

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)****Procedural Order No 11**

The present procedural order examines, in light of the Parties’ subsequent comments, the Respondents’ request of 9 July 2015, seeking a modification of the proceedings concerning the Parties’ comments on the reports of the Tribunal Experts (the Application) and determines the next steps of the procedure, including the hearing scheduled from 2 to 7 November 2015.

A. The Application and its Context

A.1 By the Secretariat’s letter of 14 April 2015, the Tribunals fixed the time for comments on the reports of the Tribunal Experts (the Reports) at five weeks following the Parties’ receipt of the Reports. That period expired on 15 July 2015.

A.2 On 9 July 2015 each of the Respondents wrote to the Secretariat with the information that they had appointed new counsel.

A.3 The Respondents’ new counsel wrote to the Secretariat on the same day, requesting an extension of the time for filing the Respondents’ comments. The Respondents’ counsel announced at the same time that BAPEX had contracted independent experts assisting BAPEX in the preparation of its comments on the Reports. The Respondents’ counsel added that there was “*crucial new technical information that must be assessed and incorporated into Bapex’s comments*” and stated that a “*complete reassessment of the analysis provided by Mr Masters regarding volumes of gas lost due to the blowouts*” was needed. They requested an extension of the time for comments until 14 August 2015.

A.4 On 14 July 2015 the Tribunals invited “*the Respondents to clarify by 17 July 2015 (i) the grounds on which the Tribunals should admit such an extended submission at this stage of the proceedings and (ii) if such submission were to be admitted, the impact it would have on the programme for this arbitration, including the opportunity for the Claimant to respond to such an additional submission, the dates reserved in November for the hearing on the Compensation Declaration and the scope of the hearing*”.

A.5 In their reply of 17 July 2015, the Respondents’ counsel confirmed that the “*Respondents would like to submit new expert testimony as their primary comments on the reports of the Tribunals’ experts*”. They further requested that “*the Tribunals admit Respondents’ expert testimony at this stage to ensure the equality of arms between the Parties and protect Respondents’ right to fully present its [sic] case*”. The Respondents’ counsel also argued that “*Respondents’ prior counsel failed to inform Respondents of the progress of the Compensation Declaration Claim and did not consult with Respondents regarding his decision not to submit expert testimony or argument on the issues that the Tribunals indicated they would decide*”. Moreover, they argued that “*the addition to the record of*

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the reports of the Tribunals’ experts and the Tribunals’ request for comments have created an additional procedural incident in this arbitration that brings with it the right of each party to a full and fair opportunity to present its case on the matters being addressed.” Concerning the procedural impact of the requested expanded submissions, the Respondents argued that they would have only “*minimal impact on the schedule of these proceedings*”, stating that the time for the Claimant to respond to the Respondents’ expanded submission would be preserved at the originally scheduled period of three weeks.

A.6 Invited to comment, the Claimant wrote on 27 July 2015 that it objected to the Respondents’ request for introducing additional expert evidence into the proceedings on the Compensation Declaration. The Claimant pointed out that the Respondents were given several opportunities to provide argument and evidence in response to the request for the Compensation Declaration, including expert reports, and that they decided not to produce any. The Claimant emphasised that the Tribunals appointed their own experts because “*BAPEX failed to submit expert evidence*”. The Tribunal Experts so appointed had the narrow mandate to provide observations on the reports of the Claimant’s experts and were not to present a new analysis different in methodology from those of Niko’s expert or the Committees. In the Claimant’s view, the Parties’ comments on the reports of the Tribunal Experts therefore must be confined to this scope. The Claimant also objected to the attempt of the Respondents “*to expand the factual record with information that the Tribunals’ experts did not consider and were not asked to consider*”. In addition, the Claimant stated that the Respondents had not provided any evidence that they were not aware of their counsel’s decision not to present expert evidence; the Claimant further described the circumstances surrounding the proceedings and concluded that the Respondents must have known of the relevant steps in the procedure. Finally, the Claimant contested that the submissions announced by the Respondents would have only “*minimal impact on the schedule of the proceedings*”. The Claimant pointed out that in the procedural calendar as originally envisioned, the Claimant would have had from receipt of the Respondents’ First Memorial “*almost four months to prepare responsive expert reports*”. In the Claimant’s view, the Respondents’ suggestion that the Claimant now would have no opportunity to submit expert reports in response and would have only three weeks to respond to the Respondents’ comments and expert reports “*cannot be sustained*”. The Claimant affirmed: “*contrary to the Respondents’ suggestion, granting their request would breach the equality of arms of the parties.*”

B. The Tribunals’ Considerations

B.1 In considering the Application, the Tribunals distinguish between the request for (a) an extension of the time for comments by the Respondents and (b) for the admission of new evidence and expert reports, expanding the scope of the Parties’ comments beyond that foreseen in the programme of the arbitration.

B.2 Concerning the time for comments, the Tribunals note that the Respondents have changed their counsel repeatedly within the past year of these proceedings.¹ As a matter of principle, such changes should not disrupt the proceedings and should not cause procedural disadvantages to the other party. In the present case, the steps provided in the agreed programme for the remainder of the arbitration and the time scheduled for them is sufficient to allow an extension for the Parties’ comments on the reports of the Tribunal Experts without disruption and inconvenience to the Claimant. In these circumstances, the Tribunals are prepared to provide additional time for the

¹ Removing Mr Nawaz, then removing counsel from Matrix Chambers and replacing them by the law firm Watson Farley & Williams and then replacing this law firm by the law firm of Foley Hoag.

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comments so as to afford the Respondents’ new counsel time to acquaint themselves with the file of the case.

B.3 As to the Respondents’ request for expanding the scope of the comments on the Reports and their argument concerning “*equality of arms*” and their right “*to a full and fair opportunity to present [their] case on the matters being addressed*”, the Respondents must be reminded of the history of these proceedings. The Claimant has set out in its letter of 27 July 2015 a detailed account of the relevant steps. The Tribunals refer to this account and summarise the relevant steps as follows.

B.4 At the very outset of the proceedings, at the Preliminary Procedural Consultation and the First Session on 14 February 2011, the Respondents were invited to inform the Tribunals whether they wished to present in these arbitrations claims concerning the loss and damage related to the blow-outs. In Procedural Order No 1 of the same day, the Tribunals reserved for the Respondents the possibility to present “*a claim for the compensation of the damage from the well blow-outs (Compensation Claim)*”. The Respondents did not seize this opportunity and did not present any claims concerning the well blow-outs in these arbitrations.

B.5 It was therefore the Respondents’ considered decision to limit the present proceedings to the Claimant’s request for the Compensation Declaration.

B.6 Given the Respondents’ objections to jurisdiction, the Tribunals first had to consider these objections and dealt with them in their Decision of 19 August 2013. Following this decision, the Tribunals’ proposals of 27 August 2013 and subsequent consultation with the Parties, the Tribunals organised the proceedings on the Payment Claim and on the Compensation Declaration; they set out the procedural timetable in Procedural Order No 3 of 15 November 2013. The Payment Claim was decided on 11 September 2014.

B.7 The procedure for the Compensation Declaration provided two opportunities for BAPEX to comment on the case made by the Claimant. Procedural Order No 3 provided in particular that BAPEX file a First Memorial on 30 January 2014 and added: “*If BAPEX intends to rely on expert reports these reports must be included in the First Memorial.*” The procedural order provided a second opportunity for BAPEX by filing its Rejoinder on 25 September 2014. This Rejoinder was scheduled as the last written submission by the Parties, followed only by a hearing, the dates of which eventually were fixed for the period from 10 to 14 November 2014, and possible post-hearing submissions.

B.8 BAPEX made the submissions provided in Procedural Order No 3 but it refrained from discussing the factual and legal issues relating to the relief sought by the Claimant, namely the question whether Niko breached any obligation or law and whether Niko has any liability with respect to the blow outs. BAPEX did not produce any expert report nor did it respond to the expert reports which Niko had produced.

B.9 By the end of the written procedure as it had been agreed with the Parties and scheduled in Procedural order No 3, BAPEX had not presented any expert report nor had it made any factual and legal argument on the substance of the Compensation Declaration. This part of the claim thus was reduced to the argument and evidence produced by the Claimant. The Tribunals would have had to decide the case concerning the Compensation Declaration on this basis alone.

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B.10 The Tribunals found in Procedural Order No 7 of 17 October 2014 that they nevertheless had to continue with the examination of Niko’s request for the Compensation Declaration and the issues which are raised by that request. The Tribunals explained in this procedural order:

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.

B.11 However, despite its decision not to respond on the substance of the case on the Compensation Declaration, BAPEX was offered an additional opportunity to present its defence. In Procedural Order No 7, announcing their intention to appoint one or several experts, the Tribunals added the following passage:

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.

B.12 BAPEX did not seize this opportunity.

B.13 In order to allow for the appointment of the Tribunal Experts, the time required for preparing their Reports and for the Parties to comment on these Reports, the Tribunals cancelled the hearing that had been fixed for November 2014 and subsequently fixed new hearing dates from 2 to 7 November 2015. The Tribunal Experts have delivered their Reports and the Parties were invited to comment.

B.14 In other words, by 25 September 2014, the time of the BAPEX Rejoinder, the written phase of the proceedings on the Compensation Declaration had been completed. By that time, all documentary evidence had to have been presented, all witnesses had to be announced by short written statements and all expert reports had to have been presented. The additional phase which the Tribunals opened at that stage had a very limited purpose: in the absence of substantive comments from the Respondents, it was to provide the Tribunals with a “*critical review of the technical issues arising from the Claimant’s case*”. This was the purpose for which the Tribunal Experts were appointed and this must be the limit to the comments which the Parties may make to the Reports.

B.15 Against this background, the Respondents have had more than a “*full and fair opportunity*” to present their case and the opportunity to comment on the Reports must be confined within the limits of the mandate assigned to the Tribunal Experts.

B.16 The Respondents allege that they were not consulted by their counsel about the decisions not to submit expert evidence or argument on the issues which the Tribunals have to decide. In its letter of 27 July 2015, the Claimant points out that the Respondents have not provided any evidence for this allegation. The Claimant expresses serious doubt about this declaration and recites the circumstances which justify such doubts. The Tribunals need not decide this question since, even if the allegation were correct and the Respondents were not consulted about the decisions of their counsel, there could be no excuse for the Respondents lack of interest in the proceedings to an extent that the total absence of any substantive response on the merits of the case by argument, evidence and expert reports escaped their attention.

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B.17 The Tribunals conclude that there is no justification for revising the procedure as requested now by the Respondents. After the completion of the written procedure, the Tribunals added a phase by which they sought a critical review of the Claimant’s technical case through independent experts so as to assist them in deciding this case despite the absence of a substantive presentation by the Respondents. The addition of this phase was itself designed in the interest of ensuring that the Tribunals heard more than one side of the argument and thus afforded an additional protection to the Respondents, even in the absence of their own argument and evidence. The next steps must remain limited to this additional phase and the critical review by the Tribunal Experts. To the extent to which it exceeds these limits, the Respondents’ request must be dismissed.

C. The Scope of the Parties’ Comments and the November 2015 Hearing

C.1 When determining the scope of the Parties’ comments to be made in the course of this additional phase, the Tribunals took into account the positions expressed at the time when the expert procedure was decided. The Tribunals noted in particular that, at the procedural consultation during which the appointment of the Tribunal Experts was discussed, the Claimant announced its intention to ask that its experts be afforded the opportunity to comment, in writing and prior to the hearing, on any formal expert report prepared by the Tribunal Experts. The Claimant also envisaged a joint expert witness examination between the Claimant’s experts and the Tribunal Experts.² No objection was raised against this intention.

C.2 The Tribunals conclude that, in the Parties’ understanding of the procedure, the Claimant is admitted to join to its comments on the Tribunal Experts’ reports observations by its own experts, provided they remain within the narrow confines of the Tribunal Experts’ Terms of Reference and their Reports. The Tribunals also conclude that the Claimant’s experts may be present at the hearing; they reserve the possibility that these experts be questioned and confronted with the Tribunal Experts.

C.3 Within the same limits, the Tribunals admit, as part of the Respondents’ comments, observations by any experts which the Respondents may appoint and the presence of such experts at the hearing. Within these limits the Respondents’ Application is granted.

C.4 Concerning the time to be allowed for the Parties’ comments and for the Parties’ responses to the other party’s comments, the Tribunals understand from the Parties’ correspondence that they are well advanced in the preparation of their comments and any possible observations and that these could have been submitted by 14 August 2015. In order to afford the Parties and their experts the time that may be required to make any adjustments following the present procedural order, the Tribunals fix the time for their comments and possible observations by the Parties’ experts at 31 August 2015.

C.5 As to the time limit for each party’s response to the other party’s comments, the Tribunals noted the Respondents’ position according to which the Claimant was expected to respond to the Respondents’ new expert reports and expanded comments within three weeks. The Tribunals do not believe that this would have provided the Claimant with a “*full and fair opportunity*” to comment on this new material. As the scope of the Parties’ comments has now been substantially reduced and remains within the originally prescribed limits, the Tribunals are of the view that a period as envisaged in the original schedule is reasonable. The Tribunals therefore fix the time for the Parties’ responses at 30 September 2015.

² See Transcript of the 12 November 2014 Procedural Consultation, p. 33.

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C.6 In order to ensure that these limits are strictly observed at the hearing, the Tribunals intend to conduct themselves the questioning of the Tribunal Experts and of the Parties’ experts. The Tribunals reserve the possibility for the Parties to question the Tribunal Experts on specified issues.

C.7 The Tribunals and the Secretariat will consult the Parties about further details concerning the agenda for the November 2015 hearing. As stated in Procedural Order No 3, the Tribunals envisage a procedural meeting, probably in the form of a telephone conference, in order to address any outstanding issues concerning the hearing. The Tribunals propose a date during the week of 19 October 2015. The Secretariat will consult the Parties about a convenient date and time during that week.

D. In light of these considerations the Tribunals make the following

ORDER

D.1 The time for the Parties’ comments on the reports of the Tribunal Experts (the Reports) is extended to Monday 31 August 2015. These comments may include observations by the Parties’ experts. They must be strictly confined to a reply to the Reports, identifying seriatim the specific paragraph or portion of each Report to which each element of the comments is addressed. In any event, they must remain within the scope which has been assigned to the Tribunal Experts in their Terms of Reference; in particular they “*shall not present a new evaluation, different in methodology*” from that set forth by the respective expert of the Claimant or adopted within the relevant Committee Reports. No new factual allegations or evidence is admitted.

D.2 Each party may respond to the other party’s comments by Wednesday 30 September 2015. These responses must be strictly limited to the points raised in the Parties’ comments, including any observations of the Parties’ experts.

D.3 The Tribunals envisage a procedural consultation by telephone conference prior to the hearing and propose such consultation to be held during the week of 19 October 2015.

D.4 The hearing in London from 2 to 6 November 2015 with possible prolongation to 7 November 2015 is confirmed. At the hearing the Tribunal Experts will be present. The Parties’ experts may also be present. The questioning of the experts will be conducted by the Tribunals. The Tribunals may hear the Tribunal Experts and the Parties’ experts collectively. They reserve the opportunity for Parties to question the Tribunal Experts on specified issues.

D.5 The Tribunals will consult the Parties about other aspects of the hearing organisation, including the possibility of short opening statements.

[signed]

On behalf of the two Arbitral Tribunals

Michael E. Schneider

President

19 August 2015