deliveries and payment for them, was concluded in 2006. On the basis of this agreement, Petrobangla owes some USD 25 million and some BDT 140 million to Niko, plus interest, as confirmed by the Tribunals in their Decision on the Payment Claim.
74. Until today, some eleven years after the start of deliveries, Petrobangla has not made any payment for the gas it received, apart from two initial interim payments of altogether USD 4 million. The Respondents' Request of 6 August 2015 seeking a decision allowing Petrobangla to continue withholding the amounts which it owes must be seen in this context.
75. In this request the Respondents argue that it was Niko that created the link between the Payment Claim and the determination of Niko's liability for compensation for damage resulting from the blow-outs. Relying on observations in one of the expert reports, Petrobangla further argues that Niko's design of the wells was deficient and that for that reason the Tribunals may find Niko liable for the damage caused.
76. Petrobangla concludes that

*it would unnecessarily prejudice Respondents, and the sovereign State of Bangladesh, to have to pay or set aside a substantial sum for Claimant that may not be owed at all. Even payment into an escrow account, entailing the*

*corresponding loss of access to a very substantial sum of money, would be an unfair burden on Petrobangla when the amount owed depends on the resolution of all of the issues Niko brought before the Tribunals.*

77. The Tribunals do not accept this reasoning. The “*substantial sum of money*” is owed by Petrobangla to Niko and is long overdue. It is Niko that is prejudiced by the “*loss of access*” to this sum, due to Petrobangla’s withholding it.
78. While the debt of Petrobangla is established, the question whether Niko is liable for the damage resulting from the blow-outs remains to be determined. If any liability of Niko were established, it is not certain that it would require payment specifically to Petrobangla rather than to BAPEX or some other entity. Indeed, Petrobangla decided not to bring any claims in these arbitrations and the liability which Niko seeks to have the Tribunals consider seems to involve alleged entitlements of BAPEX.
79. The Tribunals conclude that there is no justification for Petrobangla to further withhold the funds owed to Niko.
80. The Tribunals also have taken note of the Claimant’s proposal at the 2014 hearing, later confirmed in the Claimant’s Request, “*to use the funds owed by Petrobangla for operations in the territory of Bangladesh at large, rather than for operations limited to Chattak and Feni*”.<sup>24</sup> It insisted that this and other positions underlying the alternatives in the Revised Submissions of 29 April 2014 “*be duly taken into account by the Tribunals’ when considering Niko’s present request for provisional measures*”.<sup>25</sup>
81. The Tribunals are receptive to these considerations, in particular since they preserve the funds owed to Niko for possible payments in the event Niko were found liable for damage caused by the blow-outs and the quantum was determined. This was indeed one of the points indicated by the Tribunals in the context of the interim arrangements to which it referred in the Decision on the Payment Claim.<sup>26</sup>

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<sup>24</sup> Claimant’s Request, paragraph 10.

<sup>25</sup> Claimant’s Request, paragraph 12.

<sup>26</sup> Paragraph 283 (b) and (c).

82. When discussing in their Decision possible elements of interim arrangements which the Parties may agree or (in the absence of such agreement) the Tribunals may order, the Tribunals considered the possibility of the Parties' agreeing to put the funds to productive use in Bangladesh. Some of the alternatives in the Claimant's Revised Submissions identified such objectives.
83. Since then the Parties have informed the Tribunals that their discussions in this direction did not lead to any result. The Tribunals have taken note of this situation. They also have taken note that Petrobangla wishes to withhold payment and has not made any proposals for an interim arrangement.
84. In these circumstances and unless the Parties requested them to do otherwise, the Tribunals do not see any merit in ordering interim arrangements ordering any specific use of the funds, as envisioned by paragraph (e) iv in Alternative B in the Claimant's Revised Submissions or any variation thereof.
85. The Tribunals therefore conclude that any order made by the Tribunals relating to the implementation of the Decision on the Payment Claim must provide for an escrow account into which Petrobangla pays forthwith the amounts owed to Niko. The funds in this account shall be used, in case the Tribunals find Niko liable for all or part of the damage resulting from the blow-outs, to satisfy any compensation obligations found, and the directions given, by the Tribunals in this respect. The escrow arrangement must ensure now that funds not used for such compensation will at that point be made freely available to Niko, as indicated in the Tribunals' Decision.
86. These considerations lead the Tribunal to exclude Alternatives A and D and provide for the payment into an escrow account. This possibility is foreseen by Claimant's Alternative B, which the Tribunal adjusts as follows.
87. Petrobangla shall pay the sums owed to Niko into an escrow account opened by the Claimant. The sums shall be released as instructed by the Tribunals or agreed by the Parties. The U.S. Dollar part of the amounts shall be available free of any currency control in Bangladesh. Petrobangla's interest obligations, as specified in the Decision on the Payment Claim and in the present decision, shall continue to apply until the funds are paid to Niko

at its free disposition. Interest earned on the escrow account during a given period may be deducted by Petrobangla from the interest due for the corresponding period.

## 5. QUANTIFICATION OF PRE-DECISION INTEREST

88. As explained above, the Decision contained an order for payment of interest in the following terms

*Petrobangla must pay simple interest on Niko's invoices at the rate of six month LIBOR +2% for the US Dollar amounts and at 5% for the amounts in BDT; interest is due on the amount of each invoice as from 45 days after delivery of the invoice but not before 14 May 2007 and until it is placed at Niko's unrestricted disposition;*

89. The Claimant joined to its Request a spreadsheet setting out the its

*... calculation of interest through the date of the notification of the Decision on the Payment Claim (11 September 2014) (Exhibit C-22 quarter). Interest is calculated on the amount of each invoice as from 45 days after delivery of the invoice but not before 14 May 2007 and until the date when the Decision on the Payment Claim was dispatched to the Parties (11 September 2014). The calculation establishes that, as of 11 September 2014, the total amount of interest accrued in US dollars using the methodology ordered in the Decision was USD 5'932'833 and the total amount in taka was BDT 49'849'961. For the Tribunals' information that taka amount is equal to USD 643'682 at the exchange rate of 11 September 2014.<sup>27</sup>*

90. The Claimant clarified that the “pre-award interest” was so calculated to be treated as part of the “total amount awarded to Niko” to which “post-award interest” be applied.<sup>28</sup>
91. The Tribunals take these submissions as a request for giving effect to the Decision by ordering the payment of the interest amount as quantified by the Claimant.
92. In Procedural Order No 9 the Tribunals invited Petrobangla to provide a response both to the Request and the Clarification, including “the interest calculation attached to the Request; if it

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<sup>27</sup> Claimant's Request, paragraph 21.

<sup>28</sup> Claimant's Request, paragraph 23.

*sees the need for any corrections, Petrobangla must provide a corrected calculation by the same date”.*

93. Petrobangla did not respond on 18 December 2014, the date that had been fixed in Procedural Order No 9, nor during any of the subsequently granted extensions; BAPEX did not provide any response either. In their unsolicited submission of 25 June 2015 and in the Respondents’ Request of 6 August 2015 the interest calculation as submitted by the Claimant is not addressed.
94. The Tribunals conclude that the Claimant’s calculation of the interest due by Petrobangla until 11 September 2014 remains uncontested.
95. The Tribunals have nevertheless examined the elements of the Claimant’s calculation. They note that, according to the indications in the spreadsheet, interest was calculated only as from 14 May 2007 and, with respect to invoices issued subsequently, 45 days after the invoice date. The rates applied in the Claimant’s spreadsheet are 5% with respect to amounts in BDT and 2% above the rate of six month LIBOR for U.S. Dollar amounts. The calculation is made by applying simple interest.
96. The Tribunals conclude that the calculation was made in line with the Tribunals’ Decision of 11 September 2014. The Tribunals award **USD 5’932’833 and BDT 49’849’961** for interest due until 11 September 2014.

**6. THE POST-DECISION INTEREST RATE FOR THE U.S. DOLLAR DEBT AND THE REQUEST FOR RECONSIDERATION**

97. The Decision determines that Petrobangla must pay simple interest on Niko's invoices at the rate of six month LIBOR +2% for the U.S. Dollar amounts and at 5% for the amounts in BDT until the outstanding amounts are "*placed at Niko's unrestricted disposition*"; no distinction is made with respect to the interest rate before and that after the Decision. The reservation of the "*claim for compound interest*" concerned the principle of compounding and not the rate.
98. In its Request the Claimant asked the Tribunals to indicate how they wished the Parties to address "*post-award interest*". In the Clarification, the Claimant requested that post-Decision interest be awarded at the rate of 5%, irrespective of the currency in which it was to be calculated.<sup>29</sup> This amounts to a change in the post-Decision interest rates for the U.S. Dollar debt. Petrobangla argued that "*the rate should not change post-award*".<sup>30</sup>
99. In order to grant the Claimant's request concerning the post-Decision interest, the Tribunals would have to reconsider their ruling on the interest rate for the U.S. Dollar debt. The Tribunals have heard the Parties on the issue of the interest rates and closed the issue by their Decision. The Claimant does not provide any reason why this ruling should be reconsidered and the Tribunals do not see any.
100. In any event, even if reconsideration of this aspect of the September 2014 Decision would be admissible, the Tribunals see no justification for applying a different rate for the post-Decision interest. When they fixed the interest rate in the Decision, the Tribunals were "*guided by the objective that the successful party should be compensated for having been kept out of its money to which it was entitled*".<sup>31</sup> The Claimant has not shown any evidence nor even argued that the loss which it suffered by reason of Petrobangla's failure to pay would have changed on the date

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<sup>29</sup> Claimant's Clarification, p. 7 et seq. and p. 10, paragraph 30.

<sup>30</sup> Respondents' Observations, paragraph 22.

<sup>31</sup> Decision, paragraph 257.



when the Tribunals issued their Decision.<sup>32</sup> As stated by the ICSID Tribunal in *Micula v. Romania*:

*... the Tribunal does not see why the cost of the deprivation of money (which interest compensates) should be different before and after the award ...*<sup>33</sup>

101. While one does find in the practice of ICSID tribunals cases where a difference was made between pre- and post-award interest, “[i]n most cases, tribunals have not considered post-award interest separately from pre-award interest, and have simply granted it until the date of full payment of the award”.<sup>34</sup>
102. The Claimant seeks to justify its claim for a different interest rate for post-Decision interest by arguing that “post-award interest” has a purpose different from “pre-award interest”.
103. In support of this argument the Claimant relies on an award in ICSID proceedings and the opinion of a legal writer. The award in *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* contains the following passage, quoted by the Claimant:

*... As requested by the Claimant, the Tribunal may also determine a different interest rate to apply to post-Award interest than that applied to pre-Award interest. This is because the purpose of post-Award interest is arguably different - damages become due as at the date of the Award, and from this time, Respondent is essentially in default of payment. As such, the Tribunal considers that continuing to apply a risk-free interest rate would be inappropriate.*<sup>35</sup>

104. The Claimant also quotes Professor MARBOE’s study in the following terms:

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<sup>32</sup> The Tribunals are aware that in some legal systems a difference is made between pre-judgment and post-judgment interest and that this distinction has been applied in some awards, including awards by tribunals in ICSID arbitrations. The Tribunals see no justification to apply the distinction in the present case.

<sup>33</sup> Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No ARB/05/20, Award of 11 December 2013 (Laurent LÉVY (President), Stanimir A. ALEXANDROV and Georges ABI-SAAB), paragraph 1269.

<sup>34</sup> Sergey RIPINSKY, Kevin WILLIAMS, *Damages in International Law*, BIICL, London, 2008, 387.

<sup>35</sup> *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014 (Piero BERNARDINI (President), Pierre-Marie DUPUY and David A.R. WILLIAMS), paragraph 856, quoted after the Claimant’s Clarification, paragraph 13.

*From the moment a legally binding ruling has been rendered, the amount and time of the payment obligation is defined. The respondent is in default if it does not fulfil the payment obligation. This type of default may be penalized by a much higher interest rate which is no longer limited to the concrete damage actually incurred by the party.*<sup>36</sup>

105. In the present case, the Tribunals decided that Petrobangla was in default of its payment obligations at various dates, prior to the Decision and that from these dates onward interest was due to compensate the Claimant's loss. The considerations of the tribunal in the *Gold Reserve* case, which seemed to have fixed the rate for pre-award interest at a rate inappropriate for a case of default, do not apply here.
106. As to the considerations of Professor MARBOE, the Tribunals are mindful of the fact that they have been appointed by the Parties to resolve a specific dispute arising out of their contracts. The Tribunals do not exclude that the parties to a contract provide, in one form or another, that an arbitral tribunal may "*penalise*" a party failing to comply with its award by sanctions in the form of "*astreinte*" or increased interest rates, with the objective of promoting compliance with its decisions. However, this does not mean that the ICSID Convention empowers or entitles arbitrators, on grounds independently of the parties' agreement, to impose sanctions on a party for non-compliance with a tribunal's decision.<sup>37</sup>
107. For these reasons the Tribunals reject the Claimant's request for reconsideration and confirm the decision concerning the interest rate for the U.S. Dollar debt.

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<sup>36</sup> Irmgard MARBOE, *Calculation of Compensation and Damages in International Investment Law*, Oxford UP, 2009, paragraph 6.245.

<sup>37</sup> The matter will be considered further below in Section 7.3 in the context of the choice of the interval for compound interest.

## 7. COMPOUNDING

108. The Claimant further seeks an order that post-Decision interest be compounded monthly.
109. During the proceedings leading to the September 2014 Decision the Claimant had sought simple interest on the outstanding payments for the period up to the Decision. Only for the period thereafter it sought interest at “*an annual rate of 5 percent compounded monthly until the award is paid in full*”. After the proceedings on the Payment Claim had been closed and before they issued the Decision, the Tribunals authorised submissions on the narrow question of the interest rate in Bangladesh for U.S. Dollar debts. In its submission on that issue the Claimant confirmed the claim for simple pre-award interest at the annual rate of 5%, but added “*if a commercial rate such as [LIBOR +2%] is applied the commercial practice of compounding of interest should also be applied*”.
110. The Tribunals decided that this new alternative claim for pre-award compound interest was late and therefore not admissible. They awarded only simple interest, but left open the question of whether for the period after the notification of the Decision interest should be compounded.<sup>38</sup>
111. After the Decision had been notified and the Parties’ attempts to settle amicably the remaining issues relating to the Payment Claim had failed, the Claimant filed its Request of 25 November 2014 which also addressed the question of compounding. In its Clarification the Claimant argued that post-Decision interest should be compounded and the compounding should be effected monthly.<sup>39</sup>
112. The Respondents argued that in ICSID cases, compound interest could only be awarded for expropriation cases but not for contract claims; since the present claim is based on delay in payment under a contract, only simple interest would be admissible. If interest would be compounded, this should be calculated only annually.<sup>40</sup>

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<sup>38</sup> See paragraphs 267 to 273 of the Decision and above section 5.

<sup>39</sup> Claimant’s Clarification, pp. 6 et seq.

<sup>40</sup> Respondents’ Observations, pp. 6 et seq.

113. The Tribunals considered the argument of the Parties and the authorities to which they refer. They note from the outset that the issue of compound interest is particularly controversial. The Tribunals therefore will examine (i) whether ICSID tribunals may award compound interest in a case as the present one and, if they may, (ii) under what conditions they should award compounding and (iii) at what intervals.
114. The ICSID Convention does not regulate the question whether tribunals proceeding under the Convention and its Arbitration Rules may award compound interest. The question therefore must be decided under the applicable law, in the present case international law governing the Convention and the arbitral process as defined therein and the law of Bangladesh chosen by the Parties otherwise governing the GPSA.
115. While the question of the interest rate was argued and decided on the basis of Bangladesh law,<sup>41</sup> neither Party relied on the law of Bangladesh with respect to the compounding issue. In particular, neither Party argued that, under the law of Bangladesh, compounding was prohibited. The Tribunals, too, are not aware of such a prohibition. The Tribunals consider therefore the admissibility of compound interest and its applicability in the present case by reference to general principles applicable in international arbitration, and in particular to ICSID proceedings.

### **7.1 Admissibility of compound interest in ICSID arbitration**

116. The Claimant argues that awards of compound interest have become the norm in ICSID cases.<sup>42</sup> The Respondents rely on an ICSID award from which they conclude, as mentioned above, that “*compound interest may be awarded for expropriation but not for contract claims*”;<sup>43</sup> they point out that the present case is “*a simple breach of contract claim*”.<sup>44</sup>

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<sup>41</sup> Decision, p. 73 et seq.

<sup>42</sup> Claimant’s Clarification, paragraph 9.

<sup>43</sup> The Respondents refer to Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19. The case and this reference shall be discussed in further detail below.

<sup>44</sup> Observations, paragraph 12, relying on Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador, ICSID Case No. ARB/04/19, Award of 18 August 2008 (Gabrielle

117. The Tribunals are aware that, historically, many legal systems have taken a restrictive position toward compounding interest.<sup>45</sup> The traditional position in international adjudication has been expressed in a much quoted passage by WHITEMAN in 1943:

*There are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable. Although in rare cases compound interest, or its equivalent, has been granted, tribunals have been almost unanimous in disapproval of its allowance.*<sup>46</sup>

118. In an article of 1988, Dr F.A. MANN examined the law and practice with respect to compound interest in international law. Starting with the passage from WHITEMAN and a similar statement by ROUSSEAU in 1983,<sup>47</sup> he commented on international decisions and legal writers dealing with the subject:

*Numerous decisions, mainly arbitral awards, support both these statements. At the same time, however, it should be recognized that, as an item of damage, the problem of compound interest apparently has never been fully analysed. Most learned writers ignore it or fail to give any reason for their conclusion that compound interest is or is not payable.*

119. The only exception, which MANN recognised, is Jean-Luc SUBILIA who dealt with the problem “a little more carefully” and who concluded in his study of 1972:

*As far as compound interest is concerned, it seems that one cannot go further than to state that such recovery generally*

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KAUFMANN-KOHLER (President), Enrique GÓMEZ-PINZÓN and Albert Jan VAN DEN BERG), paragraph 838 and cases cited.

<sup>45</sup> For some examples see F.A. MANN, Compound Interest as an Item of Damage in International Law, U.C. Davis Law Review, 21 (Festschrift in Honour of Edgar Bodenheimer), 1988, 577-86; reproduced in Further Studies in International Law (New York: Oxford UP) 1966, 377 at 381.

<sup>46</sup> Majorie M. WHITEMAN, Damages in International Law, vol. 3 (Washington DC) 1943 at 1997; quoted from BROWER and SHARP, Awards of Compound Interest in International Arbitration: The Aminoil Non-Precedent, in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum for Robert Briner, Paris (ICC) 2005, 155 at 157; the passage is also quoted by MANN, 377 (the passage “is not allowable” there is reproduced as “is now allowable” – an obvious error).

<sup>47</sup> Charles ROUSSEAU, Droit international public, V (1983), paragraph 242.

*is not granted by international tribunals. Beyond that, the few precedents favourable to compound interest, which have been mentioned in Chapter VI, do not support the existence of a case law rule which would preclude them as a matter of international law.*<sup>48</sup>

120. The reservations against compound interest nevertheless persisted. The Iran-United States Claims Tribunal, for instance, consistently awarded only simple interest. Relying on the above quoted study of WHITEMAN, one chamber of that tribunal assumed in 1986 an “*international rule*” according to which, in the absence of a clear contrary agreement, compound interest was excluded.<sup>49</sup>

121. Shortly thereafter, in 1986, another chamber sounded more flexible:

*Most awards allocate only simple interest, but occasionally compound interest has been awarded ...*<sup>50</sup>

122. The occasional exception to which this decision makes reference and which is often relied on is the *Aminoil* award, which ordered 7.5% interest and 10% “level of inflation”, both compounded annually.<sup>51</sup> Nevertheless, the Iran-United States Claims Tribunal, as just mentioned, persisted in awarding only simple interest.

123. The view of WHITEMAN and the assumption of a rule in international law excluding compound interest had been contradicted forty years ago already by SUBILIA:

*In our view, in the absence of a well-established case law on the subject, one may not exclude a priori the award of compound interest. Therefore, one must examine, in the light*

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<sup>48</sup> Jean-Luc SUBILIA, *L'allocation d'intérêts dans la jurisprudence internationale*, Lausanne 1972, 124; the translation is by MANN.

<sup>49</sup> R.J- Reynolds Tobacco Co. v. Iran, Award No 145-33-3 of 31 July 1984 (Mangård presiding), 7 Iran-US CTR. 181, 192.

<sup>50</sup> McCollough & Co, Inc. v. Ministry of Post, Award No 225-89-3 of 22 April 1996 (VIRALLY presiding), 11 Iran-US CTR p. 28 paragraph 96. In a subsequent decision the same chamber interpreted a contractual clause restrictively and excluded compound interest: *Anaconda Iran Inc. v. Iran*, Award No IITL. 65-167-3 (VIRALLY presiding), 13 Iran-US CTR, 199, 234-235.

<sup>51</sup> *American Independent Oil Co. (Aminoil) v. Government of the State of Kuwait*, Award of 24 March 1982 (Paul REUTER (President), Hamed SULTAN and Gerald FITZMAURICE) in 21 ILM (1982), 976. The relevance of this award as an example for compound interest has been questioned by BROWER and SHARPE, in *Liber Amicorum Briner*, Paris 2005, 155, 160.

*of the circumstances of each case and in view of the requirement of the principle of full reparation, whether interest must be capitalised.”<sup>52</sup>*

124. Since then, this view has gained increasing strength. In the Iran-US Claims Tribunal itself, the majority view was criticised even by some of its members. Judge BROWER, for instance, wrote:

*Compound interest has a rightful place in international arbitration, especially in the context of international commercial arbitration.*<sup>53</sup>

125. In particular, Judge HOLTZMAN, in a concurring opinion to a subsequent case in 1987, examined the circumstances of the case, considering the facts that the claimant was borrowing money on a compound basis and that the claimant’s expert applied compound interest in the damage valuation, and referring to a legal opinion of Dr F.A. MANN. He concluded:

*Modern economic reality, as well as equity, demand the injured parties who have themselves suffered actual compound interest charges be compensated on a compound basis in order to be made whole. International tribunals and respected commentators have come to recognize this principle: it is unfortunate that the Final Award does not.*<sup>54</sup>

126. The view expressed by Judge HOLTZMANN has gained ground. In the above quoted article of 1988, Dr MANN developed the views expressed in the legal opinion on which Judge HOLTZMANN relied and concluded:

*... it is submitted that, on the basis of compelling evidence, compound interest may be and, in the absence of special circumstance, should be awarded to the claimant as damages by international tribunals.*<sup>55</sup>

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<sup>52</sup> SUBILIA, op. cit. 163-164 ; the original text stated: “A notre avis, l’absence d’une jurisprudence ferme sur ce point interdit d’exclure a priori l’allocation d’intérêts composés. Il y a donc lieu d’examiner à la lumière des circonstances de chaque cas si une capitalisation des intérêts s’impose au regard des exigences du principe de la réparation intégrale.”

<sup>53</sup> BROWER and SHARPE, loc. cit. p.160.

<sup>54</sup> Starrett Housing Corporation et al. v. Iran, Concurring Opinion to Award No 314-24-1, of 14 August 1987, 16 Iran-US CTR. 112, 237, 254.

<sup>55</sup> MANN, loc. cit. p. 385.

127. A decade later, Judge SCHWEBEL concluded:

*... it is plain that the contemporary disposition of international law accords with that found in the national law of States that are commercially advanced, namely, it permits the award of compound interest where the facts of the case support the conclusion that that is appropriate to render just compensation.*<sup>56</sup>

128. Arbitration practice confirms that compound interest is increasingly recognised as an admissible remedy. Some arbitration rules expressly mention the power of arbitrators to grant compound interest;<sup>57</sup> the fact that other rules do not expressly mention this power does not mean that they exclude it.<sup>58</sup>

129. Commercial arbitration awards have granted compound interest by reference to commercial usages, in cases where the creditor showed that its financing obligations included compounding<sup>59</sup> or by references to local legislation where “*the matured interest are added to the sum at the end of each year*”.<sup>60</sup>

130. In ICSID arbitration compound interest has been awarded in an increasing number of cases. In the *Santa Elena v. Costa Rica* Award of 2000, the tribunal found:

*... while simple interest tends to be awarded more frequently than compound, compound interest certainly is not unknown or excluded in international law. No uniform rule has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the*

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<sup>56</sup> Stephen M SCHWEBEL, Compound Interest in International Law, TDM 5, November 2005.

<sup>57</sup> WIPO Rules Article 60 (b), AAA International Arbitration Rules, Article 28(4), LCIA International Arbitration Rules, Rule 26.4, Article 27.6 Singapore International Arbitration Centre (SIAC). The fact that other rules do not mention such powers may well be due to the different approach in civil law systems, as described above.

<sup>58</sup> In this sense see e.g. Natasha AFFOLDER, Awarding Compound Interest in International Arbitration, 12, American Review of International Arbitration (2001), 45, 52.

<sup>59</sup> See for instance ICC Award in Case No 5514 of 1990, Collection of ICC Arbitral Awards 1991 – 1995, 459, 463 et seq., comments by Y.D. express scepticism as to a general principle but approve the solution which is based on compensation for loss suffered, 467.

<sup>60</sup> ICC Award in Case No 12112 (no date indicated), Collection of ICC Arbitral Awards 2008 – 2011, 179, 210.



*determination of interest is a product of the exercise of judgement, taking into account all of the circumstance of the case at hand and especially considerations of fairness....*

*... It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.*<sup>61</sup>

131. This case was followed by a large number of other awards in which compound interest was granted. In their study based on 42 ICSID awards from the period 2000 to 2013, UCHKUNOVA and TEMNIKOV state:

*At the outset, it shall be noted that the previously prevailing practice of awarding only simple interest has been discarded thanks in large part to the work of scholars such as Dr FA Mann, Prof. John Gotanda and Judge Stephen Schwebel.*

[...]

*... following the landmark Santa Elena v. Costa Rica case, only ten out of the 42 awards examined have applied simple interest. Of those, the decision to apply simple interest is explained by the applicable law, and in one case, the claimant himself requested simple interest...*<sup>62</sup>

132. On the basis of this practice in ICSID arbitration, the Claimant argues that “*awards of compound interest, as opposed to simple interest, have become the rule rather than the exception.*”<sup>63</sup>

133. As mentioned above, the Respondents rely on a principle according to which “*compound interest may be awarded for expropriation but not for contract claims*”, adding that the present case concerns “*a simple contract claim*”.<sup>64</sup> In support of this statement the Respondents rely on an award in ICSID

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<sup>61</sup> *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000 (L. Yves FORTIER (President), Elihu LAUTERPACHT and Prosper WEIL), paragraphs 103 and 104.

<sup>62</sup> Inna UCHKUNOVA and Oleg TEMNIKOV, *A Procrustean Bed: Pre- and Post-award Interest in ICSID Arbitration*, 29 ICSID Review (2014), 648-659.

<sup>63</sup> Claimant’s Clarification, paragraph 9.

<sup>64</sup> Respondents’ Observations, paragraph 12.

proceedings in which the tribunal indeed awarded only simple interest. However, the tribunal in that case did so because the local law prohibited compound interest<sup>65</sup> and the applicable BIT specified that the treaty shall not derogate from the laws and regulations of the host State.<sup>66</sup> The passage which the Respondents quote as expressing the “*principle*” asserted by this award in reality is found in a part of the award which presents the position of the respondent party,<sup>67</sup> but is not adopted by the tribunal.

134. The Respondents argue more generally that the ICSID cases in which compound interest was applied concern expropriation cases and that UCHKUNOVA and TEMNIKOV expressly excluded from their study of ICSID awards cases of breach of contract.<sup>68</sup> In support for the distinction between expropriation cases and contract cases the Respondents rely on the *Santa Elena v. Costa Rica* Award of 2000 quoted above. That award indeed contains the following passage:

*Even though there is a tendency in international jurisprudence to award only simple interest, this is manifested principally in relation to cases of injury or simple breach of contract. The same considerations do not apply to cases relating to the valuation of property or property rights. In case such as the present, compound interest is not excluded where it is warranted by the circumstances of the case.*<sup>69</sup>

135. The *Santa Elena* award does not explain the origin of the distinction between “*injury or simple breach of contract*” cases where only simple interest is awarded and “*valuation of property and property rights*” where compound interest may be awarded. In particular, it does not explain why the damage suffered as a result of money withheld should be different according to the legal basis on which the money is due.

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<sup>65</sup> Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award of 18 August 2008 (Gabrielle KAUFMANN-KOHLER (President), Enrique GÓMEZ-PINZÓN and Albert Jan VAN DEN BERG), paragraph 457.

<sup>66</sup> Ibid, paragraph 473.

<sup>67</sup> Ibid, paragraph 432.

<sup>68</sup> Respondents’ Observations, paragraph 11, referring to UCHKUNOVA and TEMNIKOV, 651.

<sup>69</sup> Loc. cit. paragraph 97.

136. In the view of the Tribunals, such a distinction cannot be justified by reference to the ICSID Convention nor by reference to general principles of law. Since it is generally accepted that interest is intended to compensate for the loss of use of money, there is no reason why these costs should be assessed differently when the money is owed in a case of “*simple breach of contract*” and not for expropriation. The Tribunals therefore take the numerous cases in which ICSID tribunals have awarded compound interest as confirmation of the conclusion that compound interest is admissible in ICSID Convention arbitration even when the claims made are based on a contract, as in the present case.
137. The question therefore is not whether an ICSID tribunal may award compound interest but in what circumstances it may or must do so and at what interval or rest.

## **7.2 The circumstances justifying compound interest in the present case**

138. Based on the principle that interest is intended to compensate a creditor for the loss suffered as a result of the debtor’s failure to pay amounts due when they fell due, the Tribunals have accepted that the loss to be compensated may include compound interest and that, therefore, compound interest may be awarded in “*appropriate circumstances*”<sup>70</sup> or “*if it is necessary to ensure full reparation*”.<sup>71</sup> When examining in which circumstances it is “*appropriate*” to award compound interest and when quantifying such interest one must, therefore, consider primarily the loss which the claimant demonstrates having suffered. This is a question of evidence. Professor MARBOE states:

*In the absence of specific evidence on compounding and the compounding intervals, the acceptance of compound of [sic] interest by international investment tribunals is still not to be taken for granted.*<sup>72</sup>

139. Professor BERGER explains it in the following terms:

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<sup>70</sup> Santa Elena v. Costa Rica, paragraph 104.

<sup>71</sup> Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, Award of 5 September 2008 (Giorgio SACERDOTI (President), V.V. VEEDER and Michell NADER), paragraph 310.

<sup>72</sup> Op. cit, paragraph 6.242.

*Given that the practice of banks varies as to the exact method of compound interest charge, especially if the sum outstanding is calculated on the basis of continued capitalisation of interest with quarterly, half-year or yearly rests, the claimant may not rely on a prima facie rule as to the amount of compound interest but has to provide the tribunal with detailed evidence substantiating his damages caused by the bank's charging compound interest.*<sup>73</sup>

140. This position reflects a distinction between statutory interest, legal interest, or *intérêts moratoires* (on the one hand) and compensatory interest (on the other), recognised in many jurisdictions as well as in ICSID awards. The former are due at a prescribed rate on the sole basis of the delay without the requirement of showing evidence of any damage, while the latter require proof of the loss claimed.<sup>74</sup>
141. Similarly, tribunals have adopted a “conservative approach” in cases where the claimant failed to provide evidence for the calculation.<sup>75</sup>
142. In most cases in which ICSID tribunals have awarded compound interest, they have done so without discussing the question whether the party claiming compound interest actually demonstrated having suffered loss in the form of paying compound interest or foregoing an investment opportunity on terms including such interest. Instead, tribunals and scholarly writers discussing the matter have relied on the decisions of other tribunals, concluding that “*compound interest is the norm in recent expropriation cases under ICSID*”;<sup>76</sup> or they have considered

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<sup>73</sup> Klaus Peter BERGER, *International Economic Arbitration*, Kluwer 1993, 631.

<sup>74</sup> See e.g. *Société Ouest-Africaine de Béton Industriel (SOABI)*, ICSID Case No. ARB 82/1, Award of 25 February 1988 (Aron BROCHES (President), J.C. SCHULSZ and Keba MBAYE), paragraph 636; Herbert SCHÖNLE, *Intérêts moratoires, intérêts compensatoires et dommages-intérêts de retard en arbitrage international*, in DOMINICÉ, PATRY, REYMOND, *Études de droit international en l'honneur de Pierre Lalive*, Basel 1993, 649; also UNIDROIT Principles Article 7.4.9; MARBOE, *op. cit.* paragraph 6.52 uses the term “legal interest” for interest where the claimant need not prove “the actual damage caused by the delay”.

<sup>75</sup> *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award of 16 May 2012 (Judd KESSLER (President), Franklin BERMAN and Bernardo CREMADES), paragraph 319., The passage concerns the rate of interest but the reasoning can be applied equally to compounding.

<sup>76</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* ICSID Case No. ARB/06/11, Award of 5 October 2012 (L. Yves FORTIER (President), David A.R. WILLIAMS and Brigitte STERN), paragraph 840.

more closely financial practice, accepting that, in modern commercial relations, compounding is a commercial reality. In these relations a creditor is adequately compensated for its loss only if it receives compound interest.

*In finance and all commercial transactions, compound interest is the norm. [...] parties dealing at arm's length will always insist that interest be compounded on any outstanding balances for the simple reason that compound interest could have been earned on the money had it been paid.*<sup>77</sup>

143. The position has been adopted by ICSID tribunals. One such tribunal, for instance, stated:

*... it is universal practice of banks and other loan providers in the world market to provide monies at a cost amounting to or equivalent to compound rates of interest and not simple interest.*<sup>78</sup>

144. As stated by an author who has extensively addressed matters of interest in international arbitration:

*In short, in the modern world of international commerce, almost all financing and investment vehicles involve compound, as opposed to simple, interest. Thus, it is neither logical nor equitable to award a claimant only simple interest when the respondent's failure to perform its obligations in a timely manner caused the claimant either to incur finance charges that included compound interest or to forego opportunities that would have had a compounding effect on its investment.*<sup>79</sup>

145. Based on the experience of the Banking Commission of the International Chamber of Commerce and its members, SÉNÉCHAL contrasted the absence of a “*real international consensus in international arbitration*” concerning the choice

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<sup>77</sup> Jeffrey M. COLÓN and Michael S. KNOLL, *prejudgment Interest in International Arbitration*, *Transnational Dispute Management*, vo. 4, Issue 6 (November 2007), 9.

<sup>78</sup> *Gemplus S.A., SLP S.A. Gemplus Industrial S.A. de C.V. v. United Mexican States and Talsud v. United Mexican States*, ICSID Case Nos. ARB (AF)/04/3 and ARB(AF)/04/4, Award of 16 June 2010 (L. Yves FORTIER (President), Eduardo MAGALLÓN and V.V. VEEDER), paragraphs 16-26.

<sup>79</sup> John Yukio GOTANDA, *Compound Interest in International Disputes*, *Oxford International Law Forum*, at <http://ouclf.iuscomp.org/articles/gotanda>. At FN 275 with further references.

between simple or compound interest with the reality of the financial world:

*Still, in the finance world, compound interest is the international standard applied in most time value applications. Indeed, the adoption of compound interest reflects the majority of commercial realities, in that a loss of value incurred by a company that is active in normal trading operations implies the loss of use of that value. Not recognising that reality would lead to awarding a windfall to the respondent.<sup>80</sup>*

146. One ICSID tribunal expressed this conclusion as follows:

*The time value of money in free market economies is measured in compound interest; simple interest cannot be relied upon to produce full reparation for a claimant's loss occasioned by delay in payment.<sup>81</sup>*

147. In the light of these and other concurring statements about international commercial practice,<sup>82</sup> the Tribunals accept that compounding is a commercial reality firmly established in international commercial relations and therefore presumed to be a regular element of damages when money owed is withheld. Consequently, the Tribunals are of the view that in international commercial relations a claim for compound interest does not require any specific evidence.

148. Some ICSID tribunals have reached this conclusion by accepting that “*compound interest reflects economic reality*” as an inherent general rule of the time value of money rather than by insisting that the specific incidence of this reality be demonstrated in each case.<sup>83</sup> On this basis and referring to the writings of MANN and SCHWEBEL, to the *Santa Elena* award and other legal materials, the tribunal in the *Oko Pankki v. Estonia* case, concluded:

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<sup>80</sup> Thierry J SÉNÉCHAL, Present-day Valuation in International Arbitration: a Conceptual Framework for Awarding Interest, in DE LY and L. LÉVY, Interest, Auxiliary and Alternative Remedies in International Arbitration, Paris (ICC Publication No 684), 219, 230.

<sup>81</sup> Continental Casualty v. Argentina, paragraph 309.

<sup>82</sup> E.g. AFFOLDER, loc. cit. 91.

<sup>83</sup> OKO Pankki Oyj and others v. Republic of Estonia, ICSID Case No. ARB/04/6, Award of 19 November 2007 (Otto L.O. DE WITT WIJNEN (President), L. Yves FORTIER and V.V. VEEDER), paragraph 345.

*This discretionary approach to the award of compound interest under international law may now represent a form of jurisprudence constante in ICSID awards.*<sup>84</sup>

149. The tribunal in *Gemplus and Talsud v. Mexico* stated in even firmer terms:

*In the Tribunal's opinion, there is now a form of „jurisprudence constante“ where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.*<sup>85</sup>

150. In the present case, the Tribunals consider that they should recognise this ordinary commercial reality by making provision for compound interest. The question that remains to be considered is that of the most appropriate interval to be ordered.

### **7.3 The interval or rest**

151. While commercial practice is firmly established with respect to the principle of compounding, the intervals (or rests) for compounding vary considerably. This has been observed by learned writers and by ICSID tribunals:

*There are no general rules regarding the compounding intervals.*<sup>86</sup>

152. SÉNÉCHAL describes the practice:

*There are no prescribed standards for choosing one particular compounding period over another (annually, quarterly, monthly or daily are the most common options). The compounding period usually depends on the financial products chosen by the client.*

...

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<sup>84</sup> Ibid. paragraph 349.

<sup>85</sup> *Gemplus and Talsud v. Mexico*, paragraphs 16-26.

<sup>86</sup> *Occidental Petroleum v. Ecuador*, paragraph 843.

*On the conservative side, we suggest using the yearly approach. Furthermore, the yearly compounding period is implicit in using average annual returns on the market.*<sup>87</sup>

153. Intervals may be annually, semi-annually, quarterly, monthly or even shorter. In the practice of international arbitral tribunals, including ICSID tribunals, various intervals have been applied. In many cases arbitral tribunals have chosen an interval without providing an explanation.<sup>88</sup>
154. Legal writers provide some guidance. MANN points out the considerable variations in the choice of the interval and suggested that *“in a specific case it may be necessary to investigate local practices”*, adding that *“a judge who would award quarterly or half-yearly rests would not go far wrong”*.<sup>89</sup>
155. MARBOE refers to the study of the ICC Banking Commission as reported by SÉNÉCHAL and mentions the yearly compounding. She adds as a suggestion, *“if a certain financial product has been chosen as a reference for setting the interest rate, the compounding interval of this instrument should be used ...”*.<sup>90</sup>
156. Similarly COLÓN and KNOLL refer to the period over which interest is calculated and conclude: *“A tribunal should therefore use the same compounding period in computing the award as the reference interest rate”*.<sup>91</sup>

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<sup>87</sup> Loc. cit. 231, 233.

<sup>88</sup> The Tribunal in *Gemplus and Talsud v. Mexico*, at paragraphs 16-26 simply stated “As to rest-periods, the Tribunal is content to accept the Claimants’ submission that these should be yearly rests.” The Tribunal in *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/09/1, Award of 22 September 2014 (Piero BERNARDINI (President), Pierre Marie DUPUY and David A.R. WILLIAMS), awarded interest compounded annually; it justified why it awarded compound interest but did not explain why it chose annual compounding (paragraph 854). In *Micula v. Romania* the Claimant sought interest compounded quarterly; the Tribunal gave reasons why compound interest had to be awarded but did not discuss the interval. It simply found the request for interest compounded quarterly to be “reasonable”; paragraph 1271. Significantly, the tribunal in the *OKI Pankki v. Estonia* case discussed in some detail the justification of compound interest (paragraphs 343 – 357), but then decides on annual compounding without giving reasons for the choice of the interval (paragraph 357). The tribunal in the ICSID case of *SAIPEM S.p.A v. People’s Republic of Bangladesh* (ICSID Case No. ARB/05/07), awarded simple interest because that had been the decision in the underlying ICC award. *UCHKUNOVA* and *TEMNIKOV* mention four ICSID tribunals having awarded shorter compounding intervals for post award interest of which only one provided reasons for the choice of the interval; those reasons consisted in observing that current LIBOR interest rates were very low (p. 665).

<sup>89</sup> Compound interest, loc. cit., 585.

<sup>90</sup> Op. cit. paragraph 6.224.

<sup>91</sup> Loc. cit. p. 18. They refer to a case in which a court in the United States awarded interest on the basis of the U.S. prime rate, which in practice is compounded quarterly, but ordered annual compounding.



157. A different approach was chosen by the tribunal in the ICSID case of *Occidental Petroleum v. Ecuador*: the tribunal decided on an annual interval; it did so by reference not to the specific costs incurred by the claimant but in consideration of “*recent trends in investment arbitration*” and “*the large amount of the Award and the number of years that have passed since the violation*”.<sup>92</sup>
158. In the present case, the Claimant seeks monthly compounding; but does not adduce any evidence that could assist the Tribunals in deciding that compounding should be in monthly intervals rather than in any other intervals. Given the variety of intervals which occur in practice, the Tribunals are not in a position to accept that any specific interval of compounding is so firmly established that it can be taken as commercial practice which does not require further demonstration.
159. The Claimant has not shown that its costs, incurred specifically or shown to be current in the market in which it operates, include monthly compounding; or that foregone investments would have enabled it to receive interest compounded in this interval. The Tribunals have no basis for assuming that the Claimant incurred such costs or was preventing from earning interest at that basis. They must therefore make the most conservative assumption and can award compounding only in annual intervals.
160. The Claimant seeks to support its request for monthly compounding by a different line of argument, stating that “*compounded interest is justified to encourage Petrobangla to comply in a timely fashion with its payment obligation*” and compounding interest on a monthly basis “*further this result*”.<sup>93</sup> Some tribunals have indeed included in the award an element to “*encourage*” the award debtor to comply in a timely fashion with its obligations flowing from the award, for instance by increasing the rate for post-award interest and reducing the compounding interval.
161. This practice implies that considerations other than the compensation for the Claimant’s loss would impact on the decision on the compounding interval. The issue has been

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<sup>92</sup> Paragraph 845.

<sup>93</sup> Claimant’s Clarification, paragraph 18.

considered already above in Section 6. To complete these considerations the following explanations may be added:

*These changes can be explained by the desire of some tribunals to ensure prompt compliance with the award by adding a punitive element to interest and thereby turning the post-award interest from a purely compensatory instrument into a sanction. It is not clear whether international law permits the use of post-award interest to punish the respondent for non-compliance with the award.*<sup>94</sup>

162. The practice of adding a punitive element in the decision on interest has been considered by the ICSID tribunal in the case of *EDF v. Argentina*:

*In connection with the terms of compound interest, the change from annual to monthly compounding sought by Claimants and adopted by some tribunals can be explained by the desire of these tribunals to ensure prompt compliance with the award by adding what can be seen as a punitive element, a change that this Tribunal cannot endorse.*<sup>95</sup>

163. As explained above, the Tribunals see no basis in the circumstances of the present case which would empower or entitle them to impose sanctions on a Party for non-compliance with their decision.

164. In conclusion, the Claimant has not established a basis for compounding interest at an interval shorter than annual. In the absence of such evidence, the Tribunals consider that a conservative approach to the requisite interval for compounding is warranted. The Tribunals order that interest must be compounded annually.

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<sup>94</sup> RIPINSKY and WILLIAMS, loc. cit. 389.

<sup>95</sup> EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award of 11 June 2012 (William W. PARK (President), Gabrielle KAUFMANN-KOHLER and Jesús REMÓN), paragraph 1340.

## 8. COSTS

165. In its Request the Claimant also sought a decision on cost in terms that would include the awarded costs to be capitalised and subject to compound interest as the remainder of the sum awarded. It requested “*post-award interest on the total amount awarded to Niko, that is the amount in principal, plus pre-award interest, plus costs*”, specifying its “*submission that the Tribunals should assess costs at this point of the proceedings, so that the principal amount on which post-decision interest will be due is known*”.<sup>96</sup>
166. The Tribunals recognise that it may be indicated in certain circumstances to decide on a party’s costs not only in the final award but also at some prior stages of the proceedings. In the present case, the claims and the decisions made by the Tribunals and those still outstanding are interrelated to a point that the Tribunals consider it preferable to defer the cost decision to a later stage.

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<sup>96</sup> Claimant’s Request, paragraph 23.

## 9. DECISION

167. Based on the arguments and evidence before it and in view of the considerations set out above, the Arbitral Tribunals now make the following decision:

- (i) Petrobangla shall pay into an escrow account USD 25'312'747 and BDT 139'988'337, plus interest (a) in the amounts of USD 5'932'833 and BDT 49'849'961 and (b) as from 12 September 2014 at the rate of six month LIBOR +2% for the U.S. Dollar amounts and at 5% for the amounts in BDT, compounded annually;
- (ii) The escrow account shall be opened by the Claimant at a reputable, internationally operating bank according to standard conditions in international banking practice and providing that funds in the escrow account shall be released only (a) as instructed by the present Arbitral Tribunals or (b) by joint instructions of Niko and Petrobangla;
- (iii) Petrobangla shall ensure that the U.S. Dollar amounts paid into the Escrow Account are freely available to Niko without any restrictions if and when payment to Niko is ordered by the present Arbitral Tribunals;
- (iv) Until the amounts due as per above (i) have been fully paid to Niko at its free disposition or otherwise released from the Escrow Account, Petrobangla shall continue to pay interest on these amounts at the rate of six month LIBOR +2% for the U.S. Dollar amounts and at 5% for the amounts in BDT, compounded annually. At the end of each year, the Bank shall inform Petrobangla about any interest earned on the Escrow Account during the course of the year. Petrobangla may deduct the interest so earned from its interest payments for the corresponding period. If the interest earned on the amounts in the Escrow Account during a year exceeds the interest due by Petrobangla, the exceeding amount shall remain in the account without any credit to Petrobangla;
- (v) If any difficulties occur which prevent the operation of the Escrow Account as intended by the present decision, any Party may address the Tribunals for a ruling as required.

[signed]

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Prof. Campbell McLachlan QC  
*Arbitrator*

[signed]

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Prof. Jan Paulsson  
*Arbitrator*

[signed]

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Mr Michael E. Schneider  
*President*