

IN THE SUPREME COURT OF PAKISTAN
(Advisory Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
 Mr. Justice Ijaz ul Ahsan
 Mr. Justice Munib Akhtar
 Mr. Justice Yahya Afzidi
 Mr. Justice Jamal Khan Mandokhai

**S.O
Presidential Reference No.2 of 2022**

(Reference by the President of the Islamic Republic of Pakistan under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973.)

IN ATTENDANCE

- | | | |
|---|---|--|
| For the Federation | : | Ch. Aamir Rehman,
Addl. Attorney General
Assisted by:
Barrister M. Usama Rauf
Mr. Zohair Waheed
Miss Maryam Rashid &
Miss Faryal Shah Afzidi, Adv. |
| For PPL/OGDCL/ Govt. Holdings (Pvt.) Ltd. | : | Barrister Jahanzeb Awan, ASC
Assisted by:
Mr. Umar Shahzad Abbasi
Mr. Abdullah Raza
Mr. Shabbir Harianwala |
| For Govt. of Balochistan | : | Mr. Salahuddin Ahmed, ASC
Mr. M. Asif Reki, AG, Balochistan
Mr. M. Ayaz Khan Swati, Addl. AG, Balochistan |
| For PBC | : | Mr. Mansoor Usman Awan, ASC |
| For Balochistan Bar | : | Mr. Amanullah Kanrani, ASC |
| <i>Amici Curiae</i> | : | Mr. Salman Akram Raja, ASC
Dr. M. Farogh Naseem, ASC
Mr. Zahid F. Ibrahim, ASC |
| For Barrick Gold Corporation | : | Mr. M. Makhdoom Ali Khan, Sr. ASC
Assisted by:
S.M. Faisal Hussain Naqvi, ASC
Mr. Iftikhar-ud-Din Riaz, ASC
Mr. Saad M. Hashmi, Advocate
Kh. Aziz Ahsan, Advocate
Mr. Yawar Mukhtar, Advocate
Kh. Azeem, Advocate |
| White & Case | : | Rabecca Campbell
Mr. Kamran Ahmed
(Via Video-Link) |

Lazard	: Spiro Youakim Pierre Cailletea Xovier de Regloix (Via Video-Link)
Dates of Hearing	: 25 Oct 2022, 01-02 Nov 2022, 7-10 Nov 2022, 14-17 Nov 2022, 21-24 Nov 2022, 28-29 Nov 2022

OPINION

For detailed reasons to be recorded later and subject to such amplification and elaboration as may be considered necessary, Presidential Reference No.2 of 2022 is answered as follows:

2. On 29.07.1993 the Balochistan Development Authority (**BDA**) entered into the Chaghi Hills Exploration Joint Venture Agreement (**CHEJVA**) with a foreign investor having 75% shareholding and BDA having 25% shareholding plus 2% royalty. Subsequently, in the year 2006, the foreign investor was succeeded by Tethyan Copper Company Pty. Ltd., Australia (**TCCA**). TCCA in turn was acquired by Barrick Gold Corporation (**Barrick**) and Antofagasta in equal shares. Under CHEJVA Barrick and its partner had the exclusive right to prospect and explore for copper and gold in the Reko Diq area.

3. Between 2006 and 2011, TCCA invested in mineral exploration and developed detailed plans for mining at Reko Diq. However, on 15.11.2011, the licensing authority of the Government of Balochistan (**GoB**) declined the mining lease application submitted by the project company of TCCA. Shortly thereafter, on 28.11.2011 TCCA initiated arbitration proceedings under the Pakistan-Australia Bilateral Investment Treaty (**BIT**) against the Government of Pakistan (**GoP**), which claim was registered as an arbitration case with the International Centre for Settlement of Investment Disputes (**ICSID**). TCCA also commenced arbitration proceedings

against GoB at the International Chamber of Commerce (ICC) for claims arising out of the CHEJVA. Meanwhile a Writ Petition filed by a Pakistani citizen challenging CHEJVA was dismissed by the High Court of Balochistan on 26.06.2007. Leave to appeal to the Supreme Court against the said judgment was clubbed with other Constitution Petitions. All the matters were disposed of by the Supreme Court vide short order dated 07.01.2013 setting aside the judgment of the High Court of Balochistan. The detailed reasons are reported as **Abdul Haque Baloch Vs. Government of Balochistan** (PLD 2013 SC 641). As a result, CHEJVA was declared void, *inter alia*, on the ground that it had been entered into without lawful authorization and was a non-transparent agreement that failed to comply with the regulatory provisions of law regarding mining operations in the Province.

4. The ICSID arbitration continued in the meanwhile and on 10.11.2017 the ICSID Tribunal rendered its decision on jurisdiction and liability. On 12.07.2019 the ICSID Tribunal announced its final award with TCCA receiving approximately US\$ 5.9 billion in damages, pre-award interest and costs incurred by it. Further litigation ensued as TCCA made efforts for enforcing the award in different jurisdictions.

5. In the above background, the GoP and the GoB commenced talks with the TCCA. After lengthy negotiations spanning over three years between the representatives of the two Governments and the TCCA Board, a settlement was proposed. According to the settlement the financial liability of the GoP under the ICSID award was agreed to be settled under the terms and conditions incorporated in a set of agreements executed between the parties. We do not propose nor are we required to comment on

the commercial terms settled between the parties which have been agreed after extensive negotiations between GoP/GoB and Barrick/Antofagasta. In such negotiations GoP/GoB had the assistance of independent international financial, technical and legal experts in addition to Pakistani experts. The negotiations were conducted by the duly authorized representatives of the parties who had been instructed by the competent authorities. Simultaneously, the ICC proceedings have also matured to a point of decision on liability and quantum with a likely award (as per the advice of international legal and financial consultants of GoP) of approximately US\$ 2 to 3 billion expected in favour of TCCA. As a result, in addition to the actual determined liability of US\$ 5.9 billion plus interest (on the basis of the ICSID Award), another US\$ 2 to 3 billion award is in the pipeline to be paid to Barrick and Antofagasta by the GoP and GoB. We have been informed that as part of the settlement, the parties have agreed that Antofagasta shall be paid an amount of US\$ 900 million which has since been deposited in an Escrow Account by the GoP. Upon fulfillment of the conditions precedent on or before December 15, 2022 Antofagasta shall be entitled to the amount in the Escrow Account. On receipt of the said amount any and all rights of Antofagasta under the ICSID award, the ICC proceedings and any and all claims of Antofagasta against GoP/GoB directly or indirectly arising out of or having any nexus or connection with the Reko Diq project shall stand finally and conclusively extinguished with no further claims either against Barrick or GoP/GoB. It was also agreed between the parties that under the settlement the Reko Diq project will be reconstituted with Barrick being the operator and TCCA holding 50% of the equity with the remaining 50% of the

equity being held by local Pakistani entities. We have been informed that the 50% local interest will be held as follows:

- (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.

The parties also agreed to a package of negotiated fiscal measures such as royalties and taxes applicable to the project that will be stabilized/granted for a specific period. Following the restructuring of the Reko Diq project, Antofagasta will be paid US\$ 900 million plus accrued interest by the GoP and will exit the project by transferring its entire interest in TCCA to Barrick. The GoP, GoB and both Barrick and Antofagasta have agreed that all the disputes that have arisen from the Reko Diq project which are the subject matter of litigation/Arbitration Award(s) anywhere in the world shall finally and conclusively stand resolved as soon as the agreements which have been placed on record and the conditions precedent mentioned therein are met on or before December 15, 2022, and any or all claims including the outstanding ICSID award and the anticipated ICC award shall stand settled without any further claim of any nature from either side. One of the conditions precedent for finalization of the proposed settlement is the President of Pakistan seeking an opinion from this Court on the points noted in the Implementation Agreement.

6. In light of the above background the President of Pakistan has referred the following questions for consideration and opinion of this Court:

- "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?"

7. We have heard the learned Additional Attorney General for Pakistan, the learned counsel appearing on behalf of Barrick and the Advocate General Balochistan assisted by Mr.Salahuddin Ahmed, ASC. We also appointed Mr.Farogh Naseem, ASC, Mr. Zahid Ibrahim, ASC and Mr.Salman Akram Raja, ASC as *amici curiae* who have also ably assisted the Court on the legal and constitutional issues involved in the matter. Mr.Amanullah Kanrani, ASC also submitted written submissions on behalf of the Balochistan Bar Council. We have also heard Messer Spiro Youakim, Picrre Cailletea and Xovier de Regloix, representatives of Lazard as well as Ms.Rabecca Campbell and Mr.Kamran Ahmed of White and Case (via video link) who were the Financial Consultants/Legal Advisors of the GoP/GoB respectively during negotiations with Barrick/ Antofagasta .

8. On hearing the parties, we find that the following issues arise from the Reference:

- i) Whether the Constitution places any bar on the disposal of public assets through a negotiated agreement?
- ii) Whether the Regulation of Mines and Oilfields and Mineral Development (Government Control) (Amendment) Act, 2022 (**2022 Act**) is within the

legislative competence of the Balochistan Assembly?

- iii) Whether the process through which the GoB is entering into the Agreements is fair, transparent, reasonable and in accordance with law?
- iv) Whether the terms of the Agreements violate or are in conflict with the judgment of this Court in Abdul Haque Baloch's case (PLD 2013 SC 641)?

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

(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 in-camera 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.

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

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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.

11. A point that emerges from the Reference filed before us is whether the FI Bill 2022 can be challenged on the ground that it is a person specific law. We note that the FI Bill 2022 is not limited exclusively to the Reko Diq project. Instead, it provides a framework for grant of investment incentives which will, subject to the provisions of the Bill, be available to all investments of US\$ 500 million or more. The fact that the Reko Diq project is the first to be identified as a "Qualified Investment" under the FI Bill 2022 does not render the statute as "person-specific." Furthermore, to the extent that legislative amendments in the Second Schedule to

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the FI Bill 2022 pertain specifically to the Reko Diq project, such statutory provisions and mechanisms are the norm in a number of other fiscal statutes, including, but not limited to the Income Tax Ordinance, 2001. Under the terms of the FI Bill 2022 such specific exemptions are required either to be legislatively promulgated or legislatively ratified.

12. We also note that the proposed FI Bill 2022 will not only pave the way for implementation of the Reko Diq project in its present form but will also facilitate and encourage direct foreign investment in similar mining projects and other high capital intensive industries in which direct foreign investment is required to be encouraged through guarantees assured by laws and regulatory measures.

13. To sum up we are of the view that the parameters set out in Abdul Haque Baloch's case (PLD 2013 SC 641) and the reasons for the same, have been duly addressed by the Federal and Provincial Governments. The process for the reconstitution of the Reko Diq project has been undertaken transparently and with due diligence. The Agreements are being signed by authorities duly authorized and competent to do so under the law. To ensure transparency and fairness, expert advice on the financial, technical and legal issues involved has been sought from both local as well as independent international experts/consultants on the terms settled in the Agreements. The Agreements have been put in place after due deliberation and have not been found by us to be unconstitutional or illegal on the parameters and grounds spelt out in Abdul Haque Baloch's case *ibid*. Likewise, the rationale, basis, legality and *vires* of the FI Bill 2022 as well as the amendments to its schedules and annexures and the amendments incorporated

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through SROs, provided the resolutions are passed by the Sindh and Balochistan Provincial Assemblies and the Bill is passed by the Parliament after following due process, shall be duly enacted as required under the Constitution. And such laws and regulatory measures do not in any manner violate the Constitution or the ~~xxxxxx~~ Law.

The Reference is accordingly answered in the aforesaid terms.

Sd/- HCT

Sd/- T

I agree subject to my clarification that I may not respond to question No.1 to the extent of "public policy." My detailed reasons shall follow.

Sd/- T

Sd/- T

Sd/- T

Announced in Court
on 9.12.22

Sd/- HCT

NOT APPROVED FOR REPORTING.

Sd/- HCT

95/23

IN THE SUPREME COURT OF PAKISTAN

(Advisory Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi
Mr. Justice Jamal Khan Mandokhail

Presidential Reference No.2 of 2022

(Reference by the President of the Islamic Republic of Pakistan u/Art.186 of the Constitution of the Islamic Republic of Pakistan, 1973.)

IN ATTENDANCE

For the Federation	: Ch. Aamir Rehman, Addl. Attorney General assisted by Barrister M. Usama Rauf Mr. Zohair Waheed Ms. Maryam Rashid Ms. Faryal Shah Afridi, Adv.
For PPL/OGDCL/ Govt. Holdings (Pvt.) Ltd.	: Barrister Jahanzeb Awan, ASC Assisted by: Mr. Umar Shahzad Abbasi Mr. Abdullah Raza Mr. Shabbir Harianwala
For Govt. of Balochistan	: Mr. Salahuddin Ahmed, ASC Mr. M. Asif Reki, AG, Balochistan Mr. M. Ayaz Khan Swati, Addl. AG, Balochistan
For PBC	: Mr. Mansoor Usman Awan, ASC
For Balochistan Bar	: Mr. Amanullah Kanrani, ASC
Amicus Curiae	: Mr. Salman Akram Raja, ASC Dr. M. Farogh Naseem, ASC Mr. Zahid F. Ibrahim, ASC
For Barrack Gold Corporation	: Mr. M. Makhdoom Ali Khan, Sr. ASC Assisted by: S.M. Faisal Hussain Naqvi, ASC Mr. Iftikhar-ud-Din Riaz, ASC Mr. Saad M. Hashmi, Advocate Kh. Aziz Ahsan, Advocate Mr. Yawar Mukhtar, Advocate Kh. Azeem, Advocate
White & Case	: Ra Becca Campbell Mr. Kamran Ahmed (Via Video-Link)
Lazard	: Spiro Youakim Pierre Cailleteau Xovier de Regloix (Via Video-Link)

Dates of Hearing : 25.10.2022, 01, 02.11.2022, 7th - 10th November, 2022, 14th to 17th November, 2022, 21st to 24th November, 2022, 28.11.2022 and 29.11.2022

ORDER

We had heard this matter at considerable length and announced the judgment by way of a short order unanimously. For ease of reference, the same is reproduced below:-

"For detailed reasons to be recorded later and subject to such amplification and elaboration as may be considered necessary, Presidential Reference No.2 of 2022 is answered as follows:

2. On 29.07.1993 the Balochistan Development Authority (BDA) entered into the Chaghi Hills Exploration Joint Venture Agreement (CHEJVA) with a foreign investor having 75% shareholding and BDA having 25% shareholding plus 2% royalty. Subsequently, in the year 2006, the foreign investor was succeeded by Tethyan Copper Company Pty. Ltd., Australia (TCCA). TCCA in turn was acquired by Barrick Gold Corporation (Barrick) and Antofagasta in equal shares. Under CHEJVA Barrick and its partner had the exclusive right to prospect and explore for copper and gold in the Reko Diq area.

3. Between 2006 and 2011, TCCA invested in mineral exploration and developed detailed plans for mining at Reko Diq. However, on 15.11.2011, the licensing authority of the Government of Balochistan (GoB) declined the mining lease application submitted by the project company of TCCA. Shortly thereafter, on 28.11.2011 TCCA initiated arbitration proceedings under the PakAustralia Bilateral Investment Treaty (BIT) against the Government of Pakistan (GoP), which claim was registered as an arbitration case with the International Centre for Settlement of Investment Disputes (ICSID). TCCA also commenced arbitration proceedings against GoB at the International Chamber of Commerce (ICC) for claims arising out of the CHEJVA. Meanwhile a Writ Petition filed by a Pakistani citizen challenging CHEJVA was dismissed by the High Court of Balochistan on 26.06.2007. Leave to appeal to the Supreme Court against the said judgment was clubbed with other Constitution Petitions. All the matters were disposed of by the Supreme Court vide short order dated 07.01.2013 setting aside the judgment of the High Court of Balochistan. The detailed reasons are reported as Abdul Haque Baloch Vs. Government of Balochistan (PLD 2013 SC 641). As a result, CHEJVA was declared void, inter alia, on the ground that it had been entered into without lawful authorization and was a non-transparent agreement that failed to comply with the regulatory provisions of law regarding mining operations in the Province.

4. The ICSID arbitration continued in the meanwhile and on 10.11.2017 the ICSID Tribunal rendered its decision on jurisdiction and liability. On 12.07.2019 the ICSID Tribunal

announced its final award with TCCA receiving approximately US\$ 5.9 billion in damages, pre-award interest and costs incurred by it. Further litigation ensued as TCCA made efforts for enforcing the award in different jurisdictions.

5. In the above background, the GoP and the GoB commenced talks with the TCCA. After lengthy negotiations spanning over three years between the representatives of the two Governments and the TCCA Board, a settlement was proposed. According to the settlement the financial liability of the GoP under the ICSID award was agreed to be settled under the terms and conditions incorporated in a set of agreements executed between the parties. We do not propose nor are we required to comment on the commercial terms settled between the parties which have been agreed after extensive negotiations between GoP/GoB and Barrick/Antofagasta. In such negotiations GoP/GoB had the assistance of independent international financial, technical and legal experts in addition to Pakistani experts. The negotiations were conducted by the duly authorized representatives of the parties who had been instructed by the competent authorities. Simultaneously, the ICC proceedings have also matured to a point of decision on liability and quantum with a likely award (as per the advice of international legal and financial consultants of GoP) of approximately US\$ 2 to 3 billion expected in favour of TCCA. As a result, in addition to the actual determined liability of US\$ 5.9 billion plus interest (on the basis of the ICSID Award), another US\$ 2 to 3 billion award is in the pipeline to be paid to Barrick and Antofagasta by the GoP and GoB. We have been informed that as part of the settlement, the parties have agreed that Antofagasta shall be paid an amount of US\$ 900 million which has since been deposited in an Escrow Account by the GoP. Upon fulfillment of the conditions precedent on or before December 15, 2022 Antofagasta shall be entitled to the amount in the Escrow Account. On receipt of the said amount any and all rights of Antofagasta under the ICSID award, the ICC proceedings and any and all claims of Antofagasta against GoP/GoB directly or indirectly arising out of or having any nexus or connection with the Reko Diq project shall stand finally and conclusively extinguished with no further claims either against Barrick or GoP/GoB. It was also agreed between the parties that under the settlement the Reko Diq project will be reconstituted with Barrick being the operator and TCCA holding 50% of the equity with the remaining 50% of the equity being held by local Pakistani entities. We have been informed that the 50% local interest will be held as follows:

- (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.

The parties also agreed to a package of negotiated fiscal measures such as royalties and taxes applicable to the project that will be stabilized/granted for a specific period. Following the restructuring of the Reko Diq project, Antofagasta will be paid US\$ 900 million plus accrued

interest by the GoP and will exit the project by transferring its entire interest in TCCA to Barrick. The GoP, GoB and both Barrick and Antofagasta have agreed that all the disputes that have arisen from the Reko Diq project which are the subject matter of litigation/ Arbitration Award(s) anywhere in the world shall finally and conclusively stand resolved as soon as the agreements which have been placed on record and the conditions precedent mentioned therein are met on or before December 15, 2022, and any or all claims including the outstanding ICSID award and the anticipated ICC award shall stand settled without any further claim of any nature from either side. One of the conditions precedent for finalization of the proposed settlement is the President of Pakistan seeking an opinion from this Court on the points noted in the Implementation Agreement.

6. In light of the above background the President of Pakistan has referred the following questions for consideration and opinion of this Court:

- "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?"

7. We have heard the learned Additional Attorney General for Pakistan, the learned counsel appearing on behalf of Barrick and the Advocate General Balochistan assisted by Mr.Salahuddin Ahmed, ASC. We also appointed Mr.Farogh Naseem, ASC, Mr. Zahid Ibrahim, ASC and Mr.Salman Akram Raja, ASC as *amici curiae* who have also ably assisted the Court on the legal and constitutional issues involved in the matter. Mr.Amanullah Kanrani, ASC also submitted written submissions on behalf of the Balochistan Bar Council. We have also heard Messer Spiro Youakim, Pierre Cailleteau and Xovier de Regloix, representatives of Lazard as well as Ms.Rabecca Campbell and Mr.Kamran Ahmed of White and Case (via video link) who were the Financial Consultants/Legal Advisors of the GoP/GoB respectively during negotiations with Barrick/ Antofagasta .

8. On hearing the parties, we find that the following issues arise from the Reference:

- i) Whether the Constitution places any bar on the disposal of public assets through a negotiated agreement?
- ii) Whether the Regulation of Mines and Oilfields and Mineral Development (Government Control) (Amendment) Act, 2022 (2022 Act) is within the legislative competence of the Balochistan Assembly?
- iii) Whether the process through which the GoB is entering into the Agreements is fair,

transparent, reasonable and in accordance with law?

- iv) Whether the terms of the Agreements violate or are in conflict with the judgment of this Court in Abdul Haque Baloch's case (PLD 2013 SC 641)?

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 (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 *in camera* 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.

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.

11. A point that emerges from the Reference filed before us is whether the FI Bill 2022 can be challenged on the ground that it is a person specific law. We note that the FI Bill 2022 is not limited exclusively to the Reko Diq project. Instead, it provides a framework for grant of investment incentives which will, subject to the provisions of the Bill, be available to all investments of US\$ 500 million or more. The fact that the Reko Diq project is the first to be identified as a "Qualified Investment" under the FI Bill 2022 does not render the statute as "person-specific." Furthermore, to the extent that legislative amendments in the Second Schedule to the FI Bill 2022 pertain specifically to the Reko Diq project, such statutory provisions and mechanisms are the norm in a number of other fiscal statutes, including, but not limited to the Income Tax Ordinance, 2001. Under the terms of the FI Bill 2022 such specific exemptions are required either to be legislatively promulgated or legislatively ratified.

12. We also note that the proposed FI Bill 2022 will not only pave the way for implementation of the Reko Diq project in its present form but will also facilitate and encourage direct foreign investment in similar mining projects and other high capital intensive industries in which direct foreign investment is required to be encouraged through guarantees assured by laws and regulatory measures.

13. To sum up we are of the view that the parameters set out in Abdul Haque Baloch's case (PLD 2013 SC 641) and the reasons for the same, have been duly addressed by the Federal and Provincial Governments. The process for the reconstitution of the Reko Diq project has been undertaken transparently and with due diligence. The Agreements are being signed by authorities duly authorized and competent to do so under the law. To ensure transparency and fairness, expert advice on the financial, technical and legal issues involved has been sought from both local as well as independent international experts/consultants on the terms settled in the Agreements. The Agreements have been put in place after due deliberation and have not been found by us to be unconstitutional or illegal on the parameters and grounds spelt out in Abdul Haque Baloch's case *ibid*. Likewise, the rationale, basis, legality and vires of the FI Bill 2022 as well as the amendments to its schedules and annexures and the amendments incorporated through SROs, provided the resolutions are passed by the Sindh and Balochistan Provincial Assemblies and the Bill is passed by the Parliament after following due process, shall be duly enacted as required under the Constitution. And such laws and regulatory measures do not in any manner violate the Constitution or the Law.

The Reference is accordingly answered in the aforesaid terms."

It is self evident from perusal of the above short order that it is comprehensive, deals with all material aspects of the case and contains adequate and sufficient reasons

which need no further amplification. We are therefore of the view that it is not necessary to issue separate or additional reasons in the matter especially so where the short order of the Court has already been accepted and implemented by all concerned parties.

S/J — HCT

S/J — T

As stated in my short order, I would not like to respond to question No. 1 to the extent of "public policy." Detailed reasons for the same are appended *vide* my opinion dated 18.07.2023.

S/J — T

ISLAMABAD, THE
09.12.2022
NOT APPROVED FOR REPORTING

In the short order, it was held that the short order will follow by detailed reason. Keeping in view such finding, I have already given my reasons through a ~~separate~~ separate note on 13-9-2023.

S/J — T 16/9/
2023.

Yahya Afridi, J:- The President of the Islamic Republic of Pakistan ('President') has sought the opinion of this Court in its Advisory Jurisdiction under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), on the following two questions of law:

- I. Whether the earlier judgement of this Honourable Court reported as Maulvi Abdul Haque Baloch v. Federation of Pakistan, PLD 2013 SC 461 of the law, public policy or the Constitution of Pakistan prevent the GoB and the GoP from entering into the Implementation Agreement and the Definitive Agreements or affect their validity?
- II. If enacted, would the proposed Foreign Investment (Protection and Promotion) Bill, 2022 be valid and constitutional?

The Hon'ble Chief Justice of Pakistan constituted a five-member Bench to consider and report the opinion of this Court on the questions referred to in the Reference. After thorough deliberation of all aspects of the referred questions, and considering the valuable submissions of the learned Additional Attorney-General for Pakistan and all other learned counsel, this Court rendered its opinion on both questions *vide* short order dated 09.12.2022, stating that the reasons thereof would follow. I had, with respect to my learned brothers on the Bench, abstained from rendering any opinion on a part of Question No. I, to the extent of "public policy", referred for the opinion of this court by the worthy President.

Advisory Jurisdiction

2. Before I elucidate the reasons for my abstaining in recording my opinion on the said part of Question No. I, it would be appropriate to consider the contours of the Advisory Jurisdiction vested in this Court under Article 186 of the Constitution, which reads:

186. Advisory jurisdiction.

(1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.

I had in detail penned down in my earlier opinion recorded in Presidential Reference No.1 of 2020¹ the salient features of the Advisory Jurisdiction of this Court under Article 186 of the Constitution, and the essentials whereof, relevant for my present abstention in responding to a part of Question No. 1, are as under:

First, the worthy President has the exclusive authority under Article 186 to refer a 'question' of 'public importance' to the Supreme Court for consideration and reporting its opinion thereon, but authority to determine whether a particular 'question' is a 'question of law' does not fall within his exclusive domain but remains with this Court. And that too, as a jurisdictional fact;

Secondly, in case this Court finds the 'question' referred not to be a 'question of law' or not clear in its content, the same can be sent back to the worthy President, unanswered;

Thirdly, the framers of the Constitution being cognisant of the intended legal efficacy of an 'opinion' of this Court given in its 'advisory jurisdiction' did not provide a forum of redressal to any person aggrieved thereof, like right to appeal or review, etc.; and

Finally, the finding of a nine-member bench of this Court in Hisba Bill Reference (PLD 2005 SC 873) declaring the 'opinion' recorded by the Court under Article 186 of the Constitution to be binding, which in my earnest view, disturbed the settled jurisprudential consensus on the status of 'opinion'; as this finding was recorded in exercise of its 'advisory jurisdiction'; and that too without taking any judicial heed of a principle of law already expressed by a five-member Bench of this Court, exercising its 'adjudicatory jurisdiction', while deciding two constitution petitions and answering a Reference together in Al-Jehad Trust v. Federation (PLD 1997 SC 84). However, I found it appropriate to leave this aspect of the matter for an authoritative decision in an appropriate case by this Court in its 'adjudicatory', and not 'advisory' jurisdiction.

Reasons for abstention

3. The part of the Question No. 1 which has been referred by the worthy President which, to my earnest understanding, ought not to be responded to by this Court in its Advisory Jurisdiction, reads:

Whether **public policy** prevent the GoB and the GoP from entering into the Implementation Agreement and the Definitive Agreements or affect their validity?

I had, in regard to the said part of Question No.1, noted that:

I may not respond to question No.1 to the extent of "public policy." My detailed reasons shall follow.

¹ PLD 2021 SC 825.

Given the scope and extent of the Advisory Jurisdiction of this Court, I had abstained from stating my opinion on the said part of Question No. 1 for two reasons: first, that the said part of the question did not cross the threshold of being a 'question of law', and that too as a jurisdictional precondition for invoking the Advisory Jurisdiction of this Court under Article 186 of the Constitution; and second, that the matters of policy are best left to the other organs of the State— the Executive and the Legislature- to respect the fundamental principle of 'Trichotomy of Power' as enshrined in the Constitution.

Public Policy – Question of law

4. To understand the true purport of the term 'public policy', it is important to know how the said term germinated in legal jurisprudence from a timid ground into such a powerful one that can strike down otherwise valid agreements between parties, and with time extended in special cases to policy matters, rules and even enacted laws.

5. Legal historians are of the view that the genesis of the term 'public policy' originated from the expression '*encounter commone ley*', which was seen in common-law jurisdictions to be acts or omissions prejudicial to the community. This judicial trend continued until the eighteenth century when, for the first time, the term 'public policy' was coined in common law in the case of Mitchel v. Reynolds², wherein Lord Macclesfield struck down a contract as it offended freedom of trade and had imposed restrictions thereon. Even though there was no *dolus malus* in contracts regarding other persons, yet if the interests of public were in peril, the same were exposed to being struck down for offending 'public policy'. This was referred to in common law jurisdictions as the 'public policy

² 24 Eng. Rep. 347 (1711).

exception' to the enforcement of contracts; a doctrine that allows courts to refuse to enforce a contract that is contrary to the public interest, even if the contract is otherwise valid and enforceable. The doctrine was based on the principle that when the enforcement of a contract is harmful to public good, then the Courts have a duty to protect the public interest by refusing to enforce such a contract. This watchful judicial approach then slowly extended beyond mere contracts to other social, commercial and economic areas; safeguarding against perpetuities, sales of offices, marriage contracts, and wagering.³ Thus, with time, there was a paradigm shift in viewing 'public policy'; the pendulum had moved from being simply the 'protector' of the community to that of the *res publica*. This fundamental shift in judicial approach had, in fact, politicized the idea of public policy in the legal domain.

6. The Courts were initially apprehensive of entering the untested waters of politics, and thus, were inclined to show judicial restraint in positively exercising this judicial power, unless the harm to the public was an admitted fact with no contest from the opposing parties. The apprehension was that the temptation to judicially indulge in these untested waters was rather unsafe. Justice Burroughs famously remarked:

I for one protest, as my Lord has done, against arguing too strongly upon public policy—it is a very unruly horse, and when once you get astride it you never know where it will carry you.⁴

This guarded view was later echoed in cases that followed.⁵

³ Farshad Ghodoosi, The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 Neb. L. Rev. 685 (2015)

⁴ Richardson v. Millish [1824-34] All ER Rep 258

⁵ Driefontein Consolidated Mines Ltd. Gaison (1901) 17 T.L.R. 604, "This public policy is a high horse to mount and is difficult to ride when you have mounted it." The reason for such restraint was later more clearly articulated by Lord Wright in Fender v. Mildmay (1937), 3 All England Reports 402) to be based on two paramount reasons:

- (1) The traditional reluctance of judges, and of English Judges in particular, to close or discuss openly the ideological assumptions underlying the administration of the law.
- (2) The acceptance of separation of powers and the consequent reluctance to compete with the legislator in the application of legal policy.

Public Policy – Polycentric issue

7. One serious objector to Courts interfering in matters of policy is the eminent jurist Lon Fuller, who maintained that issues of public policy arising during adjudication represent 'polycentric problems': complex matters influenced by numerous interdependent variables.⁶ He further elucidated that any decision concerning one variable by implication affects all others, and is thus best left to be dealt with by elected representatives, given the complex nature of such problems, which necessitate negotiation, compromise and consensus-oriented decision-making. Further, the reasons for the need for Courts to show restraint in 'polycentric problems' is extremely desirable when the issue revolves around or affects economic policy. In such cases, the Executive has been given room for 'trial and error', as long as it is acting within the limits of its lawful authority and is *bona fide*. This view has been felicitously expressed by Frankfurter J. in his inimitable style in Morey v. Doud⁷:

In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events - self limitation can be seen to be the path of judicial wisdom and institutional prestige and stability.

Similar views have been voiced by this Court,⁸ the Indian Supreme Court,⁹ and likewise, the South African Constitutional Court.¹⁰

Constitutional – Trichotomy of Power

8. What we must not ignore is that the command for judicial restraint is implicitly engrained as a pillar of the 'Basic Structure' of our

⁶ Lon L Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353.
⁷ (1957) 354 US 457.

⁸ Elahi Cotton Mills v. Federation of Pakistan PLD 1997 SC 582 (5-MB); Akhtar Hassan v. Federation of Pakistan 2012 SCMR 455.

⁹ Indian Ex-Servicemen Movement and Ors. Vs. Union of India (UOI) and Ors. (2022) 7 SCC 323; Balco Employees Union v. Union of India AIR 2002 SC 350.

¹⁰ International Trade Administration Commission Vs. SCAW South Africa (Pty) Ltd [2010] ZACC 6; Minister of Health and Others vs. Treatment Action Campaign and Others [2002] ZACC 16.

Constitution - 'trichotomy of power' - whereby each organ of the State is allocated separate functions. This separation of powers is a key element in the proper functioning of any healthy democracy. As far as public policy is concerned, Chapter 2 of our Constitution (Articles 27 to 34) lays down the 'Principles of Policy' for each organ or authority of the State, and each person performing functions on behalf of such an organ or authority of the State. It does not, however, expressly lay down what substantive policy should be.

9. What is also crucial to note is that the framers of the Constitution had clearly indicated under sub-rule-2 of Article 30¹¹ the non-justiciability of challenging any inaction of any organ or authority of the State to fulfil its obligation as per the 'Principles of Policy' mandated thereunder. Though the Courts cannot declare any law to be void being in breach of any of the directives stated in 'Principles of Policy', they can take cognizance of the tendency of the directives when examining the constitutionality of the law.¹² In contrast, the Fundamental Rights (Article 9 to Article 27) enshrined in the Constitution are very clear in content, and the respect they command over any piece of legislation (Article 8)¹³. The 'Principles of Policy', on the other hand, are non-justiciable guiding principles for the Executive and the Legislature, specifying the scope and extent of the policy to be made – an idea originating from Ireland¹⁴. Thus, the judiciary has been conspicuously restrained from interfering with

¹¹ 30(2) The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State, any organ or authority of the State or any person on such ground."

¹² Hanif Quareshi V. State of Bihar (AIR 1958 SC 731)

¹³ 8. Laws inconsistent with or in derogation of fundamental rights to be void.

(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

.....

(5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution.

¹⁴ Article 45 of the Constitution of Eire, 1937, followed in the Constitution of Burma of 1948, and in the constitutions of the Sub-continent.

matters relating to policy, as it cannot encroach upon the domain of the Executive, which is overseen by the Legislature, in deciding whether a policy is in or against public interest¹⁵. However, since the ultimate responsibility to uphold the supremacy of the Constitution and the rule of law in the country lies with the Judiciary, the Courts could interfere in policy decisions of the Executive, but only if the same are found to be violative of any provision of the Constitution or a law, or suffering from the *vice of mala fides*¹⁶.

10. I endorse this cautious approach of Courts in dabbling in policy matters, as these involve the intricate interplay of technical and economic elements requiring the balancing of competing interests, a forte of the functionaries of the Executive or the elected members of the Legislature, and not the unelected justices of the superior Courts.

Conclusion

11. When we test the legal validity of the Implementation Agreement and the Definitive Agreements on the touchstone of Public Policy, what emerges is not simply a 'question of law', but a web of complex commercial mining transactions, transcending international borders, thus giving rise to 'polycentric issues'. In my view, such complex transactions do not cross the threshold of being justiciable as 'questions of law' under the Advisory Jurisdiction of this Court. This guarded treading by the Courts in matters relating to 'Public Policy' is magnified ten-fold when a Court, such as the Supreme Court, and that too in its Advisory Jurisdiction under Article 186 of the Constitution, is to render its opinion - an opinion that is not only legally binding but also final as

¹⁵ The Constitution, Article 91(6): "The [Federal] Cabinet, together with the Ministers of State, shall be collectively responsible to the Senate and the National Assembly." Article 130(6): "The [Provincial] Cabinet shall be collectively responsible to the Provincial Assembly..."

¹⁶ Dossani Travels v. Travels Shop 2013 SCMR 1749 (Short Order) PLD 2014 SC 1 (Detailed reasons).

declared by a nine-member Bench of this Court in the **Hisba Bill Reference**¹⁷.

12. The judicial intrusion of this Court in the **Maulvi Abdul Haq Baloch case** (*supra*), with all the humility at my command and with utmost respect to my learned brothers, when viewed in retrospect, appears to be a rushed decision where there was no 'live issue'¹⁸ left for determination. The very issuance of a mining license, which was the subject matter of the petition before the Court, had already been cancelled by the appropriate licensing authority. In fact, time has proved that the financial exposure¹⁹ for such a judicial intrusion far exceeded the benefits it aimed to achieve, and the financial losses it purportedly claimed to save.

13. Thus, the lesson learnt from the said case must not be forgotten and such kind of judicial adventure of riding on the 'unruly horse' of 'public policy' must not be repeated by this Court, and that too in its Advisory Jurisdiction under Article 186 of the Constitution – hence my abstention in answering the said part of Question No. 1.

Sd/-

(A.W) 16.09.23

¹⁷ PLD 2005 SC 873.

¹⁸ The licensing authority rejected TCCPS application for issuance of mining lease on 15.11.2011. the appeal thereof was also dismissed on 03.03.2012 and this Court despite there being no live issue proceeded to decide the case on 07.01.2013.

¹⁹ The ICSID and ICC awards totalled approximately US\$11 billion at the time of the filing of this reference. In the same window, during the month of October 2022, State Bank of Pakistan reports that Pakistan's total liquid foreign exchange reserves stood at approximately US\$ 14 billion.

(A.W) 19.09.23

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 against the GoP (the

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

“**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

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

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 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 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 Hague*, 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 Hague* 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 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

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

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.

sd/- 13/9/2023.
(Jamal Khan Mandokhail)
Judge

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