

NIKO RESOURCES (BANGLADESH) LTD.

v.

**BANGLADESH PETROLEUM EXPLORATION & PRODUCTION COMPANY
LIMITED (“BAPEX”)
(ICSID CASE NO. ARB/10/11)****Procedural Order No 33
(Reply Post-Hearing Briefs)**

1. Further to the November 2021 Hearing, the Tribunal’s procedural directions and its questions of 25 January 2022 (the January 2022 Questions), the Parties filed on 2 March 2022 simultaneously Post-Hearing Submissions.
2. On 9 March 2022, the Claimant wrote and asserted that portions of the Respondent’s submission (a) “purport[ed] to express new opinions without support in the existing evidentiary record or (b) advance[d] claims or legal theories not discussed at the hearing in November”. The Claimant requested that “the Tribunal accord no weight to those portions of the Respondent’s submission”.
3. The Respondent replied on 10 March 2022, objecting to the “Claimant’s description of the scope of the Post-Hearing Briefs and its characterization of Respondent’s 28 February 2022 [*recte* 2 March 2022] submission”. The Respondent relied on the Tribunal’s questions of 25 January 2022 and those that the Tribunal had raised on Day 2 of the November 2021 Hearing. It stated:

Whilst Respondent maintains the position on volumes of gas lost and relevant methodologies it expressed at the Hearing, in the alternative, and when the Tribunal’s List of Questions required so, Respondent provided further calculations adapted to the periods and concepts requested by the Tribunal. These encapsulate Respondent’s “latest position” on the contested issues addressed by the Tribunal’s List of Questions. To request that Respondent refrains from submitting such calculations would tantamount to depriving it of its due process rights and its obligation to respond fully to the Tribunal’s List of Questions.
4. The Respondent recognised that “the record is closed to new factual evidence as per paragraph 12 of PO 32” but considered it generally accepted that “the introduction of new legal authorities always remains open to the Parties”.
5. The Tribunal invited the Claimant on 15 March 2022 to specify by 22 March 2022 the passages of the Respondent’s post-hearing submission that are the subject of the Claimant’s request. The Claimant communicated on the scheduled date a list of the paragraph and footnote references which, in its opinion, fell into the two categories to which its request of 9 March 2022 applied.

6. In its message of 23 March 2022, the Respondent confirmed its objections to the Claimant's request, reiterating that the quoted passages responded to the Tribunal's Questions, and stating that, the Respondent had in its post-hearing submission "provided further calculations and illustrations based on evidence in the record". It discussed some of the paragraphs in the Claimant's list, asserting for instance that Figure 1 in its Post-Hearing Brief was a "demonstrative exhibit created from evidence presented in the written pleadings and testimony at the hearing that illustrates its response to the Tribunal's question 6", and that in response to question 5, it had presented "engineering calculations" applying mathematical formulas to evidence in the evidence; and it further asserted that the numbers in table 1 of its Post-Hearing Brief "are found in the evidentiary record or are the result of calculations using those numbers that are necessary to answer the Tribunal's question 8".
7. The Tribunal has examined the Respondent's Post-Hearing Brief and in particular the passages identified by the Claimant. It notes that, indeed, many of these passages provided assertions of fact and argument that had not been presented by the Respondent at the November 2021 Hearing or at prior occasions. The Tribunal also notes some similar assertions in the Claimant's Post-Hearing Brief, for instance in paragraph 9 *in fine* and footnote 37.
8. The Tribunal is conscious of the fact that the November 2021 Hearing dealt with a broad range of evidence and expert opinion. It is in the nature of such a hearing that it may open new perspectives on the Parties' respective cases and may give rise to adjusted argument. When the Tribunal communicated after the Hearing its questions to the Parties, it pointed out therefore the importance it attributed to "understand the Parties' latest position" on the issues that had arisen, "in particular in response to the criticism raised by their opponent" at the November 2021 Hearing. It also pointed out that, by inviting the Parties to address in their Post-Hearing Briefs the matters arising from the Tribunal's January 2022 Question, the Tribunal did not wish to limit in any way the scope of the Parties' post-hearing submissions.
9. Understanding that the argument and evidence presented at the November 2021 Hearing and responding to the January 2022 Questions, could lead a Party to adjust its argument, the Tribunal sees no objection to such adjustments, provided that such adjustments are presented on the basis of the evidence in the record. Where such adjustment consists in argument and opinion that have not been previously presented, the opposing party must however be given an opportunity to comment.
10. In the explanations to the January 2022 Questions, the Tribunal also set out its preliminary understanding of the Parties' positions on some of the contested issues and expected the Parties to correct any errors in this understanding. The Tribunal notes that in their Post-Hearing Briefs, the Parties have indeed identified such errors and clarified their positions.
11. In this respect, too, the opposing party must be given an opportunity to consider the correction and clarification and to address the position as corrected and clarified.
12. For these reasons, the Tribunal does not exclude or disregard any of the passages in the Respondent's Post-Hearing Brief but gives both Parties an opportunity to respond to their opponent's Brief. These briefs must be limited to rebuttals of statements in the opponent's Brief and may not produce new evidence.

13. Given the imminent Easter holiday, the Tribunal fixes a period of 30 days from the date of this order for the rebuttals. The timeline for cost statements along the lines provided for in the 1 December 2021 procedural timetable will be extended accordingly.
14. For these reasons the Tribunal now makes the following

ORDER

15. The Parties are given the opportunity to respond to the argument in their opponent's Post-Hearing Brief. This response may be filed within 30 days from the date of this order, i.e. by **Monday, 9 May 2022** and must be limited to a rebuttal of any new argument in the opponents Post-Hearing Brief; no new evidence is admitted.
16. The deadline for the Parties' cost statements is extended to **Tuesday, 31 May 2022** and **Tuesday, 21 June 2022** for replies.

On behalf of the Arbitral Tribunal

Michael E. Schneider

[signed]

President
8 April 2022