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Niko Resources (Bangladesh) Ltd.
v.
Bangladesh Petroleum Exploration & Production Company Limited ("Bapex"), and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")
(ICSID Case Nos. ARB/10/11 and ARB/10/18)

By Procedural Order No 3 the Tribunals organised *inter alia* the proceedings concerning the Claimant's request for the Compensation Declaration. The Parties filed their memorials accordingly. The last of these memorials were Niko's Reply Concerning the Compensation Declaration (the Reply), filed on 29 May 2014, and BAPEX's Rejoinder concerning the Compensation Declaration (the Rejoinder), filed on 25 September 2014.

With respect to the Compensation Declaration, the Claimant seeks a declaration of non-liability. At the Preliminary Procedural Consultation the relief requested in this respect by the Claimant was defined in the following terms:

> "… a declaration that [the Claimant] has no liability for any damage that may have arisen from the two well blowouts which occurred on the Chattak wells and that it owes no compensation for such damage".[1]

In the Reply the Claimant discussed at length the factual, technical and legal issues relating to the two blowouts. It was supported by documentary and witness evidence as well as several expert opinions. It sought a number of declarations and orders, the first of which consisted in the request that the Tribunals issue an award in the following terms:

> "Declaring that Niko breached no obligation or law as concerns the two blowouts in 2005 at Chattak field and is not liable to BAPEX, its predecessors, assignors, successors or assigns;"

In the Rejoinder BAPEX stated that it "has never invoked Niko's liability for the two blowouts"[2] and that "this case involves no dispute between Niko and BAPEX concerning the blowouts".[3] BAPEX declared that it had no involvement in the findings of the reports which dealt with the blowouts and added that "it has little or nothing to add in response to Niko's description of the facts".[4] Neither in the Rejoinder nor in its previous submissions did BAPEX discuss the factual and legal issues related to the question whether Niko breached any obligation or law and whether Niko has any liability with respect to the blowouts.

As a result of this position, the Claimant's argument and evidence in support of the request for the Compensation Declaration have not been contested in any substantive manner. BAPEX nevertheless requests the Tribunal to dismiss the Claimant's request in its entirety on grounds unrelated to the Claimant's liability for the blowouts.

In their Decision on Jurisdiction the Tribunals considered and decided the question of their jurisdiction under the JVA concerning Niko's liability for the blowouts and the resulting damage:

[1] Procedural Order No 1, opening paragraph 2 ; quoted in the Decision on Jurisdiction, paragraph 489.
[2] Rejoinder paragraph 2.
[3] Rejoinder paragraph 19.
[4] Rejoinder paragraph 21.

The JVA conferred on Niko the role of a Sole Operator. In that capacity, as recognised by BAPEX in the Rejoinder, "Niko was responsible for all seismic, drilling and testing works, and the development of any discovery of gas in the JVA area".[5] Under the JVA Niko has a broad range of obligations and responsibilities, including the general obligation to "conduct all Petroleum Operations in a diligent, conscientious and workman like manner".[6]

The question whether Niko complied with these obligations under the JVA clearly must be determined according to the procedure prescribed by the JVA itself, i.e. ICSID arbitration. The Tribunals considered this matter in their Decision on Jurisdiction under the heading "Jurisdiction *ratione materiae*" (section 10.2) which may also be referred to as subject matter jurisdiction. The Tribunals found that they have jurisdiction to decide whether Niko is liable under the JVA for the two blowouts (paragraph 497). In addition the Tribunals also found that "it may well be possible that [they] can make findings concerning liability on grounds other than the JVA" (paragraph 506), but left the question open for further consideration.

In the Rejoinder BAPEX does not question nor even discuss the Tribunals' subject matter jurisdiction. Its principal defence consists in stating that it does not make any claims against Niko. However, this does not answer the point at issue: Niko seeks a declaration of non-liability. In order for these Tribunals to make such a declaration, it is not necessary that BAPEX has made such a claim for liability. Such liability has been invoked by others. The Tribunals find that Niko has a justified interest in having the question of its liability examined by the Tribunals having subject matter jurisdiction and, if these Tribunals find that there is no such liability, in receiving a declaration to this effect.

In these circumstances, the Tribunals must continue with the examination of Niko's request for the Compensation Declaration and the issues which are raised by that request. In particular, they must examine the question whether Niko is liable for the two blow-outs and the damage caused by them.

Given the technical nature and the complexity of many of the issues arising in this context, the Tribunals do not wish to proceed in the absence of a critical review of the technical issues arising from the Claimant's case. In the circumstances the Tribunals require the opinion of an independent expert or, given the diversity of the relevant substance matters, several experts.

The Tribunals therefore intend to engage one or several experts to proceed with a review of the relevant technical issues. They will consult the Parties about the choice of the expert(s) and the terms of reference of their engagement.

In light of these considerations, the Tribunals now make the following

[5] Rejoinder paragraph 15.
[6] Article 26.2.4, quoted by the Respondent in paragraph 15 of the Reply

Procedural Order No. 7

1. The Tribunals intend to appoint one or several experts to examine the following subject matters:

   (i) The well design and drilling of the Chattak-2 well and the design and execution of the relief well operation for Chattak-2A;
   (ii) The quantum of gas lost as a result of the Chattak-2 and Chattak-2A blow-out control incidents;
   The air quality and greenhouse gas emissions due to these incidents and resulting monetary loss or damage;

2. The Parties are invited to propose expert(s) for these subject matters. Failing agreement on such experts, the Tribunals may seek proposals from the International Centre for Expertise of the International Chamber of Commerce or may identify the expert(s) by any other means. Before appointing the expert(s) the Tribunals will give the Parties an opportunity to comment. The Tribunals will not be bound by these comments and will make the appointment in their considered discretion.

3. The experts will be provided with the reports of Mr Cline, Mr Kemp and Mr Wright and any other documents produced in the arbitration which the Tribunals consider relevant for their respective assignments. The Parties will be informed of the documents made available to the experts and may propose for communication to the Tribunals' expert additional documents contained in the file.

4. Further details of the proceedings concerning the Tribunals' experts will be discussed during the course of a procedural consultation. To this effect, the Tribunals invite the Parties to inform the Secretariat of the days in October and November 2014 at which they are available for such a consultation with respect to proceedings concerning the Tribunals' experts. This consultation may take place by telephone conference or video conference.

5. If BAPEX informs the Tribunals by 28 October 2014 that, within no more than three months from the notification of this Procedural Order, it will submit a substantive reply to the Claimant's request for a Compensation Declaration, the Tribunals may reconsider the present order.

6. The hearings scheduled for 10 to 14 November 2014 are deferred. New dates shall be considered at the procedural consultation as per above item 4.

[Signed]

On behalf of the two Arbitral Tribunals
Michael E. Schneider
President
17 October 2014