

Presidential Reference No. 2 of 2022

The above titled Reference was unanimously answered in the terms mentioned in our short order dated 09 December 2022, for detailed reasons to be recorded later. Since the detailed judgment has not been rendered till date, therefore, I deem it appropriate to deliver my reasons through this note.

Facts

2. The Balochistan Development Authority ("**BDA**") and a foreign investor, BHP Minerals International Explorations Inc. ("**BHP**"), entered into a joint venture agreement, namely, the Chaghi Hills Exploration Joint Venture Agreement ("**CHEJVA**") and obtained a license for prospecting copper, gold, and other minerals situated in Reko Diq, District Chaghi, Balochistan ("**Reko Diq**") on 29.07.1993. In the year 2000, BHP was succeeded by the Tethyan Copper Company Pty Limited ("**TCCA**"). Subsequently, in the year 2006, Barrick Gold Corporation ("**Barrick**") and Antofagasta plc ("**Antofagasta**") acquired TCCA in equal shares. In the year 2011, TCCA requested for grant of a mining lease, which was declined by the Government of Balochistan ("**GoB**"). At the same time, one Abdul Haque challenged the CHEJVA through a Constitutional Petition before the High Court of Balochistan, which was dismissed *vide* judgment dated 26.06.2007. Feeling aggrieved, a petition for leave to appeal against the said judgment was filed before this Court, which was disposed of declaring the CHEJVA as void, *inter alia*, for the reasons mentioned in this Court's judgment¹ dated 07.01.2013.

3. The TCCA initiated two international arbitration claims; *first* against the Government of Pakistan ("**GoP**") before the International Centre for Settlement of Investment Disputes Tribunal (the "**ICSID Tribunal**"). It was alleged therein that the GoP had violated its obligations under the Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments (the "**Pak-Aus BIT**"). The ICSID Tribunal on 12 July 2019, rendered an award of approximately US\$ 6.5 billion (including interest and costs) in favour of TCCA and

¹ Maulana Abdul Haque Baloch and others v. Government of Balochistan and others; PLD 2013 SC 641

against the GoP (the "**ICSID Award**"). The *second* claim of TCCA was before the International Court of Arbitration of the International Chamber of Commerce ("**ICC**") against the GoB for its refusal to grant the mining lease, contrary to the terms and conditions of the CHEJVA. As per the assessment of international legal and financial consultants, the liability of these proceedings was expected to be around US\$ 2 to 3 billion (the "**expected ICC Award**"). However, on account of the ongoing negotiations between the parties, the ICC proceedings were stayed before rendering of the final award. TCCA was owned equally by Antofagasta and Barrick, therefore, the amount of damages arising out of both the arbitration proceedings was to be shared equally between them.

4. After considerable time and effort, the parties reached a consensus for resolution of the dispute through fresh agreements to be finalised, subject to the outcome of this Reference. As a result of the settlement, Antofagasta was to be paid an amount of US\$ 900 million for its 50% share of the total amount awarded by the ICSID Tribunal and for the expected ICC award. Whereas Barrick agreed to become 50% shareholder in the newly constituted company being its operator, known as the Reko Diq Mining Company (Private) Limited ("**RDMC**"), instead of getting its share of the decretal amount awarded by the ICSID Tribunal and for the expected ICC award. The remaining 50% of the equity in the company was agreed to be held by the local entities in the following terms:

- "(i) GoB holding a 10% free carried interest;*
- (ii) GoB holding a 15% fully participating interest indirectly;*
- (iii) GoB receiving royalty at the rate of 5%; and*
- (iv) GoP or designated Pakistani entities holding the remaining 25% fully participating interest."*

As a result of the settlement, the liabilities connected with the previous Reko Diq project were finally settled with TCCA (Antofagasta and Barrick). The terms and conditions of the settlement were reduced into the Implementation Agreement and Definitive Agreements (the "**Agreements**"). Before signing the Agreements, a Reference under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "**Constitution**") was received from the President of the Islamic Republic of

Pakistan (the “**President**”) concerning the Agreements with the following questions posed for our consideration and opinion:

- “i) Whether the earlier judgment of this Honourable Court reported as ([Maulana] Abdul Haque Baloch v. [Government of Balochistan], PLD 2013 SC 641 or the laws, public policy or Constitution of Pakistan prevent the GoB and the GoP from entering into the Implementation Agreement and the Definitive Agreements [**Agreements**] or affect their validity?
- ii) If enacted, would the proposed Foreign Investment (Protection and Promotion) Bill, 2022 (**FI Bill 2022**) be valid and constitutional?”

5. This Court took up the Reference for hearing and framed five issues arising from it. With the assistance of the legal advisors, financial consultants, *amici curiae*, as well as the learned counsel for the parties, the first question referred to this Court by the President was answered in the negative, declaring that no judgment, law, public policy, or the Constitution prevents the GoP and the GoB from entering into the Agreements. The precise reasons in this behalf are mentioned in paragraph 9 of our short order, which is reproduced herein below:

“9. In light of our answers to the foregoing issues which raise legal and constitutional questions, the first question referred to this Court by the President of Pakistan, reproduced in paragraph 6(i) above is answered in the negative for the following reasons:

- i) It is settled law that while disposal of public assets through a competitive process is the ordinary rule, it is not an invariable rule. The Constitution does not forbid disposal of public assets other than through a competitive process so long as such disposal has the support of the law and is justified on rational grounds, as is the case here.
- ii) Ever since the enactment of the Constitution, legislative competence to deal with mines and mineral development (other than minerals used for nuclear energy) has rested exclusively with the Provincial Assemblies. Therefore, the Provincial Assemblies of Sindh and Khyber Pakhtunkhwa have already enacted comprehensive statutes dealing with mines and mineral development (other than minerals used for generation of nuclear energy). It follows from the legislative ambit of the Provincial Assemblies under the Constitution that they are competent to “alter, amend or repeal” any existing law to the extent that it deals with mines and mineral development. As far as the amendment incorporated in the Regulation of Mines and Oil fields and Mineral Development Reference No.2/2022 (Government Control) Act, 1948 (1948 Act) is concerned, which has been introduced by way of the 2022 Act, to the extent that the said statute applies to the Province of Balochistan it is intra vires the Constitution and the rules framed by the GoB under Section 2 of the 1948 Act. The 2022 Act can therefore be treated as a standalone

- provision that operates alongside the 1948 Act and the aforesaid rules insofar as the subject of mines and minerals development (other than oil fields and mineral resources necessary for generation of nuclear energy) falls within the exclusive legislative competence of the provincial legislature.
- iii) The Balochistan Cabinet has approved the decision to enter into the Agreements on the basis of a detailed summary, a copy of which has been filed with this Court. The summary considers 'public interest' inherent in the negotiated agreement and since the Agreements pertain to an 'international obligation' in terms of the 2022 Act (i.e., Pakistan's obligation to make payment of approximately US\$ 6 billion under an ICSID award dated 12.07.2019), the formal obligations required under the 2022 Act for entering into a negotiated agreement stand fulfilled.
 - iv) The Federal Government has placed on record documents to show that an Apex Committee headed by the Prime Minister of Pakistan and attended by all the relevant stakeholders (including the Chief Minister and Chief Secretary of Balochistan) had carefully negotiated the terms of the Agreements with the help of international financial advisors, international legal advisors, international mining experts and international tax advisors in addition to independent Pakistani advisors. As noted above, the international advisors also addressed the Court directly during proceedings in-person and through video link, and answered all the queries raised by the Court. Prima facie, the Agreements cannot be faulted for lack of due diligence on the part of State authorities.
 - v) The Agreements do not, prima facie, violate any of the findings recorded in the Abdul Haque Baloch case (PLD 2013 SC 641). Unlike CHEJVA, the decision to enter into the Agreements is backed by law and has been taken on the basis of careful negotiations during which authorized representatives of GoP/GoB were duly assisted by independent international consultants. Further, the obligation to act in accordance with "Applicable Law" contained in the Agreements as well as the obligations of the Licensee to apply for consents in accordance with law and satisfy all conditions prescribed by the Applicable Law means that the statutory discretion of public functionaries is not being fettered by the Agreements.
 - vi) We have also been informed that the Provincial Assembly of Balochistan was given a detailed incamera briefing and was taken into confidence regarding the entire project and the terms and conditions of the proposed settlement between the parties were accepted without any objections being raised by the chosen representatives of the people of Balochistan.
 - vii) On our specific query relating to environmental considerations, particularly in relation to the use of water, we have been informed that the Agreements contain no exemption from Pakistan's environmental laws. Rather, the Agreements require Barrick to act in accordance with both international environmental standards and domestic laws."

Similarly, the second question referred to this Court by the President was answered in the affirmative for the reasons mentioned in paragraph 10 of our short order which reads as under:

“10. The second question is answered in the affirmative for the following reasons:

- i) Article 144 of the Constitution allows Provincial Assemblies to empower Parliament to pass a law dealing with issues within the legislative competence of the Provinces. Similarly, Article 147 of the Constitution allows the Provinces to entrust, either conditionally or unconditionally, to the Federal Government or to its officers, functions in relation to any matter to which the executive authority of the Province extends.
- ii) We have been provided the draft resolutions proposed to be passed by the Provincial Assemblies of Sindh and Balochistan to empower Parliament to enact the proposed FI Bill 2022. Provided that the draft resolutions are passed, Parliament will be competent to enact the FI Bill 2022, including the notified exemptions specified in the Bill and the protected benefits listed in the Third Schedule.
- iii) The provisions of Section 3 of the FI Bill 2022 do not in our opinion fetter the sovereignty of Parliament. It appears that the FI Bill 2022 represents a version of the Protection of Economic Reforms Act, 1992. It allows the Federal Government to notify certain benefits which may not be withdrawn to the prejudice of an investor. We have also been informed and there is consensus of all the learned counsel in this matter that Parliament remains at liberty to repeal the entire FI Bill 2022, if it so desires, of course subject to the corresponding legal consequences that may arise from such repeal.
On our query, we have also been informed that most of the exemptions proposed to be granted are already available under the regulatory regimes pertaining to Export Processing Zones and Special Technology Zones. Further, the exemptions being granted from the operation of Labour Laws do not denude the labour force of their rightful entitlement to fair wages, allowances and guarantees/benefits provided by law. The learned counsel for Barrick has categorically assured us that the applicable minimum wage laws will be fully observed and the Agreements expressly provide that all operations will be carried out in accordance with International Mining Standards which are defined to include compliance with IFC Performance Standards, to the extent applicable. It has been pointed out to us that the IFC Performance Standards contain detailed provisions pertaining to labour rights. Barrick has also committed to act in accordance with the United Nations Guiding Principles on Business and Human Rights. We have also been assured that Barrick will contribute substantially towards Corporate Social Responsibility by dedicating a percentage of its returns towards provision of fresh drinking water, health facilities, schools and local infrastructure to the people of Balochistan. In addition, most of the labour force will be employed from amongst the local population of the Province. In addition, programs for development of skills will also be put in place.”

Opinion

6. In addition to the reasons mentioned in our short order in respect of the President’s first question, the record reflects that the parameters set out in the judgment

passed in *Abdul Haque* were properly addressed and the requirements under the relevant provisions of law and the Balochistan Mineral Rules, 2002 ("**BMR, 2002**") were fulfilled. The Agreements are in line with relevant provisions of law and rules. I am conscious of the fact that the ICSID Award and the expected ICC Award, if enforced, could have had a serious financial implication on the country as a whole and on the Province of Balochistan in particular. Fortunately, such a huge liability of the country was averted as a result of the settlement. The reconstitution of the Reko Diq project will enable the RDMC to restart work at Reko Diq, which will be beneficial for all the stakeholders. It will also facilitate and attract local and foreign investment, create employment opportunities, and uplift the backward area of the Province of Balochistan. The learned counsel representing Barrick has assured that all International Mining Standards, labour practices, environmental laws, and particularly the conservation of water resources shall be adopted and complied with. In the above background, we unanimously rendered our opinion for the reasons mentioned in our short order confirming the Agreements.

7. As far as the President's second question with regard to the constitutionality and validity of the proposed Foreign Investment (Protection and Promotion) Bill, 2022 ("**FI Bill, 2022**") is concerned, we have already answered it in the affirmative, for the reasons mentioned in paragraph 10 of our short order reproduced above. Furthermore, the said Bill was subsequently passed as the Foreign Investment (Protection and Promotion) Act, 2022 (Act No. XXXV of 2022) ("**FI Act, 2022**"). The purpose of the FI Act, 2022 has been enshrined in its preamble. Sub-section (2) of section 1 of the FI Act, 2022 was made applicable to the whole of Pakistan, however, through a subsequent amendment, for the purpose of the Province of Balochistan, it was restricted only to the extent of qualified investment of the Reko Diq project, hence, the FI Act, 2022 will not be applicable to projects in Balochistan other than Reko Diq. Article 144 of the Constitution empowers the Provincial Assemblies to amend or repeal the FI Act, 2022 to their extent at any time, if they deem it necessary.

8. We have been informed that the Federal Government has declared the area leased for the Reko Diq project as an Export Processing Zone under the Export

Processing Zones Authority Ordinance, 1980 (the “**Ordinance, 1980**”) and has extended the benefit of S.R.O.881(I)/80² to it. Such initiative would certainly encourage Foreign Direct Investment for the Reko Diq project. The Ordinance, 1980 is only applicable to industrial undertakings set up or operating in the Export Processing Zones. It would, therefore, be appropriate that the Federal Government the assigns status of an industrial undertaking to the mining sector so as to make the Ordinance, 1980 applicable to the mining areas. This will attract and encourage foreign and local investment as well as ensure sustainable economic activity and growth, not only for Reko Diq, but for mining activity all over Pakistan.

9. One of the most significant aspects of the settlement is with regard to the allocation of shares between the GoP and the GoB. As per the Agreements, the GoP retained its 25% share in the RDMC through the State-Owned Entities (“**SOEs**”) on the pretext that as per the settlement between the parties, it will pay US\$ 900 million to Antofagasta. Under such circumstances, it was the sole responsibility of the GoP to pay the decretal amount to right off its liability through its own resources. Instead, the GoP shifted its burden upon the Province of Balochistan, by adjusting the mineral-rich land owned by the Province against its liability arising out of the ICSID Award. Such treatment of the GoP in adjusting its liability against the property owned by the Province of Balochistan is not only unjust, but also amounts to undermining the principle of Provincial Autonomy. Despite this fact, the GoB and the Provincial Assembly of Balochistan agreed with the settlement, considering the gravity of the situation and the compelling circumstances surrounding the country such as the expected time for enforcement of the ICSID Award, the inability of the GoP to pay such a huge amount because of its dire financial conditions, and some other unknown reasons highlighted through the in-camera briefing given to the Provincial Assembly.

10. No doubt in the given circumstances, a reasonable settlement has been arrived at between the parties. However, we must realize the causes of such massive financial implications arising out of the previous agreement (CHEJVA), so as to avoid the slightest possibility of such liability in the future. One of the causes on the basis of

² Exemption from custom duty and sales tax for all goods imported into and exported from the Export Processing Zones

which TCCA commenced arbitration proceedings against the GoP was the violation of its international obligations under the Pak-Aus BIT. The GoP did not provide any assistance to the GoB nor apprise it about the international commitments while entering into the previous agreement. Similarly, the violation of the CHEJVA was the other cause that enabled the TCCA to commence arbitration proceedings before the ICC against the GoB.

Constitutional Position on Mineral Resources

11. Under Article 172 of the Constitution, minerals (except for mineral oil and natural gas) if located in a Province shall vest exclusively with the Government of that Province, and in any other case, with the Federal Government. The respective Governments are guardians of such resources and have exclusive rights to freely exploit, manage, control, and dispose of the same, subject to the applicable laws, rules, regulations, and policies, in a manner beneficial to their peoples. Thus, the Constitution holds and protects the Provinces' Permanent Sovereignty to freely exploit and determine the use and disposal of their natural resources. It is, therefore, the obligation of the Federal Government to accept and respect the property rights of each Province, as guaranteed by the Constitution. Since minerals are provincial subjects, therefore, the GoP must not undermine and encroach upon the jurisdiction of the Provinces, nor should the rights of their peoples be infringed. In performance of its constitutional commitments, the GoP with the assistance of the Provincial Governments, launched a National Mineral Policy ("**Policy**") in the year 1995, with an object to expand the mineral sector activity in the Provinces as well as in the Federal Territories, keeping in mind the principle of Provincial Autonomy with regard to their properties. The Policy provides a guideline, wherein considerable attention has been given to the principle of Permanent Sovereignty of the Provinces over their natural resources, therefore, it is required to be followed by the Provinces and the Federal Government when entering into any agreement and initiating mining activity anywhere in Pakistan. While entering into international agreements governed by Bilateral Investment Treaties in respect of minerals, the role of the GoP is restricted to the extent of facilitating, advising, and coordinating with the Province concerned, with the utmost care as to avoid any

violation under the international commitments. In order to properly explore, manage, control, and dispose of mines and minerals, the Provinces which have not enacted statutes and framed rules and regulations, may do so.

12. It has been reported that Reko Diq has one of the world's largest copper-gold deposits, out of which only a limited area has been leased out to the RDMC. According to the available record, still a vast area of Reko Diq and the majority of the area of the Province having precious and other mineral resources remains unexplored. Balochistan has been blessed with manifold range of natural resources, therefore, it is a constitutional obligation of the GoB to protect and preserve the natural resources of its peoples and to explore, deal, and manage the same for their benefit. In *Abdul Haque*, this Court highlighted a number of illegalities, jurisdictional defects, maladministration, corruption, lack of expertise and experience, and a colourful exercise by the authorities concerned with regard to the previous Reko Diq deal, on the basis whereof, the CHEJVA was declared null and void. Besides, this Court in the said judgment has also laid down a set of guidelines to be adopted when entering into fresh mineral agreement(s). The GoB must have recognized the repercussions of the previous agreement (CHEJVA), which caused an irreparable loss to the Province and stunned the country as a whole. It is expected that the authorities concerned of the GoB must have gained significant experience from the past, therefore, they should keep in mind the defects, flaws, and irregularities pointed out and the guidelines laid down in *Abdul Haque* to avoid any such ordeal in future. Hence, any future decision in respect of the properties of the Province must be taken in a manner beneficial for the Province and its peoples. The GoB must also simplify the procedure for allotment of prospecting license(s) and mining lease(s) to prevent any unnecessary impediments, for making investment in the mining sector more friendly.

13. The GoB has established the Balochistan Mineral Resources Limited ("**BMRL**") which has already been assigned a 15% share in the RDMC. The purpose of establishing BMRL is to secure the ownership rights of the minerals of the Province of Balochistan by entering into joint venture agreements with any potential investors, local or foreign. This is a correct decision, which will not only preserve the property rights of

the Province of Balochistan but will also ensure retention of its maximum equity. Thus, any future agreement with regard to mineral resources in the Province of Balochistan where significant data and information regarding a potential mining site is available, may be through the BMRL by way of a competitive bidding process, being the ordinary rule and the best option under the circumstances. The BMR, 2002 provides disposal of the minerals through open bidding/auction which has been reiterated by this Court in *Abdul Haque*. This is because in a competitive bidding process, the bidders compete against each other and thereby, place the Government in a stronger negotiating position. This ensures transparency and a more favourable and realistic evaluation of the resources, in securing the best contract terms possible. It also expels the pressure of any external factors. However, in case of limited information regarding mineral deposits, the GoB may adopt different licensing procedures, keeping in view the relevant provisions of law, rules, regulations, and policies. Additionally, to reach a more comprehensive and favourable agreement in the future with respect to large-scale mining of precious minerals, the GoB ought to get assistance from reputable international mineral experts, financial and legal advisors, for their proper assessment in terms of their quantity and evaluation, and for the execution of compact, realistic, and workable agreements. This will not only safeguard the interests of the Province but will also reduce the likelihood of dispute(s). Besides, with regard to large-scale mining, especially for precious minerals, the GoB may also get input from and the endorsement of the Provincial Assembly.

14. The Intergenerational Equity Principle is one of the important aspects concerning the use and rights of future generations. It states that every generation holds the Earth in common with members of the present generation and with other generations, past and future. The principle is the foundation of sustainable development and articulates a concept of fairness among generations in the use and conservation of the environment and its natural resources.³ Natural resources are also to be inherited by future generations, therefore, the Federal as well as the Provincial Governments being the trustees on behalf of their people must not ignore the rights of future generations when taking any decision in this behalf. As such, mining must be performed in a

³ Weiss, E. B. (2021, April). Intergenerational Equity. Oxford Public International Law. (<http://opil.ouplaw.com>). (c) Oxford University Press, 2023.

sustainable manner and the proceeds arising out of their respective shares may be allocated, utilized, and invested in such way to ensure that future generations receive the benefit of their inheritance. One of the options in this behalf or otherwise for each Government is to adopt an investment strategy such as the establishment of a Sovereign Wealth Fund. They may park and invest a fixed portion of revenue arising from the proceeds of mining projects in the said fund. This Reference is in respect of the Agreements in relation to the Reko Diq project, therefore, it would be appropriate for the GoP and the GoB to take initiatives and adopt such measures by allocating a fixed portion of the proceeds of their shares and royalty arising thereof for the benefit of future generations in such like fund, on terms and conditions to be determined by the GoB. The Agreements contained strict adherence of Corporate Social Responsibility ("**CSR**") and the learned counsel representing Barrick has assured compliance thereof. We appreciate the commitments made by Barrick in this behalf, however, preference may be given to health services and formal and technical education. Since the population of Reko Diq is small, therefore, the CSR initiatives may be extended for the socio-economic development of the Rakhshan Division in particular and for the entire Province of Balochistan in general.

(Jamal Khan Mandokhail)
Judge

Islamabad
K.Anees/Ammar Ahmed Cheema, L.C.
APPROVED FOR REPORTING