

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

**Procedural Order No 28
(Decision on the Document Production Request)**

1. On 8 January 2016 the Respondents filed a request for production of documents to which the Claimant replied on 18 January 2016. The Respondents’ request evolved and was modified as documents became available at the 5 and 6 February 2016 site visit. It was further considered at the February 2016 Hearing and settled at that occasion. These developments were recorded in the Decision on Liability.¹
2. At the November 2020 Hearing the Respondents presented a proposed Procedural Schedule for Quantification of the Recoverable Losses for the time following the Decision on Heads of Recoverable Loss. This schedule included as the first phase a further request for the production of documents, response by Niko and a decision by the Tribunals. The Claimant objected that such a procedure for document production had not been provided in the agreed programme and was inadmissible.
3. With the objective of avoiding that a document production phase delays the proceedings on quantification, the Tribunals gave directions in Procedural Order No 26 of 1 December 2020, providing that requests and replies be filed on 9 and 23 December 2020, respectively. Following the Tribunals’ Decision on Heads of Recoverable Loss on 18 May 2021 (the Decision), the document production requests were considered at the Case Management Conference of 8 June 2021. Further to directions given at that occasion, the Respondents updated and narrowed their document production request on 22 June 2021 in the form of a Redfern Schedule. The Claimant added its further comments, addressing the Respondents’ updates and filed the Redfern Schedule so completed on 6 July 2021. In the present Procedural Order the Tribunals decide the requests, as they are presented in that schedule.
4. The Redfern Schedule submitted to the Tribunals set out the Respondents’ requests as they had been defined in the original version, drafted prior to the Tribunals’ Decision. Some of these requests are marked as withdrawn, others continue to be pursued. With respect to the requests which continue to be pursued, the Respondents did not present a modified request, adjusted to the issues remaining after the Decision. Instead, they preserved the original request and added a column in the Redfern Schedule with comments by which the requests were reduced or modified and occasionally expanded. In order to understand the Respondents’ various requests one must therefore amalgamate the two columns and extract from the original request the

¹ Decision on Liability, section 3.2.15.

remainder that the Respondents continue to pursue. This has not assisted the Tribunals' examination of the requests.

5. Moreover, in response to a number of the requests, the Claimant accepted the production of requested documents but did so subject to its General Objection, as discussed below; it also made its acceptance of a number of requests subject to the condition of reciprocity. As a result, the Respondents still have not received the documents which the Claimant is prepared to produce. The Respondents therefore are not in a position to determine finally whether and to what extent the production which will be made is compliant and, if it is not, specify what remains to be produced. The Tribunals, in turn, cannot make a clear decision on which documents remain to be produced.
6. In these circumstances the Tribunals found it necessary to summarise their understanding of the request as it remained after the Decision and respond to it accordingly. The Tribunals concluded that it was not practical for the Tribunals' ruling on the requests so adapted to add an additional column to the already voluminous Redfern Schedule submitted by the Parties. The Tribunals therefore present their decision in the present form of a Procedural Order.

The Claimant's General Objection

7. The Claimant argues that that "no additional document disclosure phase should be permitted as it is inconsistent with the Parties' agreement on the procedure for the quantum phase reached in 2015". Its responses to the requests were "provided only in the event that the Tribunals overrule Niko's objection".
8. The Tribunals note that, as announced at the November 2015 Hearing, the Respondents made a document request on 8 January 2016 which gave rise to productions by the Claimant and was settled at the February 2016 Hearing.² Since then the Tribunals have decided Niko's liability for the blowouts and its limits, the Parties have made additional submissions of argument and evidence and have produced further expert opinions and the Tribunals have ruled on the heads of recoverable loss.
9. The Tribunals are of the view that, in view of the cooperation between Niko and BAPEX under the JVA and in the interest of a fair and just assessment of the quantum of the recoverable losses, it is important for the Niko and BAPEX to share all data in their possession that may contribute to this assessment. The Tribunals therefore are of the view that any data and information relevant for the quantification of the recoverable losses must be shared to the extent this has not been done yet.
10. Concerning the objection of the Claimant against an additional "document production phase", in Procedural Order No 26 and thereafter, the Tribunals organised the Parties' submissions on the document production request in such a manner that they did not extend the duration of the proceedings.
11. The Tribunals, therefore, decided to examine the Respondents' document production requests and, where these requests seek the production of documents relevant for the Respondents' case, order their production. This is all the more justified, as some of the requests relate to new

² See Decision on Liability, paragraph 148.

information and data produced with the Claimant's Counter-Memorial on Damages on 7 September 2020.

12. It is a matter for the Claimant to determine what evidence it wishes to produce in support of its allegations. Claims not adequately supported by the evidence produced will as a matter of course be treated accordingly.
13. When examining the Redfern Schedule as submitted, the Tribunals noted that a number of requests have been withdrawn. With respect to others, the Claimant agreed "to produce relevant and material documents" and added that it "will make such documents available to Respondents within three weeks of the Tribunals' decision on the heads of recoverable loss". The Tribunals have not been informed whether and when such documents were made available to the Respondents.

The Specific Requests

14. **Request No 1:** The Respondents sought "All wireline pressure or pressure measured while drilling formation and fluid sampling data (known as SFT data) acquired from the Chattak 2C well" and added further details. The Respondents then clarified their request by stating: "The Respondents are simply requesting all of the SFT data that the service provider hired by Niko provided to Niko's experts for their calculation of the volume of escaped gas and loss of production". The Claimant objected to the request, arguing that it was overbroad and irrelevant. It then took note of the Respondents' clarification and agreed "to provide a response providing any SFT data reports or analyses that were made available to Claimant's expert, GCA for their calculation of the volume of escape gas and loss or production".
15. The Tribunals note that this agreement seems to satisfy the request as clarified by the Respondents.
16. **Request No 2:** The Respondents describe the requested documents as "copies of notes from Claimant's experts GCA, Stuart Wright and Fekete containing volume calculation or related calculation" and "ii) original digital files or data on which Claimant's experts relied ...". They explain that the requested documents are necessary to assess, whether Claimant's expert calculation on the volume of gas lost as a result of the blowout are accurate". The Claimant is "prepared to agree to a mutual exchange of digital copies of the materials on which the parties' experts relied upon to make calculations and form their conclusions" and "that sets out the data used in their calculations or analyses". Both Parties insist on reciprocity and simultaneous exchange.
17. The Tribunals are of the view that it is upon each expert to identify the data on which his or her opinion relies; if the data are not complete it is for the party relying on the expert's opinion to produce these data. The calculations and conclusions of an expert must be verifiable and other experts must be in a position to counter them and detect any errors in them. To the extent to which this is necessary for such verification, the calculations of the experts must be made available. To the extent to which such data and such calculations are not provided, the expert opinions concerned are unsupported and the Tribunals will draw their conclusions.
18. It is therefore on each party to produce the relevant data and calculations of its experts. While the Tribunals welcome cooperation between the Parties and exchange of data calculations, the Tribunals see no justification for the condition of reciprocity. The report of each expert must be

judged on the supporting data and calculations, whether or not the other party's experts provided the necessary support of their own reports.

19. **Requests Nos 3 to 7:** Withdrawn.
20. **Request No 8:** The Respondents request "Niko's financial model in native format (e.g. Excel) for deriving cash flows of 7 January 2005 [...] and 10 October 2005 ...". The Respondents also assert that Mr Hornaday utilised the Niko model in undertaking his damage calculation. The Claimant is prepared to produce the model subject to reciprocity.
21. The Tribunals refer to their explanation above: if the Parties wish to rely on the reports of their experts, these reports must have the supporting data and information, including computer models, that allow the opposing experts to verify the results and the methods by which they were arrived. There is no justification for the condition of reciprocity.
22. **Request No 9:** The Respondents request "Any document prepared by Niko or its consultants evaluating the risks" concerning the projected revenue. The Claimant objects that the request is "overbroad" and that the information is privileged.
23. To the extent to which the evaluation of projected revenue, including the risks of achieving this revenue, is relevant for the Tribunals' decision, it is for each Party to present its evaluation and take position concerning the evaluation of its opponent. Subject to what has been said above about the need for the experts to support their reports and to the disclosure of client instructions to an expert that affect its report, the Tribunals see no relevance of internal documents prepared by the party and its expert.
24. **Request No 10:** The Respondents seek any "analyses or other documentary evidence supporting Mr Hornaday's view" concerning the depth of wells and the "amount of deviation reflected in the Hughes Report". The Respondents explain that the requested documents also are necessary to evaluate and respond to Claimant's allegations concerning drilling hazards following the two blowouts" and to "BAPEX's response to Niko's proposal to resume drilling". They state: "If Niko cannot produce any documents supporting Mr Hornaday's view on the measured depth, appropriate inferences should be drawn". The Claimant "agrees to produce a record reflecting the assumptions and calculations upon which Mr Hornaday's statement was based. It also objects to the relevance of the documents, referring inter alia to the Tribunals' statements in the Decision on Recoverable Loss concerning the conditions made by BAPEX and the Government for approving the drilling of further wells.
25. The Tribunals are of the view that it is for the party producing a witness statement to determine what documentary evidence it wishes to produce in support of such a statement. The Tribunals will assess the testimony in its context, including any supporting documentary evidence. As explained, the Tribunals see no justification for a party making the production of such evidence subject to reciprocity or other conditions.
26. **Request No 11:** Withdrawn.
27. **Request No 12:** The Respondents seek the production of all documents "showing the procedures and safety measures that were implemented following the Chattak 2 blowouts". The Respondents explain that these documents are necessary "to evaluate Mr Kelly's and Niko's statements on the volume and location of gas at the surface and risks to operations created by the continued flow of gas to the surface ...". They explain that the documents are relevant for the assessment of the "extent and duration of gas emissions after the blowouts". The Claimant contests the relevance of the requested documents and states that Mr Kelly offered no opinion

regarding the volume of gas lost at the surface. Subject to the general objections, the Claimant accepts to produce “specific additional documents setting forth safety procedures that were referred to by Mr Kelly” and asserts that all records relied upon by Mr Kelly in providing his statement have been produced.

28. The Tribunals repeat their observations concerning the evidence supporting statements by witnesses and experts: it is upon the party producing such statements to decide whether it wishes to support the weight of such statements by further evidence. With respect to Niko’s safety measures to which the present request relates, the Tribunals consider that safety measure taken or planned by Niko against continued flow of gas may be of some relevance for the contested issue of gas seepages after the completion of Niko’s relief operations. The Tribunals, therefore, would be interested in knowing whether Niko took any safety measures against continuing gas seepages and the reasons why it did or did not take such measures, without in any way prejudging the relevance of such information. In addition, the comments concerning Requests Nos 13 to 18 apply.
29. **Request Nos 13 to 18:** The Respondents refer to the witness statement of Mr Kelly and request “All Documents relating to the design of the surface gas emissions testing and the results of the testing” (Request No 13); “Records of alarms that occurred, including dates and locations” (Request No 14); “Records of where the gas seepages at ground level were recorded and the results” (Request 15); “All documents that recorded the findings of the surface emissions and details of the systematic measurement and recording of gas emissions as described by Grant Kelly” (Request No 16); “All Rig Rat gas monitoring records and records of gas monitoring referred to by Grant Kelly” (Request No 17; and “The records showing locations, gas concentrations and flow rates recorded during the Tengratila Village Gas Monitoring as described by Grant Kelly” (Request No 18).
30. The Respondents explain that the requested documents are required for their gas loss experts and for the evaluation of the drilling risks. The Claimant considers the documents as not relevant as Mr Kelly was not opining on the quantities of gas lost and the issue of drilling hazards is not relevant for any of the remaining recoverable heads of loss. The Claimant states, however, that, subject to its general objection and “to the extent documents of this nature or containing such information are not already in the Record, in the event there are specific additional documents setting forth the location of gas seepages at ground level, or reflecting the occurrence of alarms as referred to by Mr Kelly, in his Witness Statement that are available, Niko will produce the same”.
31. The Tribunals noted that Mr Kelly’s witness statement describes in detail the extensive programme developed by him and others and applied throughout the period of his involvement with work on the Chattak field (February 2005 to June 2006). The Tribunals are aware that Mr Kelly was engaged as HSE expert and the purpose of his work was not to measure the quantities of escaped gas but essentially to ensure safety. Without prejudice to any findings it may have to make, the Tribunals do however not exclude that the information collected by Mr Kelly and others in the course of these programmes are relevant and valuable for the assessment of the quantity of gas that escaped during the relief operations and possibly after their completion. The Tribunals, therefore, are of the view that this information must be made available to the Respondents and their experts, to the extent to which this has not been done. The Tribunals do not wish to prescribe any method by which the information is made available by the Claimant, but it appears to the Tribunals that this can best be done through direct contact between the experts in the relevant fields.

32. **Request No 19:** Withdrawn.
33. **Request No 20:** The Respondents refer to the description of Niko’s Surface Gas Flux Measurement in Mr Adolph’s Fourth Witness Statement and the data presented in Exhibit -283 as the results of these measurements from October 2015 to February 2020. The Respondents seek “All Documents containing limits of detection/resolution of the flux measurement system”. They explain that documents containing this information are necessary to evaluate the reliability of the measurements. The Claimant raised its general objection and referred to its objection to Request No 9, presumably related to privilege. The Claimant accepted, however, to produce “in addition to documents already in the Record [...] sample of video recordings taken reflecting the construction and operation of the traps and the taking of gas flux measurements as well as updated measurements”.
34. The Tribunals note that the documents are requested to evaluate the reliability of the measurements. If the Claimant wishes to rely on these measurements, it must face any questions concerning their reliability. The Tribunals assume that its assessment of this reliability may be influenced by available support which the Claimant may have produced or withheld. It presumes that any additional documents and information that the Claimant intends to produce may best be made available in consultation between the relevant experts and witnesses.
35. **Request No 21:** The Respondents refer to a statement in paragraph 45 of Mr Adolph’s Fourth Witness Statement according to which Niko observed that the trenches reduced bubbling in adjacent areas. The Respondents seek the production of records that support the statement. Both Parties refer to the positions expressed in relation to Request No 12.
36. The Tribunals are of the view that, to the extent the observation mentioned in Mr Adolph’s Witness Statement is of any relevance for the Tribunals’ decision, it is on the Claimant, if it wishes to support the weight of Mr Adolph’s statement, to provide any relevant evidence.
37. **Requests Nos 22 and 23:** Withdrawn.
38. **Request No 24:** The Respondents refer to paragraph 47 of Mr Adolph’s Fourth Witness Statement, describing the process by which the Surface Gas Flux was measured in the four traps described by Mr Adolph. They seek “All documents showing the location of the manometers and sampling tube on the gas traps”. The Claimant adopts the same position as that with respect to Request No 20, where it stated its willingness to produce video recordings.
39. The Tribunals are of the view that it is for the Claimant to ensure that witnesses on whose testimony it relies provide their explanations with the detail necessary for their assessment.

On behalf of the two Arbitral Tribunals

[signed]

Michael E. Schneider
President
30 July 2021