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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)**

# Procedural Order No 12

The present procedural order addresses the scope of the proceedings on the Compensation Declaration and the scope of the upcoming hearing, scheduled to commence on 2 November 2015 in London.

The Tribunals recall that in the proceedings concerning the Compensation Declaration, the Claimant requests a declaration 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 support of this request, the Claimant identified what it considered the relevant obligations and laws and sought to demonstrate that they were not breached. The Respondents did not contest the merits of the Claimant's case. They did not examine the obligations and laws which were considered in the Claimant's request; the Respondents neither asserted that these obligations and laws were breached nor did they argue that the list was incomplete and other or additional obligations and laws had to be considered. The Tribunals therefore examined the case on the basis so defined and appointed experts to assist in this examination.

Once the Tribunals' experts had delivered their reports and the Tribunals had invited the Parties to comment on these reports, the Respondents changed their position and, through their submissions and new expert reports, introduced new considerations that would have expanded the scope of the Tribunals' examination. The Respondents argued *inter alia* that the applicable laws, the obligations under the JVA, and generally accepted standards of the international petroleum industry ("Applicable Laws and Standards") considered by the Claimant to date were incomplete; the Respondents identified other Applicable Laws and Standards which, in their view, had been breached by Niko.

The Claimant objected to this expansion and insisted that the hearing scheduled for 2 to 7 November 2015 deal with the case as it had been presented and which had remained uncontested until recently.

At the Pre-Hearing Conference on 1 October 2015 the Tribunals discussed with the Parties the choice between, on the one hand, what was called the "base approach", considering the case as it had been made by the Claimant and, on the other hand, an "alternative approach" which included in the scope of the relevant obligations and laws also those which the Respondents and their experts had raised recently. In this "alternative

approach" the proceedings on the Compensation Declaration would be extended "*to the full scope of possible liability as it has now been identified in BAPEX's recent submissions*".[1]

In order to ensure that the full scope of possible breaches was covered, the Tribunals invited the Respondents to complete the list of Applicable Laws and Standards that, in their view, were breached by Niko. As the Respondents rightly point out in their letter of 19 October 2015, the invitation to complete the list was only envisaged but not made at the Pre-Hearing Conference on 1 October 2015. However, once the Claimant had chosen the "alternative approach," the Tribunals formally invited the Respondents by their letter of 7 October 2015 to identify, by 12 October 2015, "*additional obligations and breaches by the Claimant, specifying the source of each obligation and its precise content*" – now referred to as the "Breaches".

In their letter of 12 October 2015 the Respondents insisted that it was the Claimant which had the burden of proof but added that "*BAPEX will meet [the Tribunal's] request*". The Respondents then stated that, in the courts of Bangladesh and specifically in the Money Suit, Niko is pursued under general tort liability and environmental liability; but the Respondents did not identify with specificity any additional Laws or Standards which Niko's operations had breached, and thereby caused the damage flowing from the blow-outs. The Tribunals must conclude that the Respondents have no further Breaches to add which the Tribunals must consider when examining whether to make the requested declaration.

For the avoidance of doubt, the Tribunals add that identifying the Applicable Laws and Standards does not affect the burden of the Claimant to establish that it has complied with these Laws and Standards or that they are not applicable in the circumstances. The Tribunals further add that the question concerning such alleged breaches of the Applicable Laws and Standards is different from that relating to the legal basis for any liability flowing from any such Breaches.

In light of these considerations, the Tribunals make the following

**ORDER**

1. The list of Breaches of Applicable Laws and Standards that must be considered by the Tribunals when making their determination concerning the requested declaration is now complete. The Tribunals will examine by reference to the Breaches alleged until now the Claimant's request for a declaration according to which "*Niko breached no obligation or law as concerns the two blowouts in 2005 at Chattak field".*

2. Further to the Parties' request expressed during the Pre-Hearing Conference, the Tribunals have endeavoured to provide guidance as to the issues that arise in the context of this examination. They provide this guidance in the attached Note on the Scope of

[1] Summary Minutes, paragraph 7.

Examination and Questions for Consideration. The Tribunals emphasise that this Note is preliminary and provisional in nature, prepared on the Tribunals' present understanding of the issues. It does not prejudge in any manner the Tribunals' decision.

[*signed*]
On behalf of the two Arbitral Tribunals
Michael E. Schneider
*President*
21 October 2015

**ANNEX**
**November 2015 Hearing (Compensation Declaration) –**
**Note on the Scope of the Examination and Questions for Consideration**

Further to the request of the Parties, the Tribunals announced at the Pre-Hearing Conference on 1 October 2015 that they would endeavour to provide during the week of 19 October 2015 some guidance on the issues to be considered at the hearing, in particular concerning the introductory presentations by the experts at the November 2015 hearing.

The questions and issues outlined below were drafted by the Tribunals in light of the Parties' written submissions and expert reports filed to date. They are provisional and may not be taken as prejudging any of the issues that remain to be decided; nor do they restrict the Tribunals with respect to questions and issues the Tribunals may raise at the hearing.

1. The Tribunals understand that the overall principles governing Niko's obligations concerning the conduct of the operations under the JVA are set out in Article 26.2.4 of that agreement and require Niko to

> … conduct all Petroleum Operations in a diligent, conscientious and workmanlike manner, in accordance with the applicable law, this JVA and generally accepted standards of the international Petroleum industry designed to achieve efficient and safe development and production of Petroleum and to maximize the ultimate economic recovery of Petroleum from the JVA Area.

In addition, the JVA spells out other obligations of Niko as the Operator relating to its conduct of the operations in Bangladesh, in particular in Article 27, entitled "Health, Safety & Environment (HSE)". To simplify, the Tribunals refer to all obligations under the applicable law, the JVA and generally accepted standards of the international Petroleum industry as the "Applicable Laws and Standards".

2. The Tribunals understand that, in order to rule on the Claimant's request for a declaration of non-liability, they will have to examine and, following that examination and the Parties' argument, decide in the first phase of this part of the arbitrations

   (i) whether, in the conduct of drilling the Chattak 2 well and the relief operations following the first blow-out, Niko breached any of the Applicable Laws and Standards ("Breaches");

   (ii) whether any such Breaches are causal for the blow-outs; and

(iii) to the extent to which they were causal for the blow-outs, whether such Breaches could have caused any damage (loss of gas, damage to the population and the environment or otherwise).

(iv) The questions whether any such damage actually did occur, the importance of such damage, and its quantification, are reserved for a subsequent phase of the arbitrations.

3. The Tribunals wish to identify the source of the Applicable Laws and Standards, in particular

(i) whether there are any published texts which record them;

(ii) if such text exist, identify the texts;

(iii) if such texts do not exist, how else can the Applicable Laws and Standards be determined?

(iv) to what extent are the Applicable Laws and Standards on which the experts' conclusions rely generally accepted in the industry or based on the specific experience of the expert opining or on that of the personnel conducting the operations?

(v) Are there differences in the Applicable Laws and Standards depending on the circumstances under which the operations are performed, e.g. the location of the well, the characterisation of the well as "marginal" or "abandoned", the revenue that can be expected from the well, the size of the operator company?

4. The Tribunals have concluded from the expert reports that the Chattak field is characterised by "shallow gas" and that formations of that nature require particular precautions on the part of the operator. Concerning further aspects of the factual basis and assumptions for the analysis, the Tribunals consider that the following issues may need to be addressed:

(i) Information available to Niko when it designed and performed the drilling of the Chattak 2 well and the relief operations;

(ii) Specifically, information about the Moulavi Bazar blow-out;

(iii) Assumptions which Niko had to make on the basis of the (possibly limited) information available to it;

(iv) Information that was gained from the Chattak blow-outs and the extent to which Niko could have been expected to make allowance for it when planning and conducting the operations;

(v) Plausible explanations for the causes of the two blow-outs and the chain of events causing each of them;

(vi) Did Niko's operations, in addition to causing the blow-outs and the resulting damage, compromise the long term viability of the Chattak field, rendering it unsuitable for any further production?

5. In a provisional manner, the Tribunals have endeavoured to identify in the submissions of the Parties and in the expert reports the Breaches that have been alleged and to which, according to Procedural Order No 12, the Tribunals' examination now is limited. The Tribunals suggest to express these Breaches in the following manner:

(i) The casing design and setting depth for the 13-3/8" casing;

(ii) The well design for kick tolerance;

(iii) The well design for trip margin of overbalance;

(iv) The reaction of the rig crew when the blowouts occurred;

(v) The choice of the consultant for the blowout control;

(vi) The design and implementation of the Chattak 2A relief well;

(vii) In particular, the failure to drill one or more observation wells;

(viii) Defects in the design and implementation of the Chattak 2B relief well;

(ix) Failure to conduct a shallow gas hazard analysis and failure to achieve a proper understanding of the shallow gas hazards;

(x) Failure to calculate formation pressures properly;

(xi) Failure to determine fracture gradients adequately;

(xii) Failure to use a large bore diverter system instead of the classical blowout preventer (BOP) actually used;

(xiii) Crew training and experiences, including certification;

(xiv) Gas dispersion analysis;

(xv) Use of abrasion resistant materials and solids extraction; and

(xvi) Fire water supply.

The Tribunals point out that this identification is made on their present provisional understanding of the case. They invite the Parties and the experts to correct, or complement, where necessary, the identification and description of these Breaches. If any of the Breaches identified in the Parties' submissions and in the expert reports are not included in the above list, the Parties are invited to add them to the list. Such corrections and additions must be identified precisely, indicating the parts of the Parties' submissions or expert reports where breaches were described.

6. What are the consequences, in terms of liability, of Niko's choice of personnel and consultants and the due diligence reflected in this choice, distinguishing between the drilling of the Chattak 2 well and the relief operations?