

that adequate safety and precautionary measures have been taken for their dismantling in accordance with law;

9. The Government is directed to set up a High Level Technical Committee comprising representatives from the Ministry/Department of Shipping, the Ministry/ Department of Environment, Ministry of Labour and Manpower, Retired Naval Officers, Academicians/Experts in the field of Marine Engineering, Marine Biology, Specialists in the field of Environment, Soil Science and Ecology, Hazardous Waste Management and relevant NGOs, such as BELA.

Let the concluding portion of the judgment and order along with the directions above the communicated to respondents namely, respondent No. 5, Secretary, Ministry of Environment and Forest, respondent No. 6, Director General, Department of Environment, respondent No. 1, Secretary, Ministry of Shipping, respondent No. 8, Director General, Department of Shipping, and respondent No. 17, Proprietor, Madina Enterprise at once by a Special Messenger of this Court at the cost of the petitioner.

Bangladesh Environmental Lawyers Association (BELA) Vs. Bangladesh

WP No. 6911 of 2005, D-/16-11-2009

(Foreign Mining Company to Compensate for Blow Outs)

Mr. Justice Syed Mahmud Hossain and Mr. Justice Quamrul Islam Siddiqui

Quamrul Islam Siddiqui, J.: In this application under Article 102 of the Constitution of the People's Republic of Bangladesh, the petitioners challenged the following and sought for direction as under:-

*- Chintu
Chauhan
Mitigates*

- (1) why the impugned Joint Venture Agreement (shortly JVA) should not be declared to have been made without lawful authority and is of no legal effect (Annexure-A);
- (2) why the JVA should not be treated as being nullity having been procured through flawed processes and resorting to fraudulent means and forged documents by Niko (respondent No. 10 (Niko Resources (Bangladesh) Ltd.));
- (3) why JVA should not be treated as illegal and came to an end as a result of material breach of the statutory and legal obligations of the Petroleum Act, 1974 and the Environment Conservation Act, 1995 and also the constitution of Bangladesh; why respondent Nos. 1-5 (Secretary, Energy Division, Ministry of Power, Energy and Mineral Resources; Secretary, Ministry of Law, Justice and Parliamentary Affairs; The Secretary, Ministry of Environment and Forest; Bangladesh Oil, Gas & Mineral Corporation (Petrobangla); Bangladesh Petroleum Exploration and Production Company Ltd. ("BAPEX")

- (4) should not be directed to take legal measures to protect the public property, that is, subject matter of JVA by respondent No. 10 by discharging its statutory duties to mitigate the damage and loss caused by its failure to discharge its obligations and to refrain from asserting any right under JVA to receive payment thereunder;
- (5) why respondent Nos. 1-5 should not be directed to take immediate effective measures to realize full compensation for destruction of the valuable natural gas resources and the damage to life, property and environment by the blow out and;
- (6) why the JVA should not be declared to have been made in violation of Articles 135, 143, 145 and 149 of the constitution?

The facts leading to the issuance of the Rule, in brief are:-

The petitioners are non-governmental organizations registered under the Societies Registration Act and the Companies Act, working in their respective fields to promote environmental and human rights. They are authorized by their respective committees/boards to file the instant public interest litigation. The petitioners organizations have proven experience and expertise in promoting and protecting human, environmental and livelihood rights and upholding rule of law and public interest against violation of legal provisions and abuse of and misuse of power by public agencies in dealing with public properties.

Respondent No. 1 is Bangladesh represented by the Secretary, Energy Division, Ministry of Power, Energy and Mineral Resources responsible for administration of all laws, policies and matters relating to petroleum, natural gas and issues mentioned in the Petroleum Act, 1974 and the Oil, Gas and Mineral Corporation Ordinance, 1985. Respondent No. 3 is the Ministry of Environment and Forest represented by its Secretary and is responsible for the overall environmental administration of the country. Respondent No. 4 is Bangladesh Oil, Gas and Mineral Corporation known as Petrobangla (hereinafter referred to as Petrobangla) established under the Bangladesh Oil, Gas and Mineral Corporation Ordinance, 1985 and has been authorized and entrusted with the responsibilities, inter alia, to prepare and implement programs for exploration and developments of oil, gas and mineral resources and to implement the Petroleum Act, 1974 providing for exploration and production of petroleum. Respondent No. 5 is Bangladesh Petroleum Exploration and production Company Ltd.(hereinafter referred to as Bapex), a company incorporated under the Companies Act, wholly responsible for the development and production of Petroleum from Marginal/Abandoned Chhatak and Feni Gas Fields. Respondent No. 6 (The Director General, Department of Environment) is the Director General, Department of Environment empowered by the Environment Conservation Act, 1995. Respondent No. 7 (The Deputy Commissioner, Sunamganj District) is responsible for compliance with environmental clearance certificate issued for exploration/mining activities, prevent/stop activities hazardous to environment and realize compensation for injury done to ecology and or people. Respondent No. 10 is Niko Resources Bangladesh Ltd., a private limited company incorporated under the laws

of Barbados as a subsidiary of Niko Resources Ltd. and has been operating in Bangladesh on the basis of permission issued by respondent No. 9 (Board of Investment (BOI)) November 30, 2003, vide Memo No, BOI/Branch/24/2003/80 (hereinafter referred to as Niko). Respondent No. 10 is the operator under the impugned JVA and has been held responsible for the successive explosions and fire in the JVA area of Chhatak (West) that took place on January 7, 2005 and June 24, 2005.

The petitioners have been aggrieved by the activities of Niko for its failure to perform its functions according to the terms and conditions of JVA. The JVA was executed on October 16, 2003 between respondent No. 5 (Bapex) and respondent No. 10 (Niko) in violation of Article 142 of the Constitution and sections 3 and 4 of the Bangladesh Petroleum Act, 1974. The JVA was signed by respondent Nos. 5 and 10 by inclusion of Chhatak (East) Exploration Prospect by fraudulent means upon obtaining a written legal opinion from M/s Moudud Ahmed and Associates. The JVA was procured by fraudulent means on the basis of a forged written opinion. The inclusion of Chhatak (East) was clearly outside the subject matter of the JVA. The JVA was intended to apply only to developing marginal/abandoned fields and not to give any exploration rights in relation to an Exploration Prospect, Chhatak (East) which was not subject matter of the JVA. The process of executing the JVA started with a letter dated June 28, 1998 submitted by Niko. By this letter the Niko Resources Ltd. gave an unsolicited offer to respondent No. 1 wherein the Niko Resources expressed unsolicited interest for the development and production of gas fields Chhatak, Fenchuganj, Bianibazar and Kamta under a joint venture describing these fields as Marginal and non-producing gas fields. In this letter Niko did not mention the necessary technical information to fully evaluate the geological, geophysical and engineering aspects of the subject, that is, marginal fields. In the above letter (Annexure-C) Niko Resources expressly guaranteed that development in these fields would be at its own risk and expense. Moreover, the terms and conditions that internationally prevail in the development of marginal fields will also be present here. The Niko will operate in a safe and environmentally responsible manner as it never had a blow out in the past. Clause 6(c)(i) of the draft Memorandum of Understanding (MoU) annexed to the unsolicited offer letter (Annexure-C) states that during the negotiation period, the Government will not encourage, entertain, solicit or engage negotiation or discussions with any party other than Niko in respect of this project. The Niko Resources Ltd. also proposed further modality for finalizing the joint venture with respondent No. 5. If Niko remains the only qualified party or receives the highest mark then the contract negotiated with Niko should be executed. If any other party is found to be in the leading position, then Niko shall be asked to match that offer. If Niko agrees to match the leading offer, then the contract will be executed with Niko. If Niko is unable to match the best offer then the contract shall be executed with the technically qualified and commercially successful party. Upon receipt of the unsolicited offer from Niko resources, respondent No. 1, vide memo No. BiJaKhaSho/Prash-4(U:)/Niko:Resou:-22/97/204 dated May, 25, 1999 informed respondent No. 4 the following decisions:-

“ (ক) নিকো রিসোর্সের প্রস্তাবের প্রেক্ষিতে নিকো ও বাপেঞ্জের যৌথ উদ্যোগের মাধ্যমে ছাতক, কামতা ও ফেনী গ্যাস ক্ষেত্রগুলি Marginal Gas Field Development ধারণায় উন্নয়ন ও উৎপাদনের বিষয়টি গ্রহণ করা যায়।

(খ) নিকো রিসোর্সের সঙ্গে সমঝোতা স্মারক (MoU) স্বাক্ষরের পূর্বে বাপেঞ্জ ও নিকোর মধ্যে Joint Venture Agreement চূড়ান্ত করতে হবে।

(গ) অতঃপর উক্ত গ্যাস ক্ষেত্রগুলি উৎপাদনের ক্ষেত্রে নিকো ও বাপেঞ্জ কর্তৃক প্রণীত প্রস্তাব, প্রয়োজনে Swiss Challenge পদ্ধতি অবলম্বনে যাচাই করে, বাস্তবায়নের পদক্ষেপ নেয়া যেতে পারে। ”

From the above decisions, respondent No. 1 directed that ‘Swiss Challenge’ process may be resorted to for evaluation of the unsolicited offer. On 25.5.1999, respondent No. 1 also directed respondent No. 4 to take further necessary measures to implement the unsolicited offer. Subsequent development suggests that as a part of further necessary measures, a Framework of Understanding for the Study of Development and Production of Hydrocarbon from the Non-producing Marginal Gas Fields of Chhatak, Feni and Kamta was signed between respondent No. 5 and 10 on August 23, 1999 (hereinafter referred to as the FoU), Annexure-A. In February, 2000, the Study Report as Annexure-A titled “Bangladesh Marginal Field Evaluation Chhatak, Feni and Kamta” was finalized by respondent Nos. 5 and 10. This Study Report dealt with Chhatak in two different parts, namely, Chhatak (West), and Chhatak (East). In the study report, the description of Chhatak (West) field was given as “discovered field”. On the other hand, Chhakat (East) was described as an “exploration structure” with a proposal to drill an exploratory well only in respect of undiscovered/unexplored areas. Based on the findings of the Study Report, it was concluded that a Joint Venture contract as earlier stipulated might be executed between respondent Nos. 5 and 10. Although Niko Resources earlier submitted a draft JVA on November 7, 1999, the negotiation over the JVA effectively started after the submission of the Study Report. On April 13, 2000, a committee was formed by respondent No. 5 to finalized the terms and conditions of the JVA submitted by respondent No. 10 without resorting to any ‘Swiss Challenge’ for evaluation. This matter of JVA was discussed at the 114 and 118 Board Meeting of respondent No. 5 held on June 8, 2000 and August 21, 2000 and also at the 287 Board Meeting of respondent No. 4 held on October 22, 2000. At those Board Meetings the following decisions, amongst others, were taken:

- (১) আলোচ্য Joint Venture এর উদ্দেশ্য হইল ইতিপূর্বে পরিত্যক্ত ছাতক, ফেনী ও কামতা Non-Producing Marginal Gas Field সমূহকে বাণিজ্যিকভাবে গ্যাস উৎপাদন ক্ষেত্রে উন্নীত করা। আলোচ্য যৌথ উদ্যোগের কার্যক্রম পরিচালনা করিবার জন্য ছাতক গ্যাস ক্ষেত্রের পশ্চিম Block, ফেনী গ্যাস ক্ষেত্র এবং কামতা গ্যাস ক্ষেত্র এলাকা চিহ্নিত করা হইয়াছে এবং ছাতক পূর্ব Block একটি ভিন্ন এক্সপ্রোরেশন Lead বিবেচিত হওয়ায় প্রস্তাবিত কার্যক্রমে উহা ছাতক গ্যাস ক্ষেত্র এলাকার ভিতর অন্তর্ভুক্ত করা হয় নাই।
- (২) আলোচ্য Joint Venture এর আওতায় উৎপাদিত Product Agreement এর সম্পূর্ণ মেয়াদকালীন সময়ে বাপেঞ্জ প্রতি এমসিএফ গ্যাস মার্কিন ডলার ১.৭৫ হারে ক্রয় করিবে এবং

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার কর্তৃক সময়ে সময়ে অনুমোদিত end users price এ বিক্রয়/বাজারজাত করিবে।

- (৩) বিশদ আলোচনার পর বোর্ড মন্ত্রণালয়ের দিক নির্দেশনা অনুযায়ী এবং বাপেক্স বোর্ড এর ২১-৮-২০০০ইং তারিখে অনুষ্ঠিত ১১৮তম সভার সিদ্ধান্ত ও সুপারিশ অনুযায়ী প্রণীত ছাতক, ফেনী এবং কামতা Non-Producing Marginal গ্যাস ক্ষেত্রসমূহ সুইস চ্যালেঞ্জ পদ্ধতি অবলম্বনে উন্নয়নের লক্ষ্যে বাপেক্স এবং মেসার্স নিকো রিসোর্সেস লি: এর সঙ্গে সম্পাদিতব্য খসড়া Joint Venture Agreement মন্ত্রণালয়ের সিদ্ধান্ত গ্রহণের নিমিত্তে প্রেরণের অনুমোদন করে।

From the decisions of the 287 Board meeting of respondent No. 4 it appears that respondent No. 10 was declared disqualified at the second round of bidding for the Production Sharing Contract (shortly, PSC). At the said meeting the draft JVA was examined by a 7-member PSC Negotiation Committee which reiterated the decision of respondent No. 5 for excluding the Exploration Prospect of Chhatak (East) from the impugned JVA. Subsequently a series of meetings of the Board of respondent Nos. 4 and 5 took place wherein various clauses of draft the JVA were discussed with special emphasis on issues regarding (i) exclusion of Chhatak (East) Exploration Prospect from the JVA; (ii) inviting of other competitive offers through international competitive bidding adopting the method of "Swiss Challenge" prior to executing the JVA; and (iii) fixing sale price for gas. Meanwhile respondent No. 4 developed a procedure entitled, "Procedure for Development of Marginal/Abandoned Gas Field" (hereinafter referred to as the Procedure) and it was submitted to the then Prime Minister on June 6, 2001 for approval. Clause 3 of the Procedure provides that in order to declare any gas fields as marginal, respondent No. 4 shall constitute a technical committee which will evaluate the status of all gas fields on the basis of geological, geophysical and engineering data production history, costs effectiveness, size of field, remaining recoverable reserve, well deliverability, costs of production, access to pipeline and market etc. and determine which gas field may be considered as marginal and abandoned. It was decided that for the purpose of this Procedure, Chhatak, Kamta and Feni gas fields should be deemed to have been declared Marginal/Abandoned gas fields. In fact, in the Procedure Chhatak (East) gas field was not included. Though, it has been categorically made clear to respondent No. 10 that the Exploration Prospect of Chhatak (East) shall not be covered by the impugned JVA respondent No. 10 persisted in its attempt to gain undue advantage by including Chhatak (East) in the JVA area. Respondent No. 10 in its letter dated July 3, 2001 (Annexure-G) however, accepted the fact that Chhatak (East) is an undiscovered exploration area and proposed better fiscal terms for the same. In its subsequent letter dated July 8, 2002 (Annexure-G-1) respondent No. 10 requested respondent No. 5 to include Chhatak (East) in the JVA, contending that under clauses 1, 2 of the Procedure the same is treated as abandoned. On September 16, 2002 respondent No. 1 again confirmed that the activities under the JVA would be confined to Chhatak (West) gas field (Annexure-I). But in a subsequent letter dated November 25, 2002, respondent No. 10 requested respondent No. 5 to include Chhatak (East) in the JVA (Annexure-J). Respondent No. 10 obtained a 'legal opinion' on 27.2.2003 in order to

gain an undue advantage by dubious means for inclusion of Chhatak (East) in the JVA. Respondent No.1 also acted without lawful authority, relying upon the 'legal opinion' procured by respondent No. 10. There is striking similarities between the language of 'legal opinion' obtained by respondent No. 10 and the legal opinion given by respondent No. 2. Based on the legal opinion of respondent No. 2, the JVA was finally approved at the 333 meeting of the Board of respondent No. 4 held on July 22, 2003. At the meeting, the Board included the Chhatak (East) Exploratory Prospect as a marginal/abandoned gas field and the same was signed on October 16, 2003. It is clear that inclusion of Chhatak (East) in the JVA area was collusive and malafide. The requirement of adopting 'Swiss Challenge' to invite competitive offers through international bidding prior to executing the JVA with respondent No. 10 was also overruled on the basis of the erroneous and malafide opinion of respondent No. 2. The approval of the impugned JVA on the basis of such malafide opinion of respondent No. 2 was in defiance of, and disregard for, the series of decisions of the Government that favoured 'Swiss Challenge'. The available documents also suggest that despite clear decision that the sale price of gas shall be US\$ 1.75 per MCF, the impugned JVA already negotiated and executed failed to guarantee such minimum sale price. After execution of the impugned JVA respondent No. 10 started drilling a well in the Chhatak (West) field on December 31, 2004 at a place called "Tangratila" without approval of the drilling program by the Joint Management Committee as envisaged in clause 6.2 of the JVA which is a clear violation of the JVA. While respondent No. 10 was continuing with drilling well, a severe exploration/blow out occurred on the night of January 7, 2005 around 9.30 P.M putting the drilling well and its adjoining area on fire. The ferocity, gravity and magnitude of the fire that continued for a long period in various areas was devastating. After breaking out of the fire, several committees were formed by the Government and other statutory agencies to investigate into the causes/reasons for the explosion and fire and the various damages occurred. The committee submitted its report on February 10, 2005 primarily holding respondent No. 10 responsible for the explosion/fire. The aggressive drilling by the Chinese Company appointed by respondent No. 10 on the basis of faulty design of respondent No. 10 and negligence in performing duties by respondent No. 5 were identified as one of the reasons for the explosion/fire. The committee assessed loss of 100 BCF of gas till the date of submission of the report. The committee recommended realization of compensation for the loss and damages. By memo No. PaBaMa-4/5/65/2004/184 dated 2.4.2005, another committee was formed by respondent No. 3 to assess the environmental damages caused by the explosion/fire. The committee submitted its report on April 13, 2005 stating the immediate losses caused by fire in the sectors of air, trees and forest, agriculture and fisheries, water resources, soil, ecology, sand, health and social structure system of the local people were calculated at Tk. 35.45 crore. One-member committee of the Chief Reserve Study Cell of respondent No. 4 submitted its report on 4 June, 2005 stating that the loss of gas if calculated in monetary terms could be as high as Taka 100 crore. Another committee was formed with respondent No. 7 mainly to assess the loss of the local people. The Committee estimated that because of the blow out and continuing fire the local people have suffered a loss of Tk.1.19 crore on account of

loss of agriculture, crops, plantation, trees, forest, homestead, fisheries etc. After 5(five) months of the first blow out, respondent No. 10 started drilling relief well on May 31, 2005 to stop escaping of gas from the first blow out. On June 24, 2005 around 3 A.M. a second blow out occurred even with higher magnitude than the first one. The expert fear that the second blow out has damaged the gas reserve of Chhatak (West) to the extent that it might have to be declared abandoned. While Professor Mohammad Tamim of the Bangladesh University of Engineering and Technology (hereinafter referred to as BUET) has termed the delayed excavation of relief well by respondent No. 10 as "crime", on his expert opinion he mentioned that, it would be near impossible to drill any well in the field to produce gas and that the field might have to be declared abandoned. The reported incident of explosion/fire gave rise to genuine concern amongst the local people regarding the safety and security of their lives, property and livelihood. The failure of respondent No. 10 to handle safe and efficient drilling caused colossal damage of the area. A 7-member probe committee was formed by respondent No. 1, vide office order dated June 25, 2005 with the Terms of Reference (ToR) to review; 1) Whether respondent No. 10 had adequate preparation (manpower, equipment) to start the new drilling operation after the first blow out; 2) whether the design of respondent No. 10 for drilling the well was proper; and 3) whether respondent Nos. 4 and 5 monitored the drilling activities properly or not. The committee submitted its report on August 13, 2005 with the findings that a systematic study of various events leading to the two blow outs indicates that respondent No. 10 utterly failed to meet the obligations under the JVA. A 5-member committee headed by Professor M. Tamim, Head and Petroleum Engineering Department of BUET submitted its report on August 28, 2005 stating that the daily average burn of gas due to fire has been assessed at 148 MMcf. Moreover, till the drilling of the second well (October 25, 2005) another 2 BCF gas would be lost. A 3-member sub-committee of the Parliamentary Standing Committee also found serious lapses in the execution of the impugned JVA. Another 3-member committee headed by Shah Alam, Director General-2 of Prime Minister's office was formed on August 16, 2005 to probe the incident. The committee submitted its report on September 3, 2005. Although committees formed by the Government or other statutory agencies have held respondent No. 10 responsible for the explosion/fire, no action as yet been taken to realize compensation from respondent No. 10. The impugned JVA is without lawful authority and is of no legal effect. For the failure of the respondents to secure realization of adequate compensation from respondent No. 10 and the successive exploration/blow out occurred causing colossal loss to Bangladesh as a whole, the petitioner served notice upon the respondents demanding justice on 24.8.2005 calling upon them to take appropriate steps for recovery of damages from respondent No. 10. The respondents gave perfunctory replies to the petitioners in respect of the notice demanding justice. Having received no satisfactory reply from respondent No. 10 in respect of notice demanding justice, the petitioners finding no other equally, efficacious and alternative remedy moved this Court and obtained the instant Rule Nisi.

Respondent Nos. 1, 4, 5 and 10 entered appearance by filing separate affidavit-in-oppositions controverting all the material statements made in the Writ Petition.

We have perused the voluminous Writ Petition, its annexures, affidavit-in-opposition filed by respondent Nos. 1, 4, 5 and 10 and their annexures, supplementary affidavit-in-opposition, its annexures, and affidavit-in-reply on behalf of the petitioner against the affidavit-in-opposition filed by the respondents and their annexures.

According to Article 143(1) the Constitution of the Peoples Republic of Bangladesh is the owner of all minerals and other things of value underlying the land of Bangladesh ocean within the territorial waters, or the ocean the continental shelf of Bangladesh. Article 143(1) of the Constitution of Bangladesh is quoted below:-

143 (1) their shall vest in the Republic, in addition to any other land or property lawfully vested-

- (a) all minerals and other things of value underlying any land of Bangladesh;
- (b) all lands, minerals and other things of value underlying the ocean within the territorial waters, or the ocean over the continental shelf of Bangladesh; and
- (c) any property located in Bangladesh that has no rightful owner.

The Niko Resources (Bangladesh) Ltd., is a public limited company incorporated under the laws of Barbados. Niko is an international gas and petroleum exploration and production company of Canada, having worldwide operations including Indian Sub-continent. The Niko submitted an unsolicited offer to exploration of gas in Bangladesh. It has been operating in Bangladesh on the basis of permission issued by respondent No. 9 on November 30, 2003, vide Memo No. BOI/Branch/24/2003/80 Niko is the operator under the impugned JVA. The rights to explorations were granted to Niko by the Joint Venture Agreement dated October 16, 2003 executed between respondent Nos. 5 and 10. The process of executing the impugned JVA started with a letter dated June 28, 1998 from Niko. Niko submitted the letter dated June 28, 1998 addressed to respondent No. 1 wherein Niko resources expressed its interest in the development and production of the gas fields of Chhatak, Fenchuganj, Bianibazar and Kamta under a joint venture describing these fields as marginal and non-producing gas fields. At the time of submission of the offer, Niko Resources expressly guaranteed that development in these fields would be (i) at its sole risk and expense; (ii) under terms and conditions that internationally prevail in the development of marginal fields; (iii) in a safe and environmentally responsible manner as it never had a blow out and (iv) no sacrifices to be made from an economic stands point that could ever in any way endanger the project from either a safety or environmental stands point.

At the initial stage the offer of Niko did not rule out the condition of "Swiss Challenge". But by the subsequent series of meeting held in the Ministry, the condition of "Swiss Challenge" was excluded by the Government and as such the modality of "Swiss Challenge" was dropped. Bapex and Petrobangla initially

favoured the proposal of "Swiss Challenge" but ultimately dropped the modality of "Swiss Challenge".

Respondent No. 1 directed by its letter dated 25.5.1999 to respondent No. 4 to take "further necessary measures" to implement the offer of respondent No. 10. As a part of "further necessary measures" a "Framework of Understanding" (FOU) for the study of development and production of Hydrocarbon from the Non-producing Marginal Gas Fields of Chhatak, Feni and Kamta was signed between respondent Nos. 5 and 10 on August 23, 1999. The purpose of FOU (Annexure-A) was to estimate recoverable reserves within structure in the Study Area (SA). In February, 2000, the Study Report, titled "Bangladesh Marginal Field Evaluation Chhatak, Feni and Kamta" was finalized by respondent Nos. 5 and 10. The Study Report dealt with Chhatak in two parts, namely Chhatak (West) and Chhatak (East). Based on the findings of the Study report, it was concluded that a joint venture contract might be executed between respondent Nos. 5 and 10. Though Niko Resources submitted draft JVA on November 7, 1999, the negotiation over JVA effectively started after the submission of the Study Report. Respondent No. 5 formed a committee on April 13, 2000 to finalize the terms and conditions of JVA submitted by respondent No. 10 without restoring to "Swiss Challenge" for evaluation. The report and the JVA was discussed at the Board Meeting of respondent No. 5 held on June 8, 2000 and August 21, 2000 and also at the 287 Board Meeting of respondent No. 4 held on October 22, 2000.

As per decision taken at the 287 meeting of the Board of respondent No. 4, the draft JVA was examined by a 7-members PSC Negotiation Committee that reiterated the decision of respondent No. 5 for excluding the Exploration Prospect of Chhatak (East) from the impugned JVA and also directed that "Swiss Challenge" method to be reflected. But subsequently at series of meetings of the Board of respondent Nos. 4 and 5 various clauses of the draft JVA were discussed with special emphasis on issues regarding (i) exclusion of Chhatak (East) Exploration Prospect from JVA; (ii) inviting of other competitive offers through international competitive bidding by adopting the method of Swiss Challenge prior to executing the JVA; and (iii) fixing sale price of gas.

Meanwhile respondent No. 1 developed a Procedure entitled "Procedure for Development of Marginal/Abandoned Gas Field" (shortly, procedure). This Procedure was submitted before the then Prime Minister on June 6, 2001 for approval. The exploratory note mentioned in clause 10 of the Procedure stated that for the purposes of this Procedure, Chhatak, Kamta and Feni gas fields should be deemed to have been declared marginal/abandoned gas fields, and the negotiations/discussions conducted so far with the approval accorded by the Government in 1999, should be deemed to have been in compliance with the approval Procedure respondent No. 10 by its letter dated July 8, 2002 (Annexure-G-1), requested respondent No. 5 to include Chhatak (East) in the JVA. On November 25, 2002, respondent No. 10 again requested respondent No. 5 for inclusion of Chhatak (East) in the JVA.

Based on the opinion of respondent No. 2, the JVA was finally approved at the 333 meeting of the Board of respondent No. 4 held on July 22, 2003 including therein the Chhatak (East) Exploratory Prospect as a marginal/abandoned gas field and the same was signed on October 16, 2003.

The respondents also dropped the modality of "Swiss Challenge" on the basis of the opinion of respondent No. 2. The then State Minister for the Ministry of Power, Energy and Mineral Resources ruled out the option for Swiss Challenge in the summary sent to the Prime Minister on September 7, 2003 (Annexure-Z) referring again to the legal opinion on respondent No. 2. Respondent No. 2 opined that Article 5.05 of the FoU barred tender or negotiation with third party and that the Article had discarded clause (c) of the letter dated May 25, 1999 (Annexure-D).

By an office order dated January 9, 2005 under Memo No. BiJaKhaSha/Pro-1/Bibid-7/2004 respondent No. 1 formed a 6-member committee to identify the causes behind the fire. The committee submitted its report on January 19, 2005 in which the committee held (i) respondent No. 10 was primarily responsible for the exploration/fire (ii) aggressive drilling by the Chinese Company appointed by respondent No. 10 on the basis of faulty designed of respondent No. 10' and (iii) negligence in performing duties by respondent No. 5 were also identified as the cause of exploration/fire.

The committee assessed the loss of 10 BCF of gas till the date of submission of the report. The committee recommended realization of compensation for the loss caused because of the blow outs.

On April 2, 2005, another committee was formed by respondent No. 3 to assess the environmental damage. The committee submitted its report on April 13, 2005 and stated that there was loss of Tk. 35.45 crore. However, the Committee could not assess the long term loss and damage.

One member Committee of the Chief Reserve Study Cell of respondent No.4 submitted its report on June 4, 2005 stating that the loss of gas if calculated in monetary term could be as high as Tk. 100 crore.

The co-ordination of Chhatak Gas field were defined in FOU. In fact, according to the terms of FOU exclusion of Chhatak (East) from JVA and adoption of Swiss challenge would be illegal as it would breach the terms and conditions of FOU. With respect to "Chhatak (East) Explanatory Prospect" respondent No. 10 reiterates that it falls within the coordinates of Chhatak gas field as defined in the FoU. The JVA was executed pursuant to the terms and conditions of the FOU. The inclusion of Chhatak (East) in the JVA is can not be said malafied as the FOU was approved by the highest authority.

Pursuant to the terms of JVA, the Joint Venture has been producing and supplying Gas without having any guarantee of payment. At the conclusion of negotiation, GSPA was ultimately signed in December, 2006 for a gas price of US\$ 1.75 per MCF. On the other hand, respondent No. 4 is paying US\$ 2.75 per MCF for gas

purchased from Moulavi Bazar and Jalalabad Gas fields, and US\$ 2.9 per MCF for gas produce from Moulavibazar and Jalalabad fields by other International Oil Companies (IOCS). The total gas supplied by the Joint Venture till June, 2008 is 21.28 BCF, but full payment has not been made. The work program of Chhatak Gas Field including drilling program was approved by the Joint Management Committee at its meeting held on February 28, 2004. The decision taken at the meeting was in conformity with the Article 6.2 of the JVA.

In fact, in this Writ Petition the moot questions are whether the impugned Joint Venture Agreement should be declared to have been obtained without lawful authority and whether JVA should be treated as a nullity and whether dropping of the modality of Swiss Challenge was done with arbitrary and malafied manner.

We have seen that exhaustive discussions took place at the several meetings of the Board of Petrobangla and Bapex before JVA was approved and signed. We have seen also that JVA was approved by the highest authority also.

The summary dated 6.6.2001 prepared for the Procedure for development of marginal/abandoned gas fields was approved by the then Prime Minister on 14.6.2001. The summary of the Prime Minister dated 14.6.2001 has been annexed as annexure 27 to the writ petition. The extract of the summary (Annexure-27) dated 14.6.2001 is quoted below:-

ছাতক, কামতা ও ফেনী গ্যাস ফিল্ড সংক্রান্ত ব্যাখ্যা:-

ছাতক, কামতা ও ফেনী গ্যাস ফিল্ডকে প্রান্তিক/পরিত্যক্ত গ্যাস ফিল্ড হিসেবে চিহ্নিত করে ১৯৯৯ সালে সরকারের অনুমোদনক্রমে যৌথ কারিগরি সম্ভাব্যতা যাচাই পূর্বক একটি খসড়া জয়েন্ট ভেঞ্চার এগ্রিমেন্ট প্রণয়ন করা হচ্ছে। খসড়া জয়েন্ট ভেঞ্চার এগ্রিমেন্টে এ খসড়া প্রস্তাবিত পদ্ধতিতে লিপিবদ্ধ সকল শর্তাবলী অনুসরণ করা হচ্ছে। সকল পক্ষ কর্তৃক চূড়ান্ত করার পর এ জয়েন্ট ভেঞ্চার এগ্রিমেন্ট সরকারের অনুমোদনের জন্যে পেট্রোবাংলা কর্তৃক উপস্থাপন করা হবে।

উপরোক্ত কার্যপ্রণালী সম্বলিত প্রান্তিক এবং পরিত্যক্ত গ্যাস-ফিল্ড উন্নয়ন সংক্রান্ত পদ্ধতি জাতীয় স্বার্থ সংরক্ষণ করবে বলে আশা করা যাচ্ছে। বর্ণিত অবস্থায় প্রান্তিক এবং পরিত্যক্ত গ্যাস ফিল্ড উন্নয়ন সংক্রান্ত পদ্ধতিটি মাননীয় প্রধানমন্ত্রীর সানুগ্রহ বিবেচনা ও অনুমোদনের জন্য উপস্থাপন করা হইল।

From the above extract of the summary, it is clear that the then Prime Minister approved the summary on 14.6.2001 (Annexure-27). Thereafter, on 18.3.2003, the successor Prime Minister also approved the summary in almost identical terms, directing that the JVA be signed with Niko and as per FOU. The Prime Minister, while approving the summary reconfirmed the decision of the previous Prime Minister taken of 14.6.2001. Summary dated 18.3.2003 approved by the then Prime Minister has also been annexed as Annexure-10. For proper appreciation extract of Annexure-10 is also quoted below:-

উপর্যুক্ত অবস্থায় বাগেঞ্জ এবং নাইকোর এর বিরোধ নিরসনকল্পে বিষয়টির উপর আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয় এর মতামত কমনা করা হয়। আইন মন্ত্রণালয় অভিমত ব্যক্ত করে যে-

(K) Marginal/Abandoned গ্যাস ফিল্ড নির্ধারণের জন্য Abandoned Gas Fields এর আর্টিকেল ৩ এ সুনির্দিষ্ট পদ্ধতির উল্লেখ রয়েছে। Framework of Understanding ভুক্ত গ্যাস ফিল্ডগুলি Manginal/ Abandoned কিনা তা নির্ধারণে উক্ত পদ্ধতি অসুসরণীয়।

তবে ছাতক (পূর্ব), ছাতক গ্যাস ফিল্ডের অন্তর্ভুক্ত কি না তা নির্ধারণে পক্ষগণের মধ্যে সম্পাদিত Framework of Understanding এর Exhibit-A এর প্রতি দৃষ্টি দেয়া যেতে পারে। Exhibit-A -তে কামতা, ফেনী ও ছাতক ও ফেনী গ্যাস ফিল্ডের কো-অর্ডিনেটস, আয়তন ও গুণিতা সুনির্দিষ্টভাবে উল্লেখ রয়েছে। নাইকো রিসোর্সেস (বাংলাদেশ) এবং বাংলাদেশ পেট্রোলিয়াম এক্সপ্রোরেশন কোম্পানি লি: (বাপেক্স) এর মধ্যে FOU (Framework of Understanding) সম্পাদিত হয়। Exhibit-অ -তে যেহেতু ছাতক গ্যাস ফিল্ডের সুনির্দিষ্ট বিবরণ রয়েছে সেহেতু ঐ বিবরণভুক্ত এলাকাই ছাতক গ্যাস ফিল্ডভুক্ত হবে।

This summary was approved by the then Prime Minister. According to the above summary, the Chhatak gas field cannot be confined to Chhatak (West) alone. Now, on the other hand, Petrobangla, in its turn, asked Bapex to review the Niko's proposal, vide Memo No. 46.01.163/21 dated 16.8.1998. Bapex forwarded its recommendation to Petrobangla vide Memo No. 1.17.05.75 dated 22.9.1998. Thereafter Petrobangla forwarded a report with its detailed justification for approval of the Niko's proposal under cover of a Memo No. 46.01.163 dated 20.10.1998.

From the above, we do find that the JVA was not obtained by flawed process by restoring to fraudulent means. There is no denial of the fact that two severe blow outs occurred at the time of exploration and those blow out caused colossal loss and damage to life and property of the people living in the area. The first blow out took place on January 7, 2005 and the second one on June 24, 2005. In order to assess the reasons for such blow outs and to assess the damages caused, several committees were formed by the Government. The committee No. 1 submitted its report and recommended as follows:

“টেংরাটিলা গ্যাস ফিল্ডের অগ্নিকাণ্ডে ক্ষতিগ্রস্থদের ক্ষতিপূরণ বাবদ আপাতত ১,১৩,২৭,০০০/- (এক কোটি তের লক্ষ সাতাশ হাজার) টাকা পরিশোধের জন্য নাইকো (বাংলাদেশ) লিমিটেডকে নির্দেশ দেয়া যেতে পারে”।

All the committees submitted their reports recommending realization of compensation money from Niko for the loss and damage caused by the blow outs. All the committees held Niko responsible for the blow outs. The Committees even expressed if Niko was diligent such blow out could have been avoided. However, there is no denial of the facts that the successive blow outs caused heavy loss to life, property, cattle, trees and fisheries etc. of the JVA area. Niko must adequately compensate the loss caused. The Government so far has taken some positive steps for realization of compensation from Niko. Lastly respondent No. 4 filed a money suit claiming Tk. 746,50,83,973/- (Seven hundred forty six crore fifty lac eighty three thousand nine hundred seventy three) only from Niko. The suit is still pending. The amount to be paid as compensation money should be decided by the Court below after taking proper evidence or by mutual agreement among the parties

involved. But Niko cannot avoid its responsibility of giving adequate compensation for the losses caused by two successive blow outs.

In the light of the discussion, made hereinbefore, the Rule succeeds in-part. Niko is directed to pay the compensation money as per the decisions to be taken in the money suit now pending in the Court of the Joint District Judge or as per the mutual agreement among the parties. The respondents are restrained by an order of injunction from making any payment to respondent No. 10. This order of injunction shall remain in force till disposal of the money suit or till amicable settlement amongst the parties, whichever is earlier.

There is no order as to costs.

হিউম্যান রাইটস এ্যান্ড পিস ফর বাংলাদেশ বনাম বাংলাদেশ

রীট পিটিশন নং ৩৫০৩/২০০৯, তাং-/ জুন ২৪ ও ২৫, ২০০৯ ইং

(Protecting the Four Rivers of Dhaka)

জনাব বিচারপতি এ,বি,এম, খায়রুল হক এবং জনাব বিচারপতি মোঃ মমতাজ উদ্দিন আহমেদ

বিচারপতি এ,বি,এম, খায়রুল হকঃ

ঢাকা মহানগরীর চতুর্পার্শ্ব নদী, যথা বুড়িগঙ্গা, তুরাগ, বালু ও শীতলক্ষ্যা এই চারটি নদীর দূষণ, অবৈধ দখল এবং নদী অভ্যন্তরে বিভিন্ন স্থানে স্থাপনা নির্মাণ কার্য চ্যালেঞ্জ করিয়া অত্র রীট মোকাদ্দমাটি দায়ের করা হইয়াছে।

ইহা একটি জনস্বার্থমূলক রীট মোকাদ্দমা। হিউম্যান রাইটস্ এ্যান্ড পিস ফর বাংলাদেশ নামক একটি সংগঠন এবং সুপ্রীম কোর্টের ৪ জন এ্যাডভোকেট এই জনস্বার্থমূলক রীট মোকাদ্দমাটি দায়ের করিয়াছেন। তাহারা বিভিন্ন পত্র পত্রিকায় প্রকাশিত উপরোক্ত ৪টি নদীর দূরবস্থা অবলোকন করিয়া মর্মান্বিত হন এবং এই নদীগুলি দূষণ এবং দখলে মুক্তপ্রায় হওয়ায় তাহারা তাহাদের বিজ্ঞ এ্যাডভোকেট মহোদয় মারফৎ প্রতিবাদীগণের বরাবরে ১৯-৫-২০০৯ তারিখে একটি Demand For Justice Notice (এ্যানেকচার-ডি) জারি করতঃ ইহার প্রতিবাদ করেন কিন্তু ইহাতে কোন ফলোদয় না হওয়ায় দরখাস্তকারীগণ অত্র রীট মোকাদ্দমাটি আদালতে দায়ের করিলে অত্র আদালত বাংলাদেশ সংবিধানের ১০২ অনুচ্ছেদ অনুসারে প্রতিবাদীগণ বরাবরে ২৪-৫-২০০৯ তারিখে নিম্নলিখিত Rule Nisi জারি করেনঃ

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why a direction should not be given upon respondent Nos. 9,10,12-14 to demarcate the original territories of the River Buriganga, Turag, Balu and Shitalakkha, through survey by a special team and restoring the said rivers to their original condition and why all the respondents should not be directed to protect rivers namely, Buriganga, Turag, Balu and Shitalakkha from illegal encroachments and earth fillings and/or such other or further order or orders passed as to this Court may seem fit and proper.

The Rule is made returnable on 1.6.2009.