INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

TETHYAN COPPER COMPANY PTY LIMITED

Claimant

and

ISLAMIC REPUBLIC OF PAKISTAN

Respondent

ICSID Case No. ARB/12/1

DECISION ON JURISDICTION AND LIABILITY

Members of the Tribunal
Rt. Hon. Lord Leonard Hoffmann
Dr. Stanimir A. Alexandrov
Professor Dr. Klaus Sachs, President

Secretary of the Tribunal
Mrs. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: 10 November 2017

Representation of the Parties

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Frequently Used Abbreviations and Acronyms

1970 BMC Rules	Balochistan Mineral Concession Rules, 1970, also known as 1970 BMCR
1995 NMP	National Mineral Policy, dated September 1995 [Pakistan]
2013 NMP	National Mineral Policy, dated February 2013 [Pakistan]
2002 BM Rules	Mineral Rules enacted by Balochistan in 2002 to implement the National Mineral Policy
2000 Addendum	The 2000 Addendum to the CHEJVA dated 4 March 2000
Antofagasta	Antofagasta plc
Application	Mining Lease Application submitted to the Licensing Authority by TCCP on 15 February 2011
Atacama	Atacama Copper Company Pty Limited
Australia-Pakistan Treaty	Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments, dated 7 February 1998
Balochistan	Province of Balochistan
Barrick	Barrick Gold Corporation
BDA	Balochistan Development Authority
BDA Act	Balochistan Development Authority Act, 1974
BHP	BHP Minerals International Exploration, Inc.
BIT	See "*Treaty*"
2002 BM Rules	Balochistan Mineral Rules, 2002
Boggs I	Witness Statement of Catherine (“Cassie”) Boggs, dated 1 February 2013
Boggs II	Second Witness Statement of Catherine (“Cassie”) Boggs, dated 21 April 2013
CA	Claimant's Authority
CDWP	Central Development Working Party, Planning Commission [Pakistan]
CE	Claimant's Exhibit
Centre	International Centre for Settlement of Investment Disputes
CHEJVA	Chagai Hills Exploration Joint Venture Agreement

CHEJVA Agreements	CHEJVA, the 2000 Addendum, and the 2006 Novation Agreement
Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction and Counterclaim dated 12 September 2014
Constitution	The Constitution of the Islamic Republic of Pakistan, as passed on 10 April 1973 and modified up to 28 February 2012
Counter-Memorial	Respondent's Objections, Counter-Memorial and Counter-Claim dated 30 September 2013
Counterproposal	Respondent's counterproposal to the Proposed Timetable for Document Production dated 8 November 2013
Deed of Waiver	Deed of Waiver and Consent, dated 23 June 2000, between the Governor of Balochistan on behalf of the GOB and the BDA
Disqualification Proposal	Proposal to disqualify arbitrator under Article 57 of the ICSID Convention
ECNEC	Executive Committee of the National Economic Council [Pakistan]
EPZ	Export Processing Zone
ESIA	Environmental and Social Impact Assessment
Expansion Study	Expansion Pre-Feasibility Study
Feasibility Study	Feasibility Study for Initial Mine Development submitted by TCC to Balochistan on 26 August 2010
FET	Fair and Equitable Treatment
First Session	First session pursuant to Rule 13(1) of the ICSID Arbitration Rules
GOB	The Government of Balochistan
GOP	The Government of Pakistan
GSP	Geological Survey of Pakistan
GTZ / GIZ	*Deutsche Gesellschaft für Technische Zusammenarbeit* (German Society for Technical Cooperation) *Deutsche Gesellschaft für Internationale Zusammenarbeit* (German Society for International Cooperation)
H14 / H15	Principal copper-gold orebodies at the Western Porphyries, Reko Diq
H4	Tanjeel copper orebody, Reko Diq

Harvard Articles	Harvard Draft Convention on State Responsibility, 1929
Hearing	Hearing on Jurisdiction, Liability and the Counter-Claims held between 6 – 17 October 2014 in Paris, France
ICC Proceedings	The parallel ICC Case 18347/VRO/AGF between Claimant and the Province of Balochistan
ICC Rulings on Preliminary Issues	Rulings on Preliminary Issues issued by the ICC Tribunal on 21 October 2014
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in effect from 10 April 2006
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965
ICSID Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
ILC Articles	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts
Joint Venture	Unincorporated contractual joint venture between the BDA [Balochistan] and TCCA, governed by the CHEJVA
Krcmarov	Witness Statement of Robert Krcmarov, dated 23 July 2012
Exploration License EL-5	Exploration License designated EL-5, issued 18 May 2002, with retroactive effect as of 21 February 2002, for a period of three years
Licensing Authority	Director General of the MMDD served as the Licensing Authority
Livesey IV	Fourth Witness Statement of Timothy Livesey, dated 1 February 2013
Livesey V	Fifth Witness Statement of Timothy Livesey, dated 23 April 2013
Luksic	Witness Statement of Jean-Paul Luksic, dated 23 April 2014
MCC	China Metallurgical Group Corporation
Memorial	Claimant's Memorial dated 1 February 2013
Mincor	Mincor Resources NL

Mineral Agreement	Agreement between mining venture and Federal and Provincial Governments, contemplated by 2002 BM Rules and 1995 NMP
Mining Area	Area at Reko Diq, measuring 99.473 square kilometers, over which TCCP sought mining lease pursuant to CHEJVA and 2002 BM Rules
MMDD	Mines & Mineral Development Department of the Licensing Authority [Balochistan] Director General served as the Licensing Authority Secretary decided administrative appeals on orders issued by the Licensing Authority
MPNR	Ministry of Petroleum and Natural Resource [Pakistan]
Mubarakmand I	Witness Statement of Dr. Samar Mubarakmand dated 21 September 2012
Mubarakmand II	Second Witness Statement of Dr. Samar Mubarakmand dated 29 September 2013
NAFTA	North American Free Trade Agreement entered into between Canada, Mexico and the United States, entered into force on 1 January 1994
NOC	No-Objection Certificate
Notice of Intent to Reject	Licensing Authority's notice of intent to reject the Application dated 21 September 2011
2006 Novation Agreement	Agreement pursuant to which Claimant became a party to the CHEJVA (replacing BHP) dated 1 April 2006
NPI	Net profit interest
P&DD	Planning & Development Department [Balochistan]
Pakistan	Islamic Republic of Pakistan
PC-1	Planning Commission Form PC-1 [Pakistan]
PDWP	Provincial Development Working Party [Balochistan]
PL-4	Prospecting License covering the Reko Diq area, issued 8 December 1996
PL-14	Prospecting License covering the Reko Diq area, issued 21 February 2000
PO	Procedural Order
Pre-Feasibility Study	Pre-Feasibility Study for Initial Mine Development

Project Agreement	Agreement to be conducted between the Joint Venture partners pursuant to CHEJVA Clause 1.7, also known as the Shareholder Agreement
Proposed Timetable for Document Production	Claimant's proposal for a revised timetable for the production of documents dated 30 October 2013
Provisional Measures Hearing	Hearing on the Provisional Measures Request held on 6 November 2012
Provisional Measures Rejoinder	Respondent's rejoinder to the Provisional Measures Reply
Provisional Measures Reply	Claimant's reply to the Provisional Measures Response
Provisional Measures Request	Claimant's request for Provisional Measures
Provisional Measures Response	Respondent's response to Claimant's Provisional Measures Request
RE	Respondent's Exhibit
1994 Relaxation	Order re: Relaxation of Balochistan Mining Concession Rules for the Implication of the BDA-BHPM Joint Venture Agreement, dated 20 January 1994
Reply	Claimant's Reply on Liability and Response on Jurisdiction and Counterclaims dated 23 April 2014
Request for Decision on Costs	Respondent's request for the Tribunal to order Claimant to pay Respondent's costs related to the interim relief / provisional measures applications dated 8 May 2012
Request for Document Production	Respondent's request for the Tribunal to direct Claimant and its parent companies to disclose certain internal information dated 8 May 2013
Request for Suspension	Respondent's request for suspension dated 21 October 2013
Request for Suspension and Trifurcation	Respondent's request for the Tribunal to order suspension of the proceedings on the merits and a hearing on Respondent's jurisdictional objections dated 8 May 2013
Respondent's Rejoinder	Respondent’s Rejoinder and Reply on Jurisdiction, Admissibility and Counterclaim dated 25 August 2014
Response	TCC's response to the Notice of Intent to Reject from the Licensing Authority dated 29 October 2011

Revised Confidentiality Terms	The confidentiality terms agreed by the Parties and adopted by the Tribunal in PO-4 dated 27 February 2014
RfA	Claimant's Request for Arbitration dated 28 November 2011
RLA	Respondent's Legal Authority
Secretariat	ICSID Secretariat
Secretary	Secretary of the Tribunal
Secretary, MMDD.	Decided administrative appeals of decisions by the Licensing Authority
Secretary-General	Secretary-General of ICSID
Shareholder Agreement	See "*Project Agreement*"
Steering Committee	Steering Committee for the Development of Reko Diq Copper–Gold Project [Pakistan-Balochistan] established by the Pakistani Prime Minister on 3 September 2007
TCC	Claimant's reference to TCCA and TCCP collectively
TCCA	Tethyan Copper Company Pty Limited
TCCP	Tethyan Copper Company Pakistan (Private) Limited
Treaty	See "*Australia-Pakistan Treaty*"
Undertaking	Undertaking given by TCCA in April 2006 (in connection with the assignment of Exploration License EL-5 to TCCA) to abide by the 1995 NMP and the BM Rules
Vienna Convention	Vienna Convention on the Law of Treaties, adopted on 22 May 1969 and entered into force on 27 January 1980
Williams	Witness Statement of Cory Williams, dated 15 April 2014

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I. THE PARTIES

A. Claimant

1. **Tethyan Copper Company Pty Limited,** a company constituted and registered under the laws of Australia and owned (through Atacama Copper Pty Limited) in equal shares by Antofagasta plc, a company incorporated in the United Kingdom with its headquarters in Chile, and Barrick Gold Corporation, a company incorporated in Canada, hereinafter referred to as "**Claimant**" or "**TCCA**".

B. Respondent

2. Islamic Republic of Pakistan, hereinafter referred to as "Respondent" or "Pakistan".

3. Claimant and Respondent are hereinafter referred to individually as a "**Party**" and collectively as the "**Parties**".

II. THE ARBITRAL TRIBUNAL

4. The Arbitral Tribunal has been constituted as follows:

(i) Dr. Stanimir A. Alexandrov
(appointed by Claimant)
c/o Stanimir A. Alexandrov PLLC
1501 K Street, N.W., Suite C-072
Washington, D.C. 20005
U.S.A.

(ii) Rt. Hon. Lord Leonard Hoffmann
(appointed by Respondent)
Brick Court Chambers
7-8 Essex Street
London WC2R 3LD
United Kingdom

(iii) Professor Dr. Klaus Sachs
(appointed by the Parties)
CMS Hasche Sigle
Nymphenburger Strasse 12
80335 München
Germany

III. SUMMARY OF THE PROCEDURAL HISTORY

A. The Institution of These ICSID Proceedings

5. This arbitration concerns a legal dispute between TCCA and Pakistan arising out of TCCA's claimed investments in Pakistan. Claimant alleges that Pakistan violated the *Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments*, which was signed on 7 February 1998 and entered into force on 14 October 1998 (the "**Australia-Pakistan Treaty**", the "**Treaty**" or the "**BIT**"),[1] by its arbitrary and unlawful denial of a mining lease to Tethyan Copper Company Pakistan (Private) Limited ("**TCCP**"), TCCA's wholly-owned Pakistan subsidiary, and other actions attributable to Pakistan that, according to Claimant, deprived TCCA of the value of its investments. Such alleged actions include, in particular, developing and executing a scheme to take over TCCA's Reko Diq project, denying the Mining Lease Application in pursuit of that scheme and using TCCA's exploration and feasibility work product in its own project, which allegedly amounted to a breach of the fair and equal treatment obligation under Article 3(2), an expropriation of TCCA's investment without compensation in violation of Article 7(1) and an impairment of TCCA's investment in violation of Article 3(3) of the Treaty.

6. Article 3 of the Australia-Pakistan Treaty provides, in relevant part:

> "*1. Each Party shall encourage and promote investments in its territory by investors of the other Party and shall, in accordance with its laws and investment policies applicable from time to time, admit investments.*
>
> *2. Each Party shall ensure fair and equitable treatment in its own territory to Investments*."

7. Article 7(1) of the Treaty provides:

> "*Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as '*expropriation*') the investments of investors of the other Party unless the following conditions are complied with:*
>
> *the expropriation is for a public purpose related to the internal needs of that Party and under due process of law;*
>
> *the expropriation is non-discriminatory; and*
>
> *the expropriation is accompanied by the payment of prompt, adequate and effective compensation*."

[1] **Exhibit C-4**.

8. Article 3(3) of the Treaty provides:

> "*Each Party shall, subject to its laws, accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments*."

9. On 28 November 2011, Claimant filed its Request for Arbitration with the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**") pursuant to Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**").[2] Article 36 of the ICSID Convention provides:

> "*(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.*
>
> *(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.*
>
> *(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register*."

10. In its Request for Arbitration, Claimant referred to Article 13(3)(a) of the Australia-Pakistan Treaty pursuant to which Pakistan agreed to "*consent in writing to the submission of the dispute to the Centre within thirty days*" of receiving the Request for Arbitration.[3]

11. On 12 January 2012, the Secretary-General of ICSID ("**Secretary-General**") registered Claimant's Request for Arbitration.

12. By letter dated 11 April 2012, Claimant elected the formula for the constitution of the Tribunal provided under Article 37(2)(b) of the ICSID Convention (*i.e.*, that the Tribunal would consist of three arbitrators: one arbitrator to be appointed by each Party, and the third, who would be the President of the Tribunal, to be appointed by agreement of the Parties).

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[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965.
[3] RfA, ¶ 14.

13. By letter dated 18 May 2012, Claimant informed the Secretary-General that it appointed Mr. John Beechey, a British national, as an arbitrator pursuant to Article 37(2)(b) of the ICSID Convention. Mr. Beechey accepted his appointment on 1 June 2012.

14. On 12 June 2012, Respondent appointed as arbitrator Rt. Hon. Lord Leonard Hoffmann, a British national, who accepted his appointment on the following day.

15. In separate letters dated 9 July 2012, the Parties expressed their agreement to the appointment of Professor Dr. Klaus Sachs, a German national, as the President of the Tribunal. Prof. Sachs accepted his appointment as presiding arbitrator on 12 July 2012.

16. On 12 July 2012, the Tribunal was constituted in accordance with Article 37(2)(b) of the ICSID Convention.[4] Mrs. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, was designated to serve as Secretary to the Tribunal.

17. On 23 July 2012, Respondent filed a proposal for disqualification of Mr. Beechey as an arbitrator pursuant to Article 57 of the ICSID Convention (the "**Disqualification Proposal**"). On the same date, the ICSID Secretariat (the "**Secretariat**") informed the Parties that, pursuant to Rule 9(6) of the Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**"), the proceeding was suspended until a decision on the Disqualification Proposal had been taken.

18. Also on 23 July 2012, Claimant filed a Request for Provisional Measures (the "**Provisional Measures Request**"). The Secretariat informed the Parties that, in light of the suspension of the proceedings, Claimant's submission would be sent to the Tribunal once the proceedings resumed.

19. On 25 July 2012, Professor Dr. Klaus Sachs and Lord Hoffmann fixed a procedural schedule concerning the Disqualification Proposal.

20. On 26 July 2012, Respondent supplemented its Disqualification Proposal.

21. On 31 July 2012, Claimant submitted a reply to the Disqualification Proposal.

22. On 3 August 2012, pursuant to Rule 9(3) of the ICSID Arbitration Rules, Mr. Beechey furnished explanations in response to the Disqualification Proposal.

23. Following consultation with the Parties, by letter of 7 August 2012, the Secretary of the Tribunal on instructions of the President of the Tribunal, confirmed that a hearing on the Disqualification Proposal would be held at the International Dispute Resolution Centre (the "**IDRC**") in London, on 8 September 2012.

[4] Rule 6(1) of the ICSID Arbitration Rules.

24. On 31 August 2012, each Party filed observations to Mr. Beechey's explanations of 3 August 2012.

25. By letter dated 6 September 2012, Claimant informed the unchallenged Members of the Tribunal that the Parties had jointly requested Mr. Beechey to resign from the Tribunal and that he had complied with this request. By letter of the same date, Respondent expressed its consent to Mr. Beechey's resignation from the Tribunal. Respondent stated that its consent was without prejudice to objections to the jurisdiction of the Tribunal, which it might raise at a later stage of the proceedings.

26. By e-mail of the same date to the ICSID Secretariat copied to his co-arbitrators, Mr. Beechey confirmed his resignation from the Tribunal.

27. By letter dated 7 September 2012, the unchallenged Members of the Tribunal informed the Secretary-General of their consent to Mr. Beechey's resignation. By letter of the same date, the Secretariat informed the Parties thereof and invited Claimant to appoint an arbitrator pursuant to Article 37(2)(b) of the ICSID Convention in order to fill the vacancy resulting from Mr. Beechey's resignation.

28. By letter of 7 September 2012, Claimant informed the Secretary-General that it appointed Dr. Stanimir Alexandrov, a national of Bulgaria, as an arbitrator pursuant to Article 37(2)(b) of the ICSID Convention and Rule 11(1) of the ICSID Arbitration Rules. Attached to Claimant's letter was a letter from Respondent of 6 September 2012 providing its advance consent to Dr. Alexandrov's appointment, subject to Dr. Alexandrov's formal confirmation of the disclosure of his participation as counsel in two concluded cases.

29. On 10 September 2012, Dr. Alexandrov accepted his appointment and confirmed the disclosure which he had previously made to Claimant.

30. By letter of the same date, the Secretariat informed the Parties of Dr. Alexandrov's acceptance, and that the proceeding would resume pursuant to Rule 12 of the ICSID Arbitration Rules from the point it had reached at the time the vacancy on the Tribunal had occurred. The Secretariat provided the reconstituted Tribunal with Claimant's Provisional Measures Request dated 23 July 2012 ("**Provisional Measures Request**"), including supporting documents as well as the Witness Statements of Messrs. Timothy Livesey and Robert Krcmarov. In its Provisional Measures Request, Claimant requested that the *status quo* be preserved during the pendency of the arbitration. Specifically, it requested that Respondent and Balochistan refrain from (i) further developing; or (ii) disposing of, the Reko Diq Mining Area; (iii) breaching the confidentiality provisions of Claimant's Feasibility Study; and (iv) infringing Claimant's exclusive surface rights. In addition, Claimant requested that Respondent and Balochistan issue any authorization required to allow Claimant's expatriate staff to work in, and travel to Pakistan.

31. Under cover of a letter dated 11 September 2012, Claimant submitted corrected versions of Exhibits CE-99 and CE-128.

B. The Initiation of the ICC Proceedings

32. Prior to the initiation of these proceedings, Claimant filed a Request for Arbitration against the Province of Balochistan, Pakistan, with the International Chamber of Commerce, which was registered on 28 November 2011 and assigned the number ICC Case 18347/VRO/AGF ("**ICC Proceedings**"). Claimant's claims in the ICC Proceedings arise out of Claimant's alleged right to a mining lease under Article 11.8.2 of the Chagai Hills Exploration Joint Venture Agreement dated 29 July 1993 between the Balochistan Development Authority and BHP Minerals International Exploration Inc. ("**CHEJVA**") and Rule 48(1)(b) of the 2002 Balochistan Mining Rules. Claimant claims Respondent has breached the CHEJVA and the 2002 Balochistan Mining Rules by denying its application for a mining lease.

33. Claimant submitted the dispute to arbitration pursuant to Clause 15.4 of the CHEJVA which provided that "*any dispute*" which the parties failed to resolve amicably or through voluntary expert conciliation "*shall be submitted*" to international arbitration before ICSID or, in the event that ICSID does "*not accept jurisdiction*" or "*reject*[s] *the arbitration request*," to arbitration under the ICC Rules.[5]

34. On 23 July 2013, the ICC Tribunal, in response to TCCA's request dated 10 May 2013, issued its ruling on bifurcation, ruling that the Government's objections as to jurisdiction and admissibility be joined to the merits and that the validity and binding nature of the CHEJVA should be decided in advance of the main allegations regarding breach of the CHEJVA. The ICC Tribunal issued its Rulings on Preliminary Issues on 23 October 2014 ("**ICC Rulings on Preliminary Issues**").[6] These rulings will be referred to later in this Award.

35. Thus, Claimant is currently conducting parallel and independent arbitration proceedings, with the ICC Tribunal deciding Claimant's contractual claims under the CHEJVA and this ICSID Arbitral Tribunal deciding Claimant's treaty claims under the Australia-Pakistan Treaty.

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[5] Memorial, ¶ 62. **Exhibit CE-1**, Clauses 15.4.1, 15.4.8. On 28 November 2011, Claimant had also initiated arbitration proceedings against Pakistan and Balochistan before the International Centre for the Settlement of Investment Disputes ("**ICSID**") pursuant to clause 15.4.8 of the CHEJVA. By notice dated 7 December 2011, the ICSID Secretary-General informed the Parties that ICSID lacked jurisdiction over the dispute with Balochistan because Pakistan had neither designated Balochistan as a constituent subdivision, nor approved Balochistan's consent to ICSID arbitration, nor informed ICSID that such approval was not required.
[6] Ruling on Preliminary Measures, ¶ 47.

C. The ICSID Arbitral Proceedings

1. The Pre-Hearing Phase

36. By letter dated 14 September 2012, the Secretariat, on behalf of the Tribunal, confirmed that the First Session pursuant to Rule 13(1) of the ICSID Arbitration Rules ("**First Session**") and the hearing on the Provisional Measures Request (the "**Provisional Measures Hearing**") would be held at the IDRC in London on 6 November 2012.

37. Under cover of a letter dated 1 October 2012, Respondent submitted, without prejudice to its jurisdictional objections, its Response to Claimant's Request for Provisional Measures ("**Provisional Measures Response**") with supporting documents as well as the Witness Statement of Dr. Samar Mubarakmand and its annexes. In its Provisional Measures Response, Respondent informed the Tribunal about its plans to develop the deposit H4 (the "**H4 Work Plan**") and noted that the GOB had no present intention to exploit the area beyond H4. It therefore requested that the Provisional Measures Request be dismissed with costs awarded in Respondent's favor.

38. On 15 October 2012, Claimant submitted its Reply on Provisional Measures ("**Provisional Measures Reply**"), with supporting documents as well as the Second Witness Statement of Mr. Livesey. In the Reply, Claimant renewed its request that, given the imminent nature of the harm anticipated by Claimant, the Tribunal immediately grant the requested provisional measures as a temporary restraint pending disposition of the Provisional Measures Request.

39. By letter dated 18 October 2012, the Secretariat informed the Parties of the Tribunal's decision that the Tribunal would not decide on the requested relief before having received Respondent's Provisional Measures Rejoinder and having heard both Parties' arguments at the oral hearing.

40. Under cover of a letter dated 29 October 2012, Respondent submitted the Rejoinder (titled "*Respondent's Answer to the Claimant's Reply*") ("**Provisional Measures Rejoinder**"), together with supporting documents.

41. By letter dated 31 October 2012, the Secretariat, on behalf of the Tribunal, requested that Respondent inform the Tribunal and Counsel for Claimant whether Respondent intended to cross-examine Messrs. Livesey and Krcmarov during the Provisional Measures Hearing. By letter of the same date, Respondent confirmed that it did not intend to do so.

42. The Tribunal held the First Session with the Parties on 6 November 2012. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed, *inter alia*, that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, and that the procedural language would be English. The Parties were unable

to reach an agreement on the place of the proceedings. Having heard the Parties on this matter, the Tribunal decided that Washington, D.C. would be the place of the proceeding and that, unless otherwise agreed, the hearings would be held at the World Bank Conference Centre in Paris. During the First Session, the Parties and the Tribunal also discussed the other items on the Draft Agenda and Procedural Order previously circulated by the Secretary of the Tribunal, the Parties' agreements and their respective positions regarding the items on which they did not agree and agreed on a procedural timetable. At the proposal of the Tribunal, the Parties agreed to the appointment of Dr. Tilman Niedermaier as Assistant to the Tribunal.

43. The Provisional Measures Hearing was held at the IDRC on 6 November 2012, following the First Session. In addition to the Members of the Tribunal, the Assistant and the Secretary of the Tribunal, present at the hearing were (i) For Claimant: Mr. Donald Francis Donovan, Dr. Dietmar W. Prager, Ms. Natalie L. Reid, Mr. Matthew H. Getz, Ms. Natalie J. Lockwood, and Ms. Noelle Duarte Grohmann of the law firm of Debevoise & Plimpton LLP, New York; Mr. Timothy Livesey, Mr. William Hayes and Mr. Jack McMahon of Tethyan Copper Company Pty Limited; Mr. Francisco Charlin and Mr. Ramón Jara of Antofagasta plc; and Ms. Sybil Veenman and Mr. Jonathan Drimmer of Barrick Gold Corporation; and (ii) For Respondent: Mr. Ahmer Bilal Soofi, Mr. Kayzad Kaikobad and Mr. Bakhtawar Bilal Soofi of the law firm of ABS & Co, Islamabad; Ms. Cherie Booth QC of Matrix Chambers; Mr. Arthur Marriott QC, Ms. Mahnaz Malik, Mr. John Kingston, Mr. Max Holzbaur, and Ms. Pallavi Sengupta of 12 Gray's Inn, London; Mr. Irshad Ali Khokhar, Director General of the Ministry of Mines & Natural Resources of the Government of Pakistan; Mr. Mushtaq Ahmed Raisani, Secretary of Mines & Mineral of the Government of Balochistan; Mr. Aman Ullah Kanrani, Advocate General of the Government of Balochistan; and Dr. Samar Mubarakmand, Fact Witness of the Respondent. During this Hearing, the Tribunal heard oral arguments from each of the Parties on this matter and Respondent's witness Dr. Mubarakmand was cross-examined.

44. Under cover of a letter dated 13 November 2012, Claimant submitted the Third Witness Statement of Mr. Livesey.

45. On 19 November 2012, Respondent submitted its comments on the Third Witness Statement of Mr. Livesey.

46. By email of 27 November 2012, Respondent proposed to amend the procedural time table discussed during the First Session in view of an expected judgment of the Pakistani Supreme Court on the validity of the Chagai Hills Exploration Joint Venture Agreement dated 29 July 1993 between the Balochistan Development Authority and BHP Minerals International Exploration Inc. ("**CHEJVA**", as further described at paragraphs 228 to 250 below) and provide for a separate hearing on jurisdiction.

47. By letter dated 28 November 2012, Claimant, upon direction by the Tribunal, stated its position on a cross-undertaking and security in the event that the Tribunal was inclined to grant Claimant's Provisional Measure Request.

48. By letter dated 30 November 2012, Respondent replied to Claimant's letter dated 28 November 2012.

49. By letter of the same date, Claimant responded to Respondent's email of 27 November 2012 and requested that the Tribunal should "*decide in a first phase of the arbitral proceedings on (i) any jurisdictional objections raised by Respondent, (ii) the claim that Respondent breached the Australia-Pakistan Treaty; and (iii) Claimant's request for specific performance as a remedy to the breach of the Australia-Pakistan Treaty, if any.*"

50. By letter dated 1 December 2012, Respondent commented on Claimant's letter dated 30 November 2012.

51. By letter dated 3 December 2012, the Secretariat informed the Parties that the Tribunal had noted the Parties' respective positions in respect of the timetable and, for the time being, did not consider a decision to be required.

52. On 13 December 2012, the Tribunal issued its Decision on the Provisional Measures Request. In its Decision, the Tribunal ordered Respondent to "*immediately inform the Tribunal and Claimant of any change of its intention (i) to implement the H4 Work Plan, (ii) not to expand its mining activities to H14 and/or H15 or to any other deposit within License EL-5 and (iii) not to give any rights in this regard to any third party*." The Tribunal further ordered Respondent to "*inform the Tribunal and Claimant, on a regular basis, about its specific plans and activities with respect to deposit H4*." Finally, the Tribunal stated that it remained seized of the matter and would consider further applications by Claimant if the situation materially changed.

53. Under cover of a letter dated 18 December 2012, the Secretariat provided the Parties with a letter of Co-Arbitrator Dr. Alexandrov of the same date, in which Dr. Alexandrov informed the Parties that the international arbitration practice of his firm Sidley Austin LLP had been asked to serve as counsel in an arbitration in which Mr. David A.R. Williams also served as counsel and that he was part of the counsel team. In a letter dated 20 April 2012, Respondent had raised concerns regarding the proposed nomination of Mr. Williams as an arbitrator in the instant case due to his role in said arbitration.

54. Under cover of a letter dated 21 December 2012, the Secretariat provided the Parties with Procedural Order No. 1 issued by the Tribunal on 3 December 2012. Procedural Order No. 1 had been prepared on the basis of the Parties' respective comments, reflects the Parties' agreements and the Tribunal's decision during the First Session and, *inter alia*, sets out the procedural timetable.

55. By letter of the same date, Claimant applied for an extension of time for the submission of its Memorial on the Merits from 25 January to 1 February 2013.

56. Upon invitation by the Tribunal to comment on Claimant's application, Respondent informed the Tribunal by letter dated 27 December 2012 that the Pakistani Supreme Court had yet not rendered its decision on the validity of the CHEJVA and that Respondent therefore was not in a position to comment on Claimant's application. The Tribunal extended the time limit for comments on Claimant's application until 14 January 2013.

57. By letter dated 6 January 2013, Claimant renewed its application for a one-week extension of the time limit for the submission of its Memorial on the Merits.

58. On 7 January 2013, the Tribunal granted an extension of the time limit for the filing of Claimant's Memorial on the Merits from 25 January to 1 February 2013, noting that Respondent's right to submit a request for amendment of the procedural timetable, following the Pakistani Supreme Court's order/judgment, remained unaffected.

59. Under cover of a letter of the same date, Respondent filed a short order of the Pakistani Supreme Court, by which the Court had held the CHEJVA to be void, illegal and *non est*. In its letter, Respondent announced that it would submit a brief in respect of the Tribunal's jurisdiction within two weeks after the release of the detailed judgment of the Pakistani Supreme Court and made a proposal for a schedule for a one-day hearing on jurisdiction.

60. By letter dated 14 January 2013, Claimant commented on Respondent's letter dated 7 January 2013, objected to Respondent's proposal to hold a one-day hearing on jurisdiction and requested that the procedural calendar in place be confirmed.

61. By letter of 16 January 2013, the Tribunal noted that the procedural timetable in place did not provide for a separate hearing on jurisdiction. It indicated that, before Respondent filed any submissions on jurisdiction, which were not provided for in the procedural timetable, Respondent would be required to file a reasoned application for its amendment, Claimant would be afforded the opportunity to comment, and the Tribunal would then decide whether it would amend the procedural schedule. Until then, the agreed procedural schedule set out in Procedural Order No. 1 would remain the same.

62. On 1 February 2013, Claimant filed its Memorial on the Merits (the "**Memorial**"), together with supporting documents as well as the Witness Statement of Ms. Catherine Boggs and the Fourth Witness Statement of Mr. Livesey.

63. By letter dated 5 March 2013, Respondent informed the Tribunal that its lead counsel, Mr. Arthur Mariott QC, had fallen severely ill and therefore requested an extension of six weeks for submitting its Memorial on Defence and Counterclaim.

64. Upon invitation by the Tribunal, Claimant commented by letter dated 11 March 2013 on Respondent's request for an extension of time. Claimant refused to agree to an extension of six weeks and instead invited Respondent to agree on a timetable which would allow the procedural timetable to be upheld.

65. By letter of 12 March 2013, enclosing a letter from the arbitral tribunal in the parallel ICC Proceedings, Respondent reiterated its request for a six-week extension.

66. Upon invitation by the Tribunal to comment on Respondent's letter dated 12 March 2013, Claimant, by letter dated 18 March 2013, informed the Tribunal that it would agree to move the Hearing on Jurisdiction and Liability to the period between 20 January and 21 February 2014 and that, if the Hearing could not then be held, it would maintain its original position.

67. By letter of the same date, Claimant informed the Tribunal that it had appointed Mr. Mansoor H. Khan of Khan & Associates as co-counsel.

68. By letters of 28 March 2013 respectively, the Parties confirmed that they would be available for a hearing from 3 to 8 February 2014.

69. On 3 April 2013, the Tribunal decided that (i) the time limit for the submission of the Counter-Memorial was extended until 7 June 2013; (ii) the Hearing on Jurisdiction and Liability would be held from 3 to 8 February 2014 at the World Bank's Conference Center in Paris and (iii) the Parties were to liaise with each other and submit a joint proposal for the procedural schedule leading to the Hearing on Jurisdiction and Liability by 3 May 2013, failing which agreement the Tribunal would itself fix the procedural schedule leading to the Hearing on Jurisdiction and Liability on the basis of the proposal(s) submitted to it.

70. By letter dated 4 April 2013, Respondent informed the Tribunal that, due to his appointment as Federal Minister, its counsel Mr. Ahmer Soofi had ceased to represent Respondent in this case and that Mr. Kayzad Kaikobad of ABS & Co. would replace him.

71. By letter dated 3 May 2013, Claimant withdrew its request for specific performance and reserved its right to seek damages.

72. On 8 May 2013, Respondent filed preliminary objections to jurisdiction pursuant to Rule 41(1) of the ICSID Arbitration Rules and requested that the Tribunal suspend the proceedings on the merits and address the preliminary objections to jurisdiction as a preliminary question ("**Request for Suspension and Trifurcation**"). Enclosed with the letter was a judgment of the Supreme Court of Pakistan of 7 January 2013, by which the Court had held the CHEJVA to be illegal and void *ab initio*.

73. By letter of the same date, Respondent requested that the Tribunal order Claimant to pay Respondent's costs related to the interim relief/provisional measures applications ("**Request for Decision on Costs**") and that it direct Claimant and its parent companies to disclose internal information that relates to the withdrawal or write down of its interest in the Reko Diq project ("**Request for Document Production**").

74. By letter dated 10 May 2013, Respondent submitted the full judgment of the Supreme Court of Pakistan.[7]

75. By letter dated 20 May 2013, Claimant responded to the Request for Suspension and Trifurcation.

76. By letter dated 22 May 2013, Respondent responded to Claimant's letter dated 20 May 2013.

77. By letter dated 22 May 2013, Claimant responded to the Request for Decision on Costs and the Request for Document Production.

78. By letter dated 27 May 2013, Respondent commented on Claimant's letter dated 22 May 2013.

79. By letter of the same date, Claimant requested the Tribunal

> "*(i) to confirm that, as ordered on 3 April 2013, Pakistan must submit its Counter-Memorial on Liability on 7 June 2013;*
>
> *(ii) to fix a revised schedule for submissions with the dates proposed in TCCA's 20 May letter;*
>
> *(iii) to reject Pakistan's request to vacate the current hearing dates;*
>
> *(iv) in light of Pakistan's confirmation of its sole Rule 41 objection, to fix a schedule for parallel briefing on that sole objection, Pakistan's assertion that this Tribunal must accept the ruling of the Supreme Court of Pakistan on the validity of the CHEJVA and related agreements;*
>
> *(v) in the alternative to (iv), if Pakistan advises that it did not intend to provide the confirmation TCCA sought in our 20 May letter, to order in accordance with Rule 41(1) that Pakistan's Counter-Memorial include all objections that* 'the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal,*' and that briefing on those objections and on liability proceed simultaneously*."

80. By letter dated 28 May 2013, Respondent commented on Claimant's letter dated 27 May 2013.

[7] **Exhibit RE-58**.

81. By letter of the same date, Claimant responded to Respondent's letter dated 28 May 2013.

82. By letter dated 29 May 2013, Respondent submitted further comments.

83. On 29 May 2013, the Tribunal issued Procedural Order No. 2 and

(i) dismissed the Request for Suspension and Trifurcation and the Request for Document Production;

(ii) ordered the Parties to include their arguments in respect of the Tribunal's jurisdiction in their respective written submissions as provided in Section 14 of Procedural Order No. 1;

(iii) ordered Respondent to submit its Counter-Memorial on the Merits and its Memorial on Jurisdiction on 7 June 2013;

(iv) directed the Parties to liaise on a joint proposal for the procedural schedule leading to the Hearing on Jurisdiction and Liability by 14 June 2013, failing which agreement the Tribunal would fix the procedural schedule leading to the Hearing on Jurisdiction and Liability on the basis of the proposal(s) submitted to it; and

(v) informed the Parties that it would decide on the costs to the interim relief/provisional measures applications at a later stage of the arbitral proceedings. All other requests were dismissed.

84. By letter of 30 May 2013, Respondent requested an extension of the time limit for the filing of its Counter-Memorial.

85. On 31 May 2013, the Tribunal granted an extension of the time limit for the filing of Respondent's Counter-Memorial until 28 June 2013.

86. By letter dated 14 June 2013, Claimant submitted a proposal for a timetable leading to the Hearing on Jurisdiction and Liability.

87. By letter of the same date, Respondent requested a further extension of the time limit for the filing of its Counter-Memorial until 4 October 2013.

88. By letter dated 16 June 2013, Respondent informed the Tribunal about the difficult security situation in the Province of Balochistan.

89. By letter dated 19 June 2013, Claimant commented on Respondent's request for an extension of the time limit and requested the Tribunal to dismiss Respondent's application.

90. By letter of 20 June 2013, Respondent commented on Claimant's letter dated 19 June 2013.

91. By letter dated 24 June 2013, Claimant replied to Respondent's letter dated 20 June 2013.

92. On 26 June 2013, the Tribunal decided to grant Respondent an extension until 30 September 2013 on the express terms that this was a final extension and that if no Counter-Memorial was filed by then, the arbitration would proceed without one. The Parties were invited to consult with the Tribunal as to new dates for the Hearing on Jurisdiction and Liability and a new timetable for the intervening stages. The Tribunal indicated that it would be available for the Hearing in the weeks of 16 and 23 June 2014.

93. By letter dated 1 July 2013, Respondent raised the possibility of coordinated hearings in the present arbitration and the ICC Proceedings if the arbitral tribunal in the ICC Proceedings would not bifurcate the proceedings.

94. By letter dated 23 July 2013, Claimant informed the Tribunal that the arbitral tribunal in the ICC Proceedings had bifurcated the proceedings and that the Parties were trying to agree on a timetable leading to the Hearing on Jurisdiction and Liability (the "**Hearing**"). Claimant further requested that the Tribunal keep the weeks of 16 and 23 June 2013 reserved for the Hearing.

95. By letter dated 24 July 2013, Respondent commented on Claimant's letter dated 23 July 2013.

96. Under cover of a letter dated 25 September 2013, Claimant submitted a proposal for a procedural timetable.

97. On 30 September 2013, Respondent filed its Memorial on Jurisdiction and Admissibility, Counter-Memorial on the Merits and Counter-Claim (the "**Counter-Memorial**"), together with supporting documents as well as the Witness Statements of Messrs. Irshad Ali Khokhar, Amanullah Kanrani and Barbar Yaqoob Fateh Muhammad as well as a Second Witness Statement of Dr. Mubarakmand.

98. Under cover of a letter dated 8 October 2013, Respondent submitted corrected versions of the Counter-Memorial and the witness statements it had submitted on 30 September 2013.

99. By letter dated 10 October 2013, Claimant informed the Tribunal about the developments in the ICC Proceedings and requested that the Tribunal issue a procedural order adopting the proposed timetable, so that the Parties might proceed to document disclosure and the additional written submissions on jurisdiction and liability required under Procedural Order No. 1 and subsequent directions from the Tribunal.

100. By letter dated 11 October 2013, Respondent commented on Claimant's letter dated 10 October 2013 and requested that the Tribunal, before issuing any directions in this matter, wait for an application by Respondent to the arbitral tribunal in the parallel ICC Proceedings restraining Claimant from pursuing the present proceedings and an application by Respondent to the Tribunal to suspend the present proceedings pending the decision of the arbitral tribunal in the ICC Proceedings.

101. On 11 October 2013, the Tribunal adopted the procedural timetable as proposed by Claimant in its letter dated 25 September 2013.

102. By letter dated 14 October 2013, Respondent requested a revision of the Tribunal's above decision.

103. Upon invitation by the Tribunal, Claimant commented on Respondent's request to revisit its decision by letter dated 16 October 2013.

104. By email of 17 October 2013, Respondent submitted further comments.

105. On 21 October 2013, Respondent filed a Request for the Suspension of the Proceedings ("**Request for Suspension**"), together with supporting documents.

106. Under cover of a letter dated 23 October 2013, Respondent provided the Tribunal with its Memorial in the ICC Proceedings and enclosures.

107. On 30 October 2013, Claimant opposed the Request for Suspension and submitted a proposal for consolidation of the ICC and the ICSID proceedings as well as a Proposed Revised Timetable for the Production of Documents ("**Proposed Timetable for Document Production**")

108. By letter dated 8 November 2013, Respondent commented on Claimant's letter dated 3 November 2013 and submitted a counterproposal for "*sequencing the hearing of both cases so that the ICC Tribunal decides all matters relating to the CHEJVA Agreements and for the ICSID Tribunal to take account of these findings when deciding the issues of jurisdiction, admissibility and liability*" in case the Request for Suspension is rejected ("**Counterproposal**").

109. On 11 November 2013, the Tribunal rejected the Request for Suspension and provided the Parties with further directions for their negotiations on a procedural timetable.

110. By email of 14 November 2013, Respondent informed the Tribunal of the Parties' agreement to extend the deadlines for the document disclosure phase, and stated that it would not be possible to hear the jurisdiction, admissibility and liability issues in a two-week period in June 2014 or to hold a combined hearing for the two cases.

111. By email of 15 November 2013, Claimant confirmed its agreement with the extension of the time limits of the document disclosure phase.

112. By letter dated 15 November 2013, Claimant submitted a proposal for a joint hearing during the weeks of 16 and 23 June 2014 to the arbitral tribunal in the ICC Proceedings and the Tribunal.

113. By letter of 20 November 2013, Respondent rejected Claimant's proposal for a joint hearing and requested the Tribunal to provide its availabilities for a four-week Hearing and to order the Parties to agree on a timetable for further written submissions.

114. On 21 November 2013, the Tribunal decided that, pending Claimant's comments, the procedural timetable leading to the two-week Hearing in the weeks of 16 and 23 June 2014, as ordered on 11 October 2013, remained in place.

115. By letter dated 24 November 2013, Respondent stated that the Parties had not agreed to a Hearing during the weeks of 16 and 23 June 2014 and requested the Tribunal to suspend the timetable.

116. By letter of the same date, Claimant commented on Respondent's letter dated 24 November 2013.

117. By letter to the Tribunal and to the arbitral tribunal in the ICC Proceedings dated 27 November 2013, Claimant replied to Respondent's letters dated 20 and 24 November 2013 as well as to communication submitted in the ICC Proceedings. In this letter, Claimant submitted its alternative proposals for a timetable in the parallel proceedings.

118. By letter dated 28 November 2013, Respondent commented on Claimant's letter dated 27 November 2013 and requested the Tribunal to provide its availabilities for a three-week Hearing.

119. By letter dated 29 November 2013, the arbitral tribunal in the ICC Proceedings informed the Parties that it would hold the hearing on jurisdiction in the week of 23 June 2013.

120. By letter dated 9 December 2013, Respondent reiterated its request that the Tribunal provide its availabilities for a three-week Hearing.

121. By letter to the Tribunal and the arbitral tribunal in the ICC Proceedings of the same date, Claimant suggested that the members of both arbitral tribunals hold a telephone conference in order to coordinate the parallel proceedings.

122. By letter dated 10 December 2013, the Tribunal recalled that the Parties and the Tribunal had agreed on a two-week Hearing with two days in reserve, as set out in Section 17 of Procedural Order No. 1, and that, in the absence of any change in circumstances underlying the agreed two-week Hearing, the Tribunal did not consider it necessary to provide the Parties with its availabilities for a three-week Hearing, but aimed at holding a two-week Hearing at the earliest opportunity. The Tribunal further stated that, unless both weeks of 16 and 23 June 2014 became available for the Hearing, the Tribunal could

offer to hold a one-week Hearing in June and an additional Hearing in the week of 6 or 13 October 2014 or, alternatively, a two-week Hearing in the weeks of 6 and 13 October 2014.

123. By letter dated 11 December 2013, Claimant reiterated its suggestion that the members of the arbitral tribunals in the parallel proceedings hold a telephone conference with the purpose of coordinating the proceedings.

124. On 12 December 2013, the Parties submitted their respective document disclosure requests in the form of Redfern schedules.

125. By letter of the same date, Respondent commented on Claimant's letter dated 11 December 2013 and the Tribunal's letter dated 10 December 2013. Respondent opposed a telephone conference between the members of the arbitral tribunals in the parallel proceedings.

126. On 19 December 2013, the Tribunal issued Procedural Order No. 3 concerning production of documents, and ordered:

(i) the production of documents pursuant to the attached Redfern Schedules of Claimant and Respondent;

(ii) the documents and confidentiality logs to be sent directly to counsel for the other Party and not communicated at this stage to the Tribunal;

(iii) each Party to provide an index of documents produced, with an indication of the requests to which they respond, stating whether such Party has produced all responsive documents within its possession, custody or control;

(iv) the documents produced not to be made part of the record of the proceedings unless and until either Party submits them as exhibits to its submissions; and

(v) the term "*Affiliates*" as used in Respondent's Redfern Schedule to be "*limited to Claimant's direct and indirect parent companies, shareholders, officers, employees, agents, representatives, financial advisors and – where appropriate – legal advisers*."

(vi) All other document production requests were dismissed.

127. By letter dated the same date, Claimant confirmed its availability for a Hearing during the weeks of 6 and 13 October 2014 and requested that the Tribunal take the following actions:

(i) direct that the Hearing would take place at the World Bank facilities in Paris during the weeks of 6 and 13 October 2014, with the intervening weekend days of 11 and 12 October held in reserve;

(ii) extend the deadline for Claimant's Reply on Liability and Response on Jurisdiction to 21 March 2014;

(iii) extend the deadline for production of documents and privilege or confidentiality logs pursuant to Procedural Order No. 3 to 31 January 2014; and

(iv) direct that the deadline for production of documents where there were no objections remain 9 January 2014. In the alternative, Claimant requested the Tribunal, should it determine that additional days might be needed, to direct that the first week of the Hearing take place at the World Bank facilities in Paris between 16 and 20 June 2014, and that the remainder of the Hearing take place at the World Bank facilities in Paris during the weeks of 6 and 13 October 2014.

128. By email dated 23 December 2013, the Tribunal directed that the Hearing take place at the World Bank facilities in Paris during the weeks of 6 and 13 October 2014, with the intervening weekend days of 11 and 12 October held in reserve. In addition, the Tribunal invited Respondent to comment on Claimant's requests in its letter of 19 December 2013 and, further, invited the Parties to confer and agree on the rescheduling of the deadlines for the remaining written submissions.

129. By letter dated 28 December 2013, Respondent responded to Claimant's requests by agreeing to extend the time limit for the filing of Claimant's Reply on Liability and Response on Jurisdiction to 21 March 2014, and the deadline for production of documents and privilege or confidentiality logs, and any additional documents, to 20 February 2014. Respondent reiterated its need for a hearing of an estimated three weeks.

130. By letter dated 3 January 2014, Claimant responded to Respondent's letter of 28 December 2013 and requested that the Tribunal fix the deadline for additional production at 10 February 2014 and confirm that the deadline for submission of Claimant's Reply and Response is 21 March 2014.

131. By email dated 4 January 2014, the Tribunal directed the Parties as follows:

(i) the deadline for Claimant's Reply on Liability and Response on Jurisdiction is extended to 21 March 2014;

(ii) the deadline for production of documents and privilege or confidentiality logs is extended to 14 February 2014; and

(iii) the deadline for production of documents where there were no objections is extended to 14 February 2014.

132. By letter dated 10 February 2014, Claimant requested the Tribunal to issue an order providing confidentiality protection for documents disclosed in this proceeding on the terms set forth in Attachment 1 to its letter.

133. By letter dated 14 February 2014, Respondent requested the Tribunal adopt the confidentiality terms as amended by Respondent in an attachment to its letter.

134. By letter dated 19 February 2014, Claimant stated that it had no objection to Respondent's revisions to the confidentiality terms and requested the Tribunal to enter an order adopting the confidentiality terms, as revised by Respondent.

135. On 27 February 2014, the Tribunal issued Procedural Order No. 4 adopting the confidentiality terms agreed by the Parties (the "**Revised Confidentiality Terms**").

136. By email dated 20 March 2014, the Tribunal confirmed the extension of the deadline for the filing of Claimant's Reply on Liability and Counter-Memorial on Jurisdiction and Counterclaims until 18 April 2013, and the adjustment of the remaining time limits as agreed by the Parties.

137. Following Claimant's request for production of documents of 31 March 2014 and Respondent's observations of 7 April 2014, by letter dated 9 April 2014, the Tribunal ordered Respondent to produce certain documents, under the confidentiality protection of Procedural Order No. 4.

138. By letter dated 15 April 2014, Respondent informed the Tribunal of certain changes in its counsel of record based in London, including the removal of Mr. Mariott.

139. Following Claimant's request of 16 April 2014 for an extension of the time limit for the filing of its Reply on Liability and Counter-Memorial on Jurisdiction and Counterclaims and Respondent's observations of 17 April 2014, by letter dated 18 April 2014, the Tribunal granted the extension that had been requested, and amended the schedule for the subsequent submissions.

140. On 23 April 2014, Claimant filed its Reply on Liability and Response on Jurisdiction and Counterclaims (the "**Reply**"), together with supporting documents as well as the Witness Statements of Mr. Jean-Paul Luksic and Mr. Cory Williams, the Second Witness Statement of Ms. Boggs and the Fifth Witness Statement of Mr. Livesey.

141. On 7 May 2014, Respondent filed a request that the Tribunal decide on production of documents. This was followed by Claimant's observations of 10 May 2014 and Respondent's response and amended request of 11 May 2014. By letter dated 14 May 2014, the Tribunal decided on production of documents.

142. By letter of 5 June 2014, Respondent informed the Tribunal and Claimant of its intention to submit expert evidence with its Rejoinder on Liability and Reply on Jurisdiction and Counter-Claims on 25 August 2014. By letter of 18 June 2014, Claimant filed observations and opposed Respondent's request. On 21 June 2014, the Tribunal decided on the admissibility of new evidence, and informed the Parties that:

    (i) the Tribunal did not consider it to be established that the expert evidence which Respondent intended to introduce would respond to or rebut matters raised in Claimant's prior written submissions; and

    (ii) under Rule 34(1) of the ICSID Arbitration Rules, the Tribunal had the implied power to reject any evidence submitted in violation of Paragraph 16.4 of Procedural Order No. 1.[8]

143. By email dated 24 June 2014, Respondent reserved the right to reply to the Tribunal's communication of 21 June 2014 the following week. By letter of 3 July 2014, Respondent expressed its objections to the Tribunal's decision of 21 June 2014.

144. By email dated 7 July 2014, the Tribunal informed the Parties that Respondent's position, as stated in its letter of 3 July 2014, was noted.

145. By letter dated 16 July 2014, Respondent informed that Tribunal of certain changes in Respondent's counsel based in Islamabad and London.

146. Following a request from Respondent of 1 July 2014 that the Tribunal revisit the issue of the location of the Hearing to be held from 6 to 17 October 2014, Claimant's observations of 8 July 2014 and Respondent's response of 14 July 2014, on 17 July 2014, the Tribunal dismissed Respondent's request and decided that:

    (i) the Hearing shall take place at the ICC Hearing Centre in Paris during the weeks of 6 and 13 October 2014 with the intervening weekend days of 11 and 12 October being held in reserve; and

[8] Paragraph 16.4 of Procedural Order No. 1 provides that "[i]*n their second written submissions, the Parties shall include only additional written witness testimony, expert opinion testimony, documents or other evidence that responds to or rebuts matters raised by the other Party's prior written submission*."

(ii) the Parties should make the arrangements, including visa applications, necessary to enable all counsel, witnesses and experts to participate in the Hearing.

147. By letter dated 14 August 2014, the Tribunal provided directions to the Parties concerning the organization of the Hearing and a pre-hearing organizational meeting (the "**Pre-Hearing Organizational Meeting**").

148. On 20 August 2014, Respondent updated its counsel of record, and on 25 August 2014, so did Claimant.

149. On 25 August 2014, Respondent filed its Rejoinder and Reply on Jurisdiction, Admissibility and Counterclaim ("**Respondent's Rejoinder**"), together with supporting documents as well as the Second Witness Statement of Mr. Khokhar and the witness statement of Mr. Ahmed Baksh Lehri.

150. On 12 September 2014, Claimant filed its Rejoinder on Jurisdiction and Counterclaims ("**Claimant's Rejoinder**"), together with supporting documents.

151. By letter dated 27 September 2014, Claimant filed a request for the exclusion of evidence (certain documents cited or filed by Respondent in its Rejoinder).

152. By letter dated 28 September 2014, Claimant sought Respondent's consent to Claimant's submission of a limited number of additional exhibits. In the event that Respondent declined consent, Claimant simultaneously requested that the Tribunal decide on the admissibility of such additional exhibits as new evidence.

153. On 30 September 2014, the Pre-Hearing Organizational Meeting was held between the Parties and the Tribunal by conference call at 3:00 p.m. CET.

154. Following Respondent's observations of 1 October 2014, by letter of 2 October 2014, the Tribunal decided on Claimant's requests of 27 and 28 September 2014 for the exclusion of evidence and admissibility of new evidence.

2. The Hearing on Jurisdiction and the Merits

155. The Hearing was held between 6 October 2014 and 17 October 2014 at the Hearing Center of the International Court of Arbitration of the International Chamber of Commerce at 112 Avenue Kleber, in Paris. The Hearing was transcribed by a court reporter, Mr. David A. Kasdan of B&B Reporters.

156. At the Hearing, Claimant was represented by Messrs. Adnan Afridi, William Hayes and Mr. Ramón Jara, Tethyan Copper Company Pty Limited; Mr. Julian Anderson, Antofagasta plc; Mr. Jonathan Drimmer, Barrick Gold Corporation; Ms. Sybil Veenman, Former Senior Vice President & General Counsel, Barrick Gold Corporation; and Mr. Charles Finsbury, RLM Finsbury Ltd. (TCA Consultant).

157. At the Hearing, Respondent was represented by Dr. Abdul Malik Baloch, Chief Minister, Balochistan; Mr. Shahid Khaqan Abbasi, Federal Minister for Petroleum and Natural Resources, Pakistan; Mr. Sanaullah Khan Zehri, Senior Minister, Mines and Minerals, Balochistan; Mr. Salman Aslam Butt, Attorney General, Pakistan; Mr. Saifullah Chatta, Chief Secretary, Balochistan; Mr. Saeed Jamali, Secretary, Mines & Mineral Development Department, Balochistan; Mr. Abid Saeed, Secretary, Ministry of Petroleum & Natural Resources, Pakistan; Mr. Nazimmudin Baloch, Advocate General, Balochistan; Mr. Liaquat Kashani, Deputy Secretary, Mines & Mineral Development Department, Balochistan; Mr. Ghalib Iqbal, Ambassador of Pakistan to France; Mr. Janbaz Khan, Deputy Ambassador of Pakistan to France; Mr. Khawaja Ahmed Hosain, Deputy Attorney General (DAG) Pakistan; Mr. Naseem Lehri, Principal Secretary; and Mr. Umis Sarpara, Personal Staff Officer.

158. The following appeared as legal counsel for Claimant at the Hearing: Messrs. Donald Francis Donovan, Mark W. Friedman and Dietmar W. Prager and Ms. Natalie L. Reid of Debevoise & Plimpton LLP; Mr. Makhdoom Ali Khan of Fazle Ghani Advocates; and Ms. Berglind Birkland, Ms. Terra Gearhart-Serna, Mr. Bernardo Becker Fontana, Ms. Alexa von Wobeser and Ms. Doreena Hunt of Debevoise & Plimpton LLP.

159. The following appeared as legal counsel for Respondent at the Hearing: Mr. Ahmer Bilal Soofi, ASC, Mr. Majid Bashir ASC, Mr. Kayzad Kaikobad, Ms. Marium Khalid and Mr. Faizan Warraich of ABS & Co; Ms. Cherie Blair CBE, QC, Ms. Julia Yun Hulme, Mr. James Palmer, Mr. Tom Coats and Mr. Sajid Suleman of Omnia Strategy LLP; Mr. Graham Dunning QC of Essex Court Chambers; Ms. Mahnaz Malik and Mr. Zannis Mavrogordato of 20 Essex Street Chambers; Mr. Lucas Bastin of Quadrant Chambers; Mr. Sean Aughey of 11 KBW Chambers and Mr. Matthieu Gregoire of Henderson Chambers.

160. Each of the Parties made an oral presentation at the opening of the Hearing and distributed copies of their opening presentations.

161. During the Hearing, the following fact witnesses gave evidence for Claimant and were cross-examined by Respondent's counsel in accordance with the procedure agreed by the Parties in the Minutes of the First Session and the Pre-Hearing Organizational Meeting: Mr. Cory Williams, Former Manager of Exploration, BHP Minerals; Mr. Jean-Paul Luksic, Chairman, Antofagasta plc; Ms. Cassie Boggs, Vice President & General Counsel, Resource Capital Funds and former Chief Executive Officer, Tethyan Copper Company Pty Limited; and Mr. Timothy Livesey, former Chief Executive Officer, Tethyan Copper Company Pty Limited.

162. During the Hearing, the following fact witnesses gave evidence for Respondent and were cross-examined by Claimant's counsel in accordance with the procedure agreed by the

Parties in the Minutes of the First Session and the Pre-Hearing Organizational Meeting: Mr. Ahmed Baksh Lehri, Former Chief Secretary, Balochistan and Member, Federal Public Service Commission, Pakistan; Mr. Amanullah Kanrani, ASC, Former Advocate General, Balochistan; Mr. Irshad Khokhar, Former DG, Ministry of Petroleum & Natural Resources, Pakistan; Mr. Babar Yaqoob Fateh Muhammad, Former Chief Secretary, Balochistan, Secretary Communication, Pakistan; and Dr. Samar Mubarakmand (NI), (HI), (SI), Former Member Planning Commission, Pakistan.

163. By letter dated 7 October 2014, Claimant reiterated its requests of 27 and 28 September 2014 insofar as they had been denied by the Tribunal on 2 October 2014.

164. By letter dated 8 October 2014, Respondent opposed Claimant's requests of 7 October 2014 and requested that the Tribunal refuse Claimant's invitation to reverse in these respects its decision of 2 October 2014.

165. On 10 October 2014, the Tribunal decided on Claimant's requests of 7 October 2014.

166. During the course of the Hearing, by letter dated 12 October 2014, Claimant informed the Tribunal that it would not cross-examine Respondent's witness Mr. Yaqoob Fateh Muhammad and had so informed counsel for Respondent; requested leave to submit a new exhibit, Respondent's National Mineral Policy 2013 ("**2013 NMP**") as Exhibit CE-416; and also requested leave to submit four new legal authorities, two cases from the Pakistan Supreme Court and two decisions of other Pakistan courts, all of which had already been submitted as authorities in the ICC Arbitration, as Exhibits CA-172 through CA-175.

167. By letter dated 12 October 2014, Respondent proposed to produce Mr. Yaqoob Fateh Muhammad, as he had already arrived in Paris before Claimant determined that it would not cross-examine him, to give a brief oral testimony regarding his statement and to answer any questions the Tribunal might have. In addition, Respondent opposed Claimant's request to submit proposed Exhibit CE-416 and proposed Exhibits CA-172 through CA-175 on the grounds that, contrary to agreed agenda paragraph 11.A of the Pre-Hearing Conference Call, Claimant did not approach Respondent to inquire whether it would agree to the submission of the proposed new exhibits and there were no exceptional circumstances that justified the admission of these new exhibits.

168. On 13 October 2014, at the Hearing, the Tribunal responded to Claimant's application and Respondent's response as follows:

(i) the Tribunal accepted Respondent's proposal to produce Mr. Yaqoob Fateh Muhammad to give brief oral testimony at the Hearing to affirm his statement and answer questions posed by Respondent; it being understood that Claimant was free to cross-examine Mr. Yaqoob thereafter; and

(ii) the Tribunal accepted the 2013 NMP and the four legal authorities as new documents, it being understood that Claimant would not be permitted to use them in the cross-examination and that both Parties would be given an opportunity to comment on their relevance, if any, in the further proceedings, *i.e.*, the oral closing arguments or the post-hearing briefs.[9]

169. By letter dated 17 October 2014, Respondent requested the Tribunal's consent for it to refer to two cases shown on Slide 94 without having to submit those authorities in this arbitration and to submit two new legal authorities and three new exhibits for use in its closing submissions.

170. At the Hearing, the Tribunal admitted the use of Slide 94 in Respondent's Closing Submission, reserving its right to reject these references after having considered the application; however, the Tribunal requested that Respondent not refer in its oral closing argument to the two new legal authorities mentioned on page two of its letter or the three new exhibits mentioned there, noting that the Tribunal would make a decision on whether to admit them into the record.[10] Further, the Tribunal admitted Annex 4 to the record.

3. The Post-Hearing Phase

171. By letter dated 23 October 2014, the Tribunal invited the Parties to comment on the results of the Hearing and, in particular, address the following issues/documents:

> *"1. The Rulings on Preliminary Issues rendered by the ICC tribunal on 21 October 2014 and the relevance of this decision for this case, if any;*
> *2. The admission requirement in Article 1(1)(a) of the Treaty and whether the admission of an investment may be retrospectively affected by an event such as the Supreme Court judgment of 7 January 2013, taking into account the particular language used in Article 1(1)(a) of the Treaty;*
> *3. Claimant: Clarification of its relief sought, in particular regarding the alleged FET breaches, i.e., whether it claims that Respondent's "other measures against TCCA's investments" (Reply on Liability, para. 505 (b)) amount to independent breaches of the FET standard in Article 3(2) of the Treaty or whether it regards them as cumulatively amounting to an FET breach;*
> *4. The 2007 EL-5 Quarterly Report appended to the second EL-5 renewal application (at appendix 4) and its relevance in the context of the second renewal of EL-5;*
> *5. The new authorities and exhibits that were admitted into the record:*
> *a. by means of the Tribunal's letter of 2 October 2014;*

[9] Transcript (Day 6), p. 1501 line 19 to p. 1504 line 6.
[10] Transcript (Day 9), p. 2340 lines11-19.

b. in the course of the Hearing on Jurisdiction and Liability; and
c. if and insofar as they will be admitted, the new authorities and/or exhibits proposed by Respondent in its letter of 17 October 2014; and

6. Any other issues on which the Parties wish to elaborate in relation to arguments that were raised by the other Party in its closing argument or by the Tribunal at some point during the Hearing."

In addition, the Tribunal requested the Parties to limit their Post-Hearing Briefs to a maximum of fifty pages and to inform the Tribunal of their agreement on the deadline for the submission of the Post-Hearing Briefs, providing that if the Parties were unable to reach agreement within ten days of the notification of the letter, the Tribunal would set an appropriate time limit.

172. By letter dated 27 October 2014, Claimant:

(i) objected to Respondent's references to the legal authorities shown on Slide 94 of its closing presentation and requested the Tribunal to disregard these references;

(ii) stated that it had no objection to admission of Respondent's additional legal authorities, as long as Claimant was permitted to submit four additional authorities in support of its arguments made in response to those authorities as part of its Post-Hearing Brief;

(iii) stated that it had no objection to Respondent's proposed additional exhibits; and

(iv) in response to the Tribunal's inquiry in the course of the Hearing about the "*2007 EL-5 Quarterly Report*" cited in paragraph 3.23 of TCCP's Interim Response to the Notice of Intent to Reject (Exhibit CE-8), submitted three additional exhibits.

173. After reviewing the Parties' further comments, set forth in Claimant's letter of 3 November 2014 and Respondent's letter of 7 November 2014, and their positions regarding the timing of their Post-Hearing Briefs, set forth in their respective letters dated 3 November 2014, the Tribunal directed the Parties by letter dated 10 November 2014 as follows:

(i) The Parties' Post-Hearing Briefs shall be submitted simultaneously on 15 January 2015. There will not be a second submission of rebuttal Post-Hearing Briefs;

(ii) As suggested in its letter of 3 November 2014, Claimant shall clarify its position on its requested relief in writing, by 18 November 2014;

(iii) Slide 94 of Respondent's Closing Presentation is admitted into the record;

(iv) Respondent may submit the two additional legal authorities identified in its letter of 17 October 2014, and Claimant may submit the four additional legal authorities identified in its letter of 27 October 2014, both with their Post-Hearing Briefs; and

(v) The three additional exhibits proposed by Respondent in its letter of 17 October 2014 and the three additional exhibits proposed by Claimant in its letter of 27 October 2014 are admitted into the record.

174. In response to a question from the Tribunal at the Hearing, by letter dated 18 November 2014, Claimant stated the relief it seeks for Respondent's breaches of the fair and equitable treatment obligation imposed by Article 3(2), as follows:

> *"For purposes of the liability phase of the arbitration, TCCA seeks separate and independent declarations that:*
>
> *(i) the denial of the Mining Lease Application breached Article 3(2);*
>
> *(ii) the development and implementation of the plan to take over the Reko Diq project breached Article 3(2); and*
>
> *(iii) in addition to each constituting independent violations, the foregoing breaches, together and along with other Government conduct with respect to TCCA's investment—including, to the extent necessary to prove a composite breach, the Governments' conduct in the Mineral Agreement negotiations and/or in the Pakistan Supreme Court proceedings—constitute an overall course of action that is a composite breach of Article 3(2).*
>
> *(iv) TCCA does not seek a separate and independent declaration that Pakistan breached Article 3(2) through either the Governments' bad-faith conduct in the Mineral Agreement negotiations, or the conduct of the Governments and the Supreme Court in the domestic constitutional proceedings.*
>
> *This statement of the relief requested is subject to two reservations.*
>
> *First, while TCCA seeks separate and independent declarations only with respect to the breaches set forth in paragraphs (i), (ii), and (iii) above, the Tribunal may consider any of the evidence presented by the Parties and adduced in the hearing in determining whether the conduct in question violated Pakistan's obligation to accord fair and equitable treatment to TCCA's investment by way of the conduct set forth in those paragraphs.*
>
> *Second, should the Tribunal reach causation and damages, TCCA reserves the right to present any arguments, and to seek any rulings, with respect to the conduct of the Governments in the Mineral Agreement negotiations or the conduct of the Governments and the*

Supreme Court in the domestic constitutional proceedings to the extent relevant to causation and damages."

175. On 15 January 2015, Claimant filed its Post-Hearing Brief, together with new Exhibits CE-417 to CE-419, new Legal Authorities CA-176 to CA-179 and updated indices of exhibits and authorities, and Respondent filed its Post-Hearing Brief.

176. On 2 March 2015, in response to a request from the Tribunal, the Parties filed their respective Statements of Costs in connection with the proceedings as of such date.

4. Respondent's Request to Submit New Evidence and Application to Dismiss the Claims

177. On 22 June 2015, the firm of Allen & Overy informed the Tribunal and ICSID that it had been appointed as counsel to act in the *quantum* phase of the proceedings and for all other matters going forwards and was in the process of finalizing the formal arrangements of its instruction by obtaining a power of attorney. It requested that the Tribunal and ICSID enter Allen & Overy LLP on the record as counsel for Pakistan in place of existing counsel.

178. In addition, Allen & Overy informed the Tribunal that "*cogent new evidence of corruption on the part of TCC*" had very recently been brought to their attention by Pakistan and it would shortly write to the Tribunal with further details, together with a proposed timetable for addressing this evidence.

179. Finally, Allen & Overy requested that the Tribunal "*cease all efforts towards finalising the award*."

180. By letter dated 23 June 2015, Claimant objected to Pakistan's attempt to introduce new evidence and objected even more strongly to Pakistan's request that the Tribunal depart from its mandate and cease its efforts towards finalizing the award. Claimant requested the Tribunal to reject Pakistan's request.

181. By e-mail of 26 June 2015, the Tribunal noted the Parties' positions and informed the Parties that "[f]o*r the time being, the Tribunal sees no reason to discontinue its still ongoing deliberations on this case*."

182. By letter dated 21 July 2015, Allen & Overy submitted a power of attorney dated 6 July 2015 authorizing it to represent the Government of Pakistan and further submitted, on behalf of Respondent, five witness statements signed by Messrs. Shehbaz Mandokhail, Abdul Aziz, Muhammad Tahir and Masood Malik and Sheikh Asmatullah. Respondent requested the Tribunal to admit this new evidence into the record and to determine the effect of this evidence and any related further evidence in accordance with an enclosed procedural timetable.

183. By letter dated 29 July 2015, Respondent submitted the Urdu translations of the five English language witness statements provided under cover of its 21 July 2015 letter.

184. By letter dated 11 August 2015, at the Tribunal's invitation, Claimant objected to Respondent's request to admit new evidence as well as its request to initiate a new phase of the proceedings to determine the effect of this evidence, claiming that Respondent had not satisfied the requirements for the admission of late evidence, namely, that the proferred evidence was unavailable earlier and that it would have a decisive impact on the outcome of the case.

185. By letter dated 17 August 2015, Respondent commented on Claimant's objections and claimed that it was entitled to adduce the new evidence because the proceedings were not closed pursuant to Rule 38 of the ICSID Arbitration Rules, and even if the Rule 38 standard applied, the evidence satisfied it because the evidence was new and it was relevant and material to the outcome of the case. Respondent requested the Tribunal to adopt the timetable proposed in its 21 July 2015 letter and to consider the new evidence presented in that letter.

186. By e-mail of 19 August 2015, Claimant requested leave to respond to Respondent's letter of 17 August 2015.

187. By email dated 20 August 2015, the Tribunal granted Respondent leave to file a full submission in relation to its request by 2 September 2015 and granted Claimant the opportunity to reply to Respondent's submission and Respondent's 17 August 2015 letter, both by 7 October 2015.

188. By letter dated 25 August 2015, addressed to Respondent, with a copy to the Tribunal, Claimant requested that Respondent provide certain information as to the circumstances under which the witness statements that Respondent seeks to submit into evidence were obtained. In addition, in light of the on-going inquiry being conducted by the National Accountability Bureau (NAB) under the National Accountability Ordinance 1999 in Pakistan, Claimant requested "*unequivocal assurance that the confidentiality of its communications, in the form of emails, phone calls, in-person conversations, or otherwise between and among TCC's personnel and its lawyers, both within and without Pakistan has been strictly respected, and that those communications have not been and will not be interfered with, monitored, taped, or otherwise compromised*."

189. By letter dated 28 August 2015, addressed to the Claimant, with a copy to the Tribunal, Respondent stated that it would provide the relevant information together with its full submission on 2 September 2015. As to Claimant's second request, Respondent stated that in case Claimant should have an application to make in this regard, it should do so,

absent such an application, its statement had no place in international arbitration proceedings.

190. On 31 August 2015, Claimant filed a request that the Tribunal:

> *" 1. Direct Pakistan to provide unequivocal assurances that the confidentiality of its communications, in the form of emails, phone calls, in-person conversations, or otherwise between and among TCC's personnel and its lawyers, both within and without Pakistan, has been strictly respected, and that those communications have not been and will not be monitored, recorded, interfered with, or otherwise compromised; and*
>
> *2. If Pakistan continued to refuse such assurances, direct Pakistan to identify when, how, and which communications between and among TCC's personnel and its attorneys, both within and without Pakistan, have been monitored, recorded, intercepted, or otherwise compromised."*

191. On 2 September 2015, Respondent filed an Application to Dismiss the Claims ("**Respondent's Application**"), together with supporting witness statements and expert opinions.

192. By letter dated 8 September 2015, upon invitation of the Tribunal, Respondent requested the Tribunal to reject TCC's application, and concluded by stating that "*the NAB has requested counsel for Pakistan to convey to the Tribunal and to TCC that it has not and will continue not to monitor/intercept any form of privileged communication (oral or written) between TCC personnel and their legal counsel*." (emphasis in original)

193. By e-mail of 10 September 2015, the Tribunal noted Respondent's statement quoted in the previous paragraph and invited Claimant to clarify whether it wished to maintain its request as set out in its letter of 31 August 2015.

194. By letter dated 15 September 2015, Claimant responded that Respondent's statement "*ha*[d] *no meaningful content*" and requested that the Tribunal:

> "*1. Order Pakistan to refrain from monitoring, recording, interfering with, or otherwise compromising the confidentiality of any communications, in the form of emails, phone calls, in-person conversations, or otherwise, between and among TCC's personnel and its attorneys, both within and without Pakistan; and*
>
> *2. Direct Pakistan to identify when, how, and which communications between and among TCC's personnel and its attorneys, both within and without Pakistan, have been monitored, recorded, intercepted, or otherwise compromised to date*."

195. By letter dated 18 September 2015, Respondent noted that Claimant, in its letter of 15 September 2015, had raised arguments in relation to Respondent's Application that should have been contained in its reply to this Application due on 7 October 2015. Therefore, Respondent sought guidance from the Tribunal as to the point in time at which it should address Claimant's arguments.

196. By email of the same day, the Tribunal informed the Parties that it did not require any further submissions from the Parties on Claimant's request dated 31 August 2015, as amended on 15 September 2015. The Tribunal further stated that, in case it decided to grant the Parties a second round of submissions on Respondent's Application, Respondent could address any contention contained in Claimant's letter of 15 September 2015 that relate to said Application in its response submission to Claimant's reply due on 7 October 2015.

197. On 24 September 2015, the Tribunal issued Procedural Order No. 5, ordering Respondent to:

> "*I. Ensure that neither the NAB nor any other agency of the Federal or Provincial Governments monitor/intercept or record any privileged or potentially privileged communication (oral or written), between and among TCC's personnel, including in-house legal counsel, and its attorneys, both within and outside Pakistan; and*
>
> *II. Identify whether and if so, when, how and which privileged or potentially privileged communications (oral or written) between and among TCC's personnel, including in-house legal counsel, and its attorneys, both within and outside Pakistan, have been monitored/intercepted or recorded by the NAB or any other agency of the Federal or Provincial Governments to date."*

198. By letter dated 5 October 2015, Respondent submitted witness statements of Col. Sher Khan and Mr. Muhammad Farooq, together with an Urdu translation of Mr. Bari Dad's second witness statement.

199. By e-mail dated 6 October 2015, Mr. Makhdoom Ali Khan gave notice to the Tribunal that he had withdrawn as TCCA's counsel in this case and that his withdrawal "*was not prompted by any doubts about TCCA's integrity*."

200. On 16 October 2015, Claimant filed Claimant's Opposition to Respondent's Application to Dismiss Claims ("**Claimant's Opposition**"), together with updated indices of Claimant's Exhibits and Authorities and a courtesy copy of its simultaneous filing in the ICC arbitration.

201. By e-mail of 20 October 2015, Respondent requested that it be granted an opportunity to respond to Claimant's Opposition, in particular in respect of the alternative argument.

202. By letter dated 21 October 2015, Pakistan confirmed, after inquiry of potentially relevant agencies, that "*it has not monitored, intercepted or recorded any of the type of communications referred to in paragraph 25 II of Procedural Order No. 5*."[11]

203. On 27 October 2015, the Tribunal (i) invited Respondent to comment on Claimant's alternative argument as set out in Claimant's Opposition; (ii) requested the Parties to agree on a time schedule to address the new issues raised in Respondent's Application; and (iii) informed the Parties:

> "*The Tribunal would like to inform the Parties that it has almost concluded its deliberations on the case and that the draft of its Decision on Jurisdiction and Liability is in a very advanced stage. In light of the circumstances, the Tribunal will finalize, and provide the Parties with, a draft of the Decision that it would have rendered but for the issues raised in Respondent's Application. The Tribunal notes that, while this approach is not provided for by ICSID, it is common practice in the WTO and also provided for in Article 10.20(9) lit. a of the CAFTA. By analogy to the latter provision, the Parties may submit their comments on the draft Decision on Jurisdiction and Liability within 60 days of its transmission by the Tribunal. Any such comments will be duly considered by the Tribunal in its ultimate Decision on Jurisdiction and Liability.*"

204. By letter of 6 November 2015 to Respondent and copied to the Tribunal, Claimant referred to Respondent's declaration of 21 October 2015 and requested that Respondent:

> "*1. Inform TCCA and the Tribunal of the criteria it is using to determine whether communications to, from, and within TCC are privileged or potentially privileged;*
>
> *2. Inform TCCA and the Tribunal who is responsible for applying such criteria; and*
>
> *3. Identify the agencies to which it has 'made . . . enquiries' regarding potential monitoring, interception, or recording of TCC's communications, and the steps that it is taking to ensure that all organs of the Federal and Provincial Governments are complying with the terms of paragraph 25(I) of the Order.*"

205. On 10 November 2015, Respondent submitted its Reply to Claimant's Opposition to Dismiss Claims ("**Respondent's Reply**"). On 11 November 2015, Respondent submitted a slightly revised version of its Reply that substituted the previous one due to an omitted sentence.

206. On 12 November 2015, the Tribunal issued the following directions to the Parties:

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[11] Paragraph 25 II of Procedural Order No. 5 refers to "*privileged or potentially privileged communications (oral or written) between and among TCC's personnel, including in-house legal counsel, and its attorneys, both within and outside Pakistan*."

"1. *As the next procedural step, Claimant should submit a substantive response to Respondent's Application at the time agreed by the Parties, or fixed by the Tribunal as indicated below.*

2. *For clarification purposes, all witness statements, including the two witness statements from the witnesses Col. Sher Khan and Mr. Muhammad Farooq submitted with Respondent's letter of 5 October 2015, as well as all other evidence submitted by Respondent in relation to its Application are admitted into the record, de bene esse, i.e., provisionally and without prejudice to Claimant's right to apply to have it struck out.*

3. *The Tribunal notes Respondent's statement at para. 15 of its Reply that it 'has no present intention of submitting further witness evidence in respect of the corruption allegations.' In case Respondent wishes to submit any further witness statements and/or any additional documents into record, it may do so only upon request for, and grant of, leave from the Tribunal.*

4. *The Tribunal further notes Respondent's undertakings offered at para. 20 of its Reply and sees no need for additional orders relating to safe-conduct guarantees for the time being.*

5. *Claimant's request for disclosure of documents as set out in the Annex to its Opposition is denied for the time being. The Tribunal will decide on the Parties' requests for disclosure of documents in accordance with the time schedule to be agreed by the Parties or fixed by the Tribunal.*

207. By letter of 13 November 2015, Respondent replied to Claimant's letter of 6 November 2015 and argued that it "*complied with Procedural Order No. 5 in full, providing the confirmation requested with regard to monitoring intercepting or recording any of the types of communications referred to in paragraph 25(II) of Procedural Order No. 5*."

208. On 24 November 2015, the Parties submitted their respective proposals for the procedural timetable to address the new issues raised in Respondent's Application, together with comments.

209. On 25 November 2015, the Parties submitted their respective alternative proposals for the procedural timetable, together with comments.

210. On 27 November 2015, the Tribunal provided the Parties with possible dates for an oral hearing in late 2016 and invited the Parties to agree on a procedural timetable leading up to either of those hearing dates.

211. On 3 December 2015, Respondent informed the Tribunal that the Parties had been unable to reach agreement on the procedural timetable and submitted its revised proposal, together with comments. On 7 December 2015, Claimant submitted its revised proposal for the procedural timetable, together with comments.

212. On 11 December 2015, the Tribunal issued the procedural timetable to address the new issues raised in Respondent's Application.

213. On 3 February 2016 and having given advance notice to the Parties of its intention to do so on 27 October 2015, the Tribunal provided the Parties with its Draft Decision on Jurisdiction and Liability and invited them to provide comments on errors of fact, misprints, etc. within 60 days of the decision's transmission to the Parties.

214. On 4 April 2016, the Parties submitted their respective comments on the Tribunal's Draft Decision on Jurisdiction and Liability.

215. On 20 March 2017, the Tribunal issued its Decision on Respondent's Application to Dismiss the Claims (with reasons to follow). For a summary of the procedural history leading up to the Tribunal's Decision on Respondent's Application to Dismiss the Claims, which is issued with reasons together with this Decision on Jurisdiction and Liability, *see* paragraphs 8 to 182 of the Tribunal's Decision on Respondent's Application to Dismiss the Claims (with reasons).

IV. FACTUAL BACKGROUND

216. This section sets out a summary of the facts that are not disputed between the Parties or are otherwise established by the evidence submitted in these proceedings to the satisfaction of the Tribunal.

A. In April 2006, Claimant Became a Party to the Chagai Hills Exploration Joint Venture Agreement and the Assignee of Exploration License EL-5

217. On 1 April 2006, Claimant became a party to the CHEJVA pursuant to a Novation Agreement with BHP Minerals International Exploration Inc. ("**BHP**") and the "*GOVERNOR OF BALOCHISTAN, for and on behalf of the province of Balochistan, in the Islamic Republic of Pakistan (*'GOB'*) acting through its agent THE BALOCHISTAN DEVELOPMENT AUTHORITY, a statutory corporation created by and existing under the Balochistan Development Authority Act 1974 (*'BDA'*)*" (the "**2006 Novation Agreement**"),[12] The 2006 Novation Agreement was signed by

> *"THE GOVERNOR OF BALOCHISTAN through the BALOCHISTAN DEVELOPMENT AUTHORITY for and on behalf of THE PROVINCE OF BALOCHISTAN*

[12] **Exhibit CE-3**.

[by] Arbab M. Yousaf Chairman BDA."[13]

218. Pursuant to the 2006 Novation Agreement, Claimant replaced BHP as a party to the CHEJVA with a 75% interest in the unincorporated contractual joint venture established under the CHEJVA (the "**Joint Venture**").[14] Under the terms of the 2006 Novation Agreement, all references to BHP were to be read and construed as if they were references to TCCA.[15]

219. The Province of Balochistan ("**GOB**"), "*in its capacity as a party to the CHEJVA*," covenanted with TCC "*to observe the terms and conditions of the* [CHE]*JVA which are on its part required to be observed*."[16]

220. Clause 7(b) of the 2006 Novation Agreement provided that the Agreement would come into effect on 1 April 2006 "*upon the grant of the approval by the Licensing Authority under Rule 64 of the Rules of the transfer by BHPB of its undivided 75% interest in EL-5 to TCC*."

221. The Joint Venture received the consent of the Licensing Authority to the assignment to TCCA of Exploration License EL-5 by letter dated 8 April 2006.[17] Such consent was granted on the terms and conditions contained in the CHEJVA and also on the following terms and conditions set forth in the letter:

> "*1. M/S Tethyan Copper Company Limited (the assignee) shall pay rent and royalty etc at the rate prescribed in the Balochistan Mineral Rules, 2002 and as amended from time to time.*
>
> *2. M/S Tethyan Copper Company Limited (the assignee) shall have to assume all the obligations and to pay all outstanding dues in respect of this Exploration License ever since its grant if they become due at the later stage.*
>
> *3. M/S Tethyan Copper Company Limited (the assignee) shall furnish an undertaking that they will observe and abide by all the terms and conditions as contained in this office letter No.DG(MM)-EL(5)/5011-22, dated 18-05-2002 and will also abide by all other conditions of National Mineral Policy read with Balochistan Minerals Rules, 2002 as approved / amended from time to time.*

[13] Counter-Memorial, ¶104.
[14] **Exhibit CE-3**, Clause 2.
[15] **Exhibit CE-3**, at Article 2(a). In Part IV, 3, all references to BHP have been replaced with TCCA.
[16] **Exhibit CE-3**, Clause 4(f).
[17] Counter-Memorial, ¶ 108. **Exhibit CE-18**.

> *4. M/S Tethyan Copper Company Limited (the assignee) shall submit an undertaking to this effect that they will furnish regularly quarterly progress report.*
>
> *5. M/S Tethyan Copper Company Limited shall perform its obligation under the agreement signed between M/S BDA/ BHP Chagai Hills Joint Venture & Tethyan Copper Company Limited.*
>
> *6. The Exploration License assigned to the M/S Tethyan Copper Company Limited shall be terminated if they violate any of the terms and conditions as laid down above and in Balochistan Minerals Rules, 2002.*"[18]

222. By letter dated 10 April 2006, Claimant furnished the undertaking requested in item 3 of this consent letter, accepted the terms and conditions of the Licensing Authority's letter and undertook to observe and abide by such terms and conditions as well as "*all other applicable conditions of the National Mineral Policy read with the Balochistan Minerals Rules, 2002 as approved/amended from time to time*."[19]

1. TCCA, the Company

223. TCCA had been incorporated on 28 June 2000 by Mincor Resources NL, an Australian junior mining company, ("**Mincor**") as a registered company under the Corporations Law of Western Australia.[20] It was listed on the Australian Stock Exchange in October 2003.[21]

224. In May 2006, TCCA was acquired by Atacama Copper Pty Limited, a holding company in New South Wales, Australia ("**Atacama**"), which is owned by Antofagasta, a leading copper mining company incorporated in London with headquarters in Santiago de Chile ("**Antofagasta**").[22] The purchase price was AU$ 220 million (then approximately US$ 170 million).[23]

225. On 22 September 2006, 50% of Atacama's shares were sold by Antofagasta to Barrick Gold Corporation, the world's largest gold mining company, incorporated and headquartered in Ontario, Canada ("**Barrick**"). The purchase price was US$ 123 million.[24]

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[18] **Exhibit CE-18**.
[19] **Exhibit CE-206**.
[20] **Exhibit CE-13**.
[21] **Exhibit CE-199**, p. 7.
[22] Memorial, ¶ 144.
[23] Memorial, ¶ 145.
[24] *See* **Exhibit CE- 211**, p. 18.

2. Reko Diq, in the Chagai District of the Province of Balochistan

226. Reko Diq is a small town in the Chagai District of the Province of Balochistan, Pakistan, near the borders with Afghanistan and Iran.[25] The Reko Diq area is part of the Tethyan Magmatic Arc, known for its copper-gold mining potential.[26] In the late 1960s and early 1970s, the Geological Survey of Pakistan ("**GSP**") performed preliminary surveying of mineralization in the Chagai District and concluded that there was copper and gold mineralization in the Reko Diq area.[27]

227. Reko Diq contains at least 13 principal mineralized deposits, the two largest of which are copper-gold deposits called the Western Porphyries, also known by the designations H14 and H15,[28] a copper orebody called Tanjeel, also known by the designation H4,[29] and other orebodies in the vicinity of the Western Porphyries and Tanjeel, known as H13 and H79, as well as H8 and H35, that show potential for development.[30]

3. The Chagai Hills Joint Venture Agreement

i. The Object of the Joint Venture

228. The CHEJVA established the Joint Venture between BHP and the BDA "*for the purpose of conducting exploration for and, if warranted, developing any Mineral deposits lying within the Exploration Area*."[31] The object of the Joint Venture was agreed in Clause 3.1, which provided that

> "*[T]he Parties hereby establish a contractual joint venture the objects of* which *are to explore for Mineral deposits in the Exploration Area and to conduct Feasibility Studies so as to evaluate the economic viability of said Mineral deposits in the Exploration Area and all acts ancillary thereto which the Operating Committee shall resolve to be carried out.*"

[25] Memorial, ¶ 31; Counter-Memorial, ¶ 35.
[26] Counter-Memorial, ¶ 35.
[27] Memorial, ¶ 41; Counter-Memorial, ¶ 37.
[28] Memorial, ¶¶ 35-36. A porphyry is a formation typically shaped like an upright cylinder, usually with a surface area of one to five square kilometers and a depth sometimes exceeding one kilometer.
[29] Memorial, ¶ 37.
[30] Memorial, ¶ 38.
[31] **Exhibit CE-1**, Preamble, Clause A. The term "Mineral" is defined as "*gold and where other minerals (as defined by the Mining Rules) occur in association with a particular gold deposit then, '*Mineral*' shall mean gold and such associated minerals.*" Clause 1.1. The term "*Exploration Area*" is defined as "*the area described in Article 5 and identified in the map comprising Schedule B.*" Clause 1.1.

ii. The Parties' Obligations

229. Pursuant to Clause 3 of the CHEJVA, the BDA held a 25% Percentage Interest in the Joint Venture, while BHP [TCCA][32] was entitled to earn a 75% Percentage Interest by conducting an agreed plan of exploration activities and related studies.[33]

230. Pursuant to Clauses 3.2 and 7, BHP [TCCA] had to cover all costs of exploration activities. In addition, Clauses 10.2 and 10.3 provided that BHP [TCCA] would act as the Manager for the Joint Venture, with the "*day-to-day responsibility for conduct of the Joint Venture Activities*."[34] Pursuant to Clause 10.4, the Manager had to "*conduct all Joint Venture Activities in accordance with sound internationally accepted exploration and mining methods and practices*."[35]

231. The Manager's responsibilities were subject to "*the direction, supervision and control of the Operating Committee*," which was comprised of two representatives each from BHP [TCCA] and the BDA.[36] Among other duties, the Operating Committee (the "**OC**") established the general policies of the Joint Venture, reviewed technical reports and approved work programs and budgets submitted by the Manager.[37]

232. The OC also had the power to direct BHP [TCCA] as the Manager to prepare pre-feasibility and feasibility studies.[38] Pursuant to Clause 7.3, "*in the event that the Operating Committee decides to undertake a Feasibility Study, BHP* [TCCA] *shall fund such Study provided always that BDA shall continue to provide*," among other things, the "*appropriate administrative support*."[39]

233. The BDA agreed in Articles 5 and 7 to provide, among other services, "*appropriate administrative support as required for the obtaining of all leases, licenses, claims, permits or other authorities of any kind whatsoever being necessary for the conduct of Joint Venture Activities*."[40]

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[32] Under the 2006 Novation Agreement, all references to BHP are to be read and construed as if they were references to TCCA. *See* paragraph 218 above.
[33] Memorial, ¶ 52; CHEJVA, Clauses 3.2, as amended by the 2000 Addendum, and 3.4. Under Clause 1.1 of the CHEJVA, the term "*Percentage Interest*" is defined as "*the undivided interest of a Party expressed as a percentage in the Joint Venture, the rights and liabilities arising under this Agreement and the Joint Venture Property*."
[34] Memorial, ¶ 54; CHEJVA, Clause 10.2.
[35] CHEJVA, Clause 10.4.
[36] Memorial, ¶ 55; CHEJVA, Clause 10.2 and sub-clause 8.2.1.
[37] Memorial, ¶ 55; CHEJVA, Clause 8.1.
[38] Memorial, ¶ 56; CHEJVA, Clauses 7.1 and 10.3(i).
[39] Memorial, ¶ 56; CHEJVA, Clause 7.3.
[40] Memorial, ¶ 53; CHEJVA, Clause 7.2(a).

234. Pursuant to sub-clause 24.6.1, the Parties covenanted "*not to engage (whether alone or in association with others), during the currency of this Agreement, in any activity in the Exploration Area except as provided for and authorized by this Agreement or as expressly agreed by the Parties*."[41]

235. Under sub-clauses 24.6.2 and 24.6.3, BHP [TCCA] and the BDA agreed to "*be just and faithful to one another*," to "*do all such acts as shall be reasonably required to give effect to the purposes of* [the] *Agreement*," and not to "*do or omit to be done anything whereby the interests of the Joint Venture contemplated herein are prejudiced*."[42]

236. Clause 10.3 specifically required both BHP [TCCA] and the BDA to "*use all reasonable endeavors . . . to procure that* [exploration licenses] *are renewed or replaced by other titles or rights in substitution for them on their expiration*."[43]

iii. The Mining Lease and the Mining Venture

237. Sub-clause 11.3.1 of the CHEJVA provided that within 14 days of the completion of a Feasibility Study, the Manager "*shall serve a copy of the Study on each Party*" and within 90 days of receiving such copy, "*each Party shall advise the Manager whether it intends to participate in development of said Mineral deposit as a Mining Area*."[44] A party giving notice of intention to participate in development was then referred to as a "*Participating Party*:"

> "*The Parties (if any) giving notice of intention to participate in development are hereinafter collectively referred to as* 'Participating Party.'"[45]

238. The CHEJVA also made clear that the BDA would not be required to participate in mine development.[46] Sub-clause 11.3.3 provided that if a party gave notice that it did not wish to participate in development, or failed to provide notice of intention to proceed within such 90-day period, it would be deemed to be a Non-participating Party.[47]

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[41] CHEJVA, sub-clause 24.6.1.
[42] CHEJVA, sub-clauses 24.6.2 and 24.6.3.
[43] CHEJVA, Clause 10.3.
[44] **Exhibit CE-1**; CHEJVA, sub-clause 11.3.1.
[45] **Exhibit CE-1**; CHEJVA, sub-clause 11.3.2.
[46] If the parties decided to conclude a new mining joint venture, the BDA would pay for its share of the joint venture expenditure in relation to any future development of a mine. This was to be paid for by Claimant through a loan to the BDA, which would have to be paid back to Claimant by the BDA. Counter-Memorial, ¶ 64; CHEJVA, Clause 9.3, as amended by the 2000 Addendum.
[47] Memorial, ¶ 59. **Exhibit CE-1**; CHEJVA, sub-clause 11.3.3.

239. Sub-clause 11.4.1 of the CHEJVA provided that mining development would proceed either "*if the Parties so decide*[d] *pursuant to sub-clause 8.2.10(d)*" (*i.e.*, a resolution is passed by the OC by unanimous votes of all Parties to "*transfer the Joint Venture Activities to the Mining Venture*")[48] and/or if "*pursuant to sub-clause 11.3.2 one or more Participating Parties give notice of an intention that development is to proceed*."[49]

240. Sub-clause 11.4.2 clarified that "[w]*here the BDA is a Non-participating Party, then subject both to BHPM* [TCCA] *obtaining all routine Government approvals required and to compliance with Clause 11.6, BHPM* [TCCA] *shall be entitled to undertake sole risk investment . . . in a mining development within any of the relevant Prospecting Licenses*."[50]

241. Clause 11.5 provided:

> "*11.5.1 If any notice of intention to participate in Mine Development is given pursuant to sub-clause 11.3.2, within one hundred and twenty (120) days of the Election Date, the Participating Party shall notify the Non-participating Party, in writing, as to whether or not it intends to purchase the Percentage Interest of the Non-participating Party pertaining to the proposed Mining Area (hereinafter called the "Non-participating Party's Transfer Interest").*
>
> *11.5.2 If the Participating Party notifies the Non-participating Party that it does not wish to purchase the Non-participating Party's Transfer Interest, the Non-participating Party shall be entitled, subject to the grant of the requisite consent of the Provincial Government, to sell and transfer the Non-participating Party's Transfer Interest to a third party, provided that such third party agrees to be bound by the provisions of the JVA with respect to such Mining Area. The Participating Party shall sign all documents, deeds, novations and consents necessary to give effect to such sale and transfer, and for such third party to become a party to the JVA with respect to such Mining Area.*
>
> *11.5.3 If the Participating Party wishes to purchase the Non-participating Party's Transfer Interest, within 120 days of the Election Date, the Participating Party and the Non-participating Party shall, in good faith, negotiate in order to agree upon the fair value to be paid by the Participating Party to the Non-participating Party as consideration for transfer of the Non-participating Party's Transfer Interest*."[51]

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[48] **Exhibit CE-1**; CHEJVA, sub-clause 8.2.10(d).
[49] **Exhibit CE-1**; CHEJVA, sub-clause 11.4.1.
[50] **Exhibit CE-1**; CHEJVA, sub-clause 11.4.2.
[51] **Exhibit CE-1**; CHEJVA, Clause 11.5 as amended by the 2000 Addendum. Under sub-clause 11.3.2, the term "*Election Date*" is defined as the date of receipt by the Manager of the last notice affirming an intention to participate in mining development.

242. The condition of compliance with Clause 11.6, referred to in sub-clause 11.4.2, related to the determination of the fair value to be paid for the Non-participating Party's Percentage Interest. Sub-clause 11.6.1 provided a simple formula for the parties' determination based on the amount of exploration expense, with interest, contributed to work programs and budgets (including those relating to the Feasibility Study) and a reasonable proportion of overhead pertaining to Joint Venture Activities during the period the proposed Mining Area was under investigation.[52] Sub-clause 11.6.2 provided for referral of the question of fair value to an expert (bound by the parameters referred to in sub-clause 11.6.1) if the parties were unable to reach a mutually acceptable decision pursuant to Clause 11.5 within the 120-day period.[53]

243. Clause 11.7 established the time frame for establishment of the Mining Venture:

> "*Within one hundred and eighty (180) days of the Election Date or such other period as may be agreed between all Participating Parties (*'the date of segregation'*), the Participating Parties shall segregate from the Exploration Area boundaries of the Mining Area established by the said Study and shall thereby establish a joint venture in respect of such area (the* 'Mining Venture'*).*"[54]

244. Sub-clause 11.8.1 defined the term "*Mining Area,*" as follows:

> "*Unless otherwise unanimously agreed by all Parties, the boundaries of the Mining Venture shall not contain a greater land area than is necessary to encompass all ore resources which may be properly mined as a single mining enterprise together with any necessary plant or facilities for the milling and treatment of ore and other appropriate infrastructure and, thereafter, a new joint venture shall be deemed to exist between the Participating Parties in respect of that area (the* 'Mining Area'*).*"

245. Sub-clause 11.8.2 of the CHEJVA provided that:

> *"[w]here the Joint Venture or, pursuant to sub-clause 11.3.2, a Participating Party elects to develop a mine then, subject only to compliance with routine Government requirements, it shall be entitled to convert the relevant [Exploration] Licence(s) held by it into Mining [Leases] so as to give secure title over the required Mining Area."*[55]

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[52] **Exhibit CE-1**; CHEJVA, sub-clause 11.6.1.
[53] **Exhibit CE-1**; CHEJVA, sub-clause 11.6.2.
[54] CHEJVA, Clause 11.7.
[55] Memorial, ¶ 58; CHEJVA, sub-clause 11.8.2.

iv. Changes in Legislation

246. Clause 17(b) of the CHEJVA included a mechanism to regulate the impact of changes in legislation, which provided that, if any subsequent change of "*laws, regulations, rules or policies*" were to "*materially and adversely affect*[], *directly or indirectly*" the economic benefits accruing to either party or the Joint Venture under the CHEJVA, "*then this Agreement shall continue to be implemented in accordance with its original terms*."[56] Conversely, in case of any "*more favourable*" change, "*the Joint Venture and the Party concerned shall promptly apply to receive the benefits of such Change or New Provision*."[57]

v. Dispute Settlement

247. Clause 15.4 of the CHEJVA provided that "*any dispute*" which the parties failed to resolve amicably or through voluntary expert conciliation "*shall be submitted*" to international arbitration before ICSID or, in the event that ICSID does "*not accept jurisdiction*" or "*reject*[s] *the arbitration request*," to arbitration under the ICC Rules.[58]

248. Sub-clause 15.4.7 stated that, "[f]*or purposes of arbitration pursuant to the ICSID Convention, the Parties agree that the transactions to which this Agreement relates constitute an investment within the meaning of Article 25(1) of the ICSID Convention*."[59]

vi. Governing Law

249. Sub-clause 15.4.4 of the CHEJVA provided that:

> "[i]*n rendering their decision, the arbitrators shall consider the intention of the Parties at the time of entering into this Agreement insofar as it may be ascertained from the Agreement, Pakistani law, and as provided by* Article *16, generally accepted standards and principles of international law applicable to the mining industry*."[60]

250. Clause 16 provided that "*the Law applicable to this Agreement is the law of Pakistan which the Parties acknowledge and agree includes the principles of international law*."[61]

[56] Memorial, ¶ 61; CHEJVA, Clause 17(b).
[57] Memorial, ¶ 61; CHEJVA, Clause 17(a).
[58] Memorial, ¶ 62; CHEJVA, Clause 15.
[59] Memorial, ¶ 63; CHEJVA, sub-clause 15.4.7.
[60] Memorial, ¶ 64; CHEJVA, sub-clause 15.4.4.
[61] Memorial, ¶ 65; CHEJVA, Article 16.

4. The Background of the CHEJVA

a. The CHEJVA Was Originally Entered into by BHP and the BDA in July 1993

251. After initial discussions with the BDA starting in May 1990, BHP submitted to the BDA a draft agreement for the proposed joint venture between BHP and the "*Government of Baluchistan*" on 8 May 1991.[62] The BDA forwarded the draft to the Government of Balochistan, Secretary Industries, Commerce and Mineral Resources, for onward transmission to the Law Department for appraisement on 29 May 1991.[63] On 1 June 1991, the Secretary consented, subject to concurrence by the Finance and Law Departments, that the BDA be authorized to discuss further details with the foreign sponsors.[64]

252. The draft joint venture agreement was reviewed by the law firm of Chima & Ibrahim, in July 1991, and their comments were communicated to the Chief Secretary of Balochistan.[65] The law firm noted that the draft stipulated that "*in the event of any inconsistency between the Agreement and any laws of Baluchistan, the terms of the Agreement shall prevail*."[66] The law firm questioned whether the GOB, acting within the authority conferred on it by law, could enter into such an agreement.[67] The firm further noted that "*if GOB were to opt out, for any reason, during or after the exploration and feasibility stage, BHPM would still remain entitled to go through the various stages, including development, envisaged by the Agreement, and there would remain an implied undertaking on the part of GOB to render necessary approvals in this regard*."[68] The law firm commented: "*Indeed it is only reasonable that this should be so*."[69]

253. It appears from the correspondence, dated 29 September 1991, from Chima & Ibrahim to the BDA that neither the Government of Balochistan nor the BDA wanted to participate in the joint venture proposed by BHP. The letter stated that the Government and the BDA "*would be content to receiv*[e] *royalties for discovered minerals; thereby obviating the need for contribution of funds to the project*."[70] For this reason, the law firm enclosed a

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[62] **Exhibit CE-298**. The draft was prepared for signature by BHP Minerals Limited and The Government of Baluchistan, Province of Pakistan.
[63] **Exhibit CE-185**.
[64] **Exhibit CE-299**.
[65] **Exhibits CE-302** and **CE-304**, **CE-303**.
[66] **Exhibit CE-302**.
[67] **Exhibit CE-302**.
[68] **Exhibit CE-302**.
[69] **Exhibit CE-302**.
[70] **Exhibit CE-304**,p. 1.

draft prospecting license but offered that if it was still desired that the GOB and/or BDA enter into a joint venture with BHP, they would provide a draft joint venture agreement as well or amend the draft provided by BHP.[71]

254. In response to the BDA's comments of 16 October 1991 on the draft joint venture agreement, BHP explained that "[i]*t was our original intention that the Agreement be entered into with the Government of Baluchistan. The purpose of such an arrangement was to ensure that the effect of those provisions of the Mining Concession Rules which cause BHP difficulty could be overridden. When we meet, perhaps we can discuss means by which those concerns which we have in relation to certain aspects of the Mining Concession Rules might be addressed."*[72] BHP's concerns were discussed in meetings with the BDA, and on 4 December 1991, BHP's attorney communicated with Chima and Ibrahim regarding the open issues and stated that it would re-draft the agreement once BDA's position on these issues had been confirmed. The main outstanding issues were the mining concession rules, taxation, area of interest, exploration programme, operating committee, royalty and arbitration. With respect to the mining concession rules, BHP commented that it *"would expect that the Agreement will specifically address those rules which are problematic and be the subject of a Notified Order so as to overcome the Rules*."[73]

255. On 28 April 1992, the National Centre for Technology Transfer, Ministry of Science & Technology advised the Chairman of the BDA that approval of the Federal Government was not necessary and "*it is the Government of Baluchistan and BDA to make decision at their own accord as far as* [the joint venture agreement] *is concerned*."[74]

256. The second draft was circulated on 3 August 1992.[75] This draft had been amended to provide that the parties would be BHP Minerals Asia Pacific Limited and the Baluchistan Development Authority.

257. In the Summary for the Chief Minister, dated 11 November 1992, regarding the proposed joint venture agreement, the Additional Chief Secretary noted that:

> *"5. In consonance with the Government's clear policy of a 'roll-back' of the Public Sector, we would have ordinarily opposed a Joint Venture involving BDA/Government of Balochistan. We of course wish to encourage foreign investment, particularly in the Mining Sector, but*

[71] **Exhibit CE-304**,p. 1.
[72] **Exhibit RE-34**.
[73] **Exhibit RE-35**.
[74] **Exhibit CE-305**.
[75] **Exhibit CE-415**.

> *ideally Foreign Investors should come in on their own without expecting any equity participation from Government of Balochistan.*
> *6. In this particular case, however, BDA's negotiations with BHP have reached an advanced stage and BDA has already expended some money on technical advice etc. Withdrawal of BDA at this stage may convey the wrong signal to BHP.*
> *7. We may, therefore, allow BDA to continue their negotiations with BHP for a joint venture, subject to the following:-*
> *i) Agreement should be got vetted by the P&DD, Finance Department, Law Department and ofcourse [sic] the administrative department i.e. Industries Department.*
> *ii) Agreement should provide for transfer of BDA share-holding to the domestic private sector/another department or agency of the Government of Balochistan. This is important as one day Government may decide to wind up BDA. (It also bears reiteration that dividends coming directly to the Government from this Joint Venture would help Provincial Revenue Generation; but if they go to BDA they will be used* [replacement for the word *"asked"* which is struck out by hand] *upto* [sic, words *"up"* and *"to"* separated by slash inserted by hand] *meet BDA's expenses."*[76]

258. The next draft was circulated on 22 March 1993, but neither Party has produced a copy of this draft.[77]

259. In the continuing negotiations, BHP noted in its cover letter dated 2 April 1993 to the Chairman of the BDA, enclosing draft no. 4, that BHP "*holds to the view that for this project a Joint Venture Agreement (in conjunction with requisite Notified Orders and written assurances/rules from Government) will suffice*."[78] BHP noted in the enclosed comments to those contained in correspondence from Chima & Ibrahim that the agreement was between the BDA and BHP only, and that the Government of Balochistan was not a party to the Agreement.[79]

260. On 13 July 1993, the final draft was submitted by Mr. Ata Mohammad Jafar, Chairman of the BDA, to the Chief Minister of Balochistan for his approval for signing.[80] Mr. Jafar summarized briefly the background of the joint venture and the negotiation of the agreement, noting that the agreement was proposed to be signed by the parties on 29 July 1993. He explained that since the agreement was only conditional, the BDA would have six months' time, after signing, for obtaining consents and approvals from the Federal and

[76] **Exhibit CE-306**.
[77] Respondent's letter to the Tribunal dated 13 January 2015.
[78] **Exhibit RE-36**.
[79] **Exhibit RE-36**, Attachment, Item 8.
[80] **Exhibits CE-186** and **RE-39**.

Provincial Governments in respect with legal and fiscal parameters; if the conditions would not be acceptable within six months, the agreement would cease. Mr. Jafar also noted that this draft had been approved by the BDA Board of Directors in its meeting of 3 July 1993.[81]

261. The CHEJVA had been vetted by the Law Department of Balochistan on 24 July 1993.[82]

262. On 27 July 1993, the Chief Secretary of Balochistan added his comment to the final draft, namely that the BDA should have moved the P&D and Finance Department in time to vet the agreement; this was not done. He noted that "*P&D says it requires time to vet the same. However, as the agreement is to be signed on the 29th, it has been proposed to term it '*provisional*' so that amendments / modification, if any, could be made at a later stage. CM may like to approve.*"[83]

263. The CHEJVA was signed on 29 July 1993.[84] It is made between the "*Governor of Balochistan, through the Chairman, Balochistan Development Authority a statutory corporation of Balochistan Province (hereinafter called the* 'BDA'*)*" and BHP. The Agreement is signed by:

> *"THE BALOCHISTAN DEVELOPMENT AUTHORITY*
> *By: /s/ ATA MOHAMMAD JAFAR*
> *Title: CHAIRMAN,*
> *Balochistan Development Authority"*[85]

264. As discussed at paragraph 291 below, the CHEJVA was made "*conditional"* upon the Parties' receiving from the Federal and/or Provincial Governments within six months all consents and approvals necessary under Pakistani law and all assurances as to fiscal parameters for investment in any future mining venture which either of the parties might need.[86]

b. In March 2000, the CHEJVA Was Amended by BHP and the BDA

265. On 4 March 2000, BHP and the BDA entered into Addendum No. 1 to Chagai Hills Exploration Joint Venture Agreement (the "**2000 Addendum**") with "*the GOVERNOR OF BALOCHISTAN, for and on behalf of the Province of Balochistan*" (the "**GOB**"). The

[81] **Exhibit CE-186**.
[82] **Exhibit CE-309**.
[83] **Exhibits CE-186** and **RE-39**.
[84] **Exhibit CE-1**.
[85] **Exhibit CE-1**.
[86] **Exhibit CE-1**, Clause 2.1.

Chairman of the BDA [signature illegible] signed the 2000 Addendum on behalf of the "*Governor of Balochistan*" and on behalf of the BDA.[87]

266. According to Claimant, on 24 December 1999, based on a recommendation from the Chief [Minister] that the proposal set forth in the summary "*may kindly be approved*," the Governor of Balochistan expressly authorized the Chairman of the BDA to sign the 2000 Addendum "*on behalf of the Government of Balochistan*."[88] The Governor's authorization letter read as follows:

> "*I, Justice (Retd) Amir ul Mulk Mengal, Governor Balochistan hereby authorize Chairman, Balochistan Development Authority to sign Addendum No. 1 to the Joint Venture Agreement dated July 29, 1993 between Government of Balochistan through Chairman, Balochistan Development Authority and BHP Minerals International Exploration Inc. for the Exploration of Copper, Gold and Associated Minerals in Chagai (Balochistan) on behalf of the Government of Balochistan*."[89]

267. The Principal Secretary of the Governor's Secretariat had forwarded the authorization letter to the BDA on 24 December 1999 through letter No. SO-59B-4-12/99/4725, noting that "*the Governor of Balochistan has been pleased to approve and sign the authorization letter allowing the Chairman . . . to sign the subject addendum on behalf of the Government of Balochistan*."[90]

268. On 28 December 1999, the Chairman of the BDA referred the draft Addendum to the Law Department, GOB, for vetting.[91] On 31 December 1999, the Section Officer (Legislation) in the Law Department returned the Addendum "*duly vetted*."[92]

269. Pursuant to Clause 2.2 of the 2000 Addendum, the GOB appointed the BDA "*to act as its agent in connection with the* [CHE]*JVA and with full power and authority to bind the GOB in all respects and with regard to all matters pertaining to or arising out of the JVA*."[93]

270. In the 2000 Addendum, BHP and the BDA confirmed their intention that "*the GOB is the party to the CHEJVA*" and [a]*ll references to the BDA's role and authority as agent for the GOB, shall be deemed to mean the GOB*."[94]

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[87] Counter-Memorial, ¶100.
[88] **Exhibit RE-58(VI)(an)**,pp. 18-19; 52-53.
[89] **Exhibit RE-58(VI)(an)**, pp. 52-53.
[90] *Id*., p. 52.
[91] *Id*., p. 54.
[92] *Id*., p. 55.
[93] **Exhibit CE-2**, Clause 2.2.
[94] **Exhibit CE-2**, Clause 2.1.

271. The GOB ratified all previous acts, matters and things done or performed by the BDA in connection with the CHEJVA prior to the execution of the 2000 Addendum[95] and confirmed that all other provisions of the CHEJVA remained in full force and effect, subject to the amendments set out in the 2000 Addendum.[96]

c. In April 2000, BHP Decided to Exit the Joint Venture and Granted Mincor an Option to Enter into an Alliance for Exploration in Reko Diq

272. By letter dated 10 April 2000, BHP advised the Governor of Balochistan (*"c/- Balochistan Development Authority*") that it wished to enter an Alliance Agreement with Mincor.[97] Enclosing a copy of the Option Agreement, BHP further advised that Mincor "*intends to create a special company (to be known as the Tethyan Copper Company or TCC) to finance and operate the Alliance Agreement and conduct exploration*."[98] Receipt of the letter was acknowledged on 12 April 2000 by the Balochistan Development Authority by its Chairman Mr. Ameer Ali Burq.

273. On 28 April 2000, BHP and Mincor signed the Option Agreement (the "**2000 Option Agreement**"), which granted Mincor an exclusive 180-day option to enter into the Alliance Agreement with BHP regarding the exploration of Reko Diq.[99] In Clause 3, the Option Agreement further set out the terms of the Alliance Agreement.

274. On 23 June 2000, BHP and "*the GOVERNOR OF BALOCHISTAN, for and on behalf of the Province of Balochistan (hereinafter referred to as '*GOB*') acting through its agent, THE BALOCHISTAN DEVELOPMENT AUTHORITY, statutory corporation created by and existing under the Balochistan Development Authority Act 1974 (hereinafter referred to as '*BDA*')*" entered into a Deed of Waiver and Consent ("**Deed of Waiver**") for BHP's transaction with Mincor. The Deed of Waiver was signed by the Chairman of the BDA on behalf of "*THE GOVERNOR OF BALOCHISTAN through its agent, THE BALOCHISTAN DEVELOPMENT AUTHORITY*" and BHP[100]

275. Pursuant to the Deed of Waiver, the GOB waived any and all pre-emptive rights it had under Clause 14.3 of the CHEJVA with respect to the transfers between BHP and Mincor contemplated under the Option Agreement.[101]

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[95] **Exhibit CE-2**, Clause 2.2.
[96] **Exhibit CE-2**, Clause 15.0.
[97] Memorial, ¶ 97. *See* **Exhibit CE-192**.
[98] **Exhibit CE-12**, Clause 2.2.4. As stated at paragraph 223 above, TCCA was organized on 28 June 2000 as a registered company under the Corporations Law of Western Australia.
[99] **Exhibit CE-12**, Clause 2.2.1.
[100] **Exhibit CE-194**.
[101] **Exhibit CE-194**, Clause 2.

276. The GOB further undertook to ensure that BHP would be able to transfer its interest in any licenses effectively to Mincor.[102] BHP, in turn, agreed that it would remain liable in case Mincor's actions or omissions caused BHP to breach any of its obligations under the CHEJVA.[103]

277. The GOB and BHP further confirmed the validity of the CHEJVA by agreeing that "*all the provisions of the* [CHEJVA] *remain in full force and effect*," and that the Deed of Waiver was a "*supplement to the* [CHE]*JVA*."[104]

d. In October 2000, Claimant Exercised Mincor's Option and Entered into the Alliance with BHP

278. On 24 October 2000, TCCA, as nominee of Mincor, exercised Mincor's option to enter into the Alliance Agreement with BHP.[105]

279. On 11 November 2000, the Government of Balochistan Industries Department confirmed that BHP was "*entitled to transfer its interest in their joint venture with Government of Balochistan/B.D.A. including the interest in licenses to MINCOR Resources NL or its nominee, under rules 12, 14 and 15*."[106]

280. On 30 November 2000, TCCA established Tethyan Copper Company Pakistan ("**TCCP**") as its wholly-owned subsidiary in Pakistan.[107]

281. On 15 October 2002, Claimant entered into the Alliance Agreement (the "**2002 Alliance Agreement**") with BHP, which would allow Claimant to earn a share of BHP's 75% interest in the Chagai Hills joint venture by exploring and developing the Chagai Hills mining area held by the joint venture.[108]

282. The purpose of the 2002 Alliance Agreement, according to Clause 2.1, was to "*develop*[] *the mineral potential of the* [Chagai Hill Region of Pakistan] [and] *enabl*[e] *BHP's obligations under the CH*[E]*JV*[A] *to be fulfilled*," while at the same time "*allowing TCC to become a party*" to the CHEJVA.[109]

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[102] **Exhibit CE-194**, Clause 4.
[103] **Exhibit CE-194**, Clause 5.
[104] **Exhibit CE-194**, Clauses 6-7.
[105] *See* **Exhibit CE-198**, Recitals ¶ D.
[106] **Exhibit CE-195**.
[107] *See* **Exhibit CE-14**; **Exhibit CE-21**, ¶ 2. Claimant sometimes refers to TCCA and TCCP collectively as "**TCC**."
[108] Memorial, ¶ 97. *See* **Exhibit CE-192** at Clause 1.
[109] **Exhibit CE-198,** Clause. 2.1.

283. The 2002 Alliance Agreement set forth in detail the expenditure and work requirements through which TCCA would acquire BHP's interest in the Joint Venture.[110] Pursuant to Clause 12, BHP retained a "*Clawback Right*" by which it could partially re-acquire its interests at Reko Diq in the event of a major mineral discovery.[111]

e. Exploration License EL-5

284. Exploration License EL-5 ("**Exploration License EL-5**") had been granted by the Balochistan Licensing Authority to the Joint Venture, "*M/S. BDA/BHP Chagai Hills Joint Venture*", on 18 May 2002 for a period of three years (21 February 2002 to 20 February 2005). It originally covered 973.75 square kilometers (240620.20 acres) in the Reko Diq area.[112]

285. On 9 April 2005, Exploration License EL-5 was renewed for the reduced area of 482.72 square kilometers (119304.95) acres for a further period of three years (21 February 2005 to 20 February 2008). On 1 December 2007, it was renewed a second time for the reduced area of 435.02 square kilometers (107516.65 acres) for the period 20 February 2008 to 19 February 2011.[113]

f. By July 2005, Claimant Had Earned the Right, pursuant to the 2002 Alliance Agreement, to BHP's Interest in Exploration License EL-5

286. On 12 July 2005, BHP confirmed TCC's notification of 11 July 2005 that TCC had completed all of its obligations under the 2002 Alliance Agreement with regard to the Tanjeel project – including the expenditure of US$ 3 million in accordance with Section 7.2 thereof – and had consequently earned all of BHP's right, title and interest in the Licenses as provided in the 2002 Alliance Agreement.[114]

287. On 23 November 2006, TCCA paid US$ 60 million to BHP to terminate BHP's clawback right under Clause 12 of the 2002 Alliance Agreement.[115]

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[110] **Exhibit CE-198.** *See, e.g.*, Clauses 5.4, 7.5.
[111] **Exhibit CE-198**. *See, e.g.*, Clause 12.
[112] **Exhibit CE-16**.
[113] **Exhibits CE-20** and **CE-17**.
[114] **Exhibit CE-200**. The term "*Licenses*" is defined as meaning the mining tenements held or applied for or acquired by the Parties (whether jointly or with other parties) in the Region as at the date of the Option Agreement or at any time during the currency of the Option Agreement or this Agreement (including without limitation the Reko Diq Licence).
[115] *See* **Exhibit CE-211**, pp. 18–19; **Exhibit CE-223**, p. 127.

B. Pakistan's Federal and Provincial Regulatory System

288. Under the Pakistan Constitution, minerals are a provincial subject, except mineral oil, natural gas and nuclear minerals and those occurring in certain special areas,[116] and the Provincial Governments are responsible for development and exploitation of minerals which fall in their domain.[117]

1. The Balochistan Mining Concession Rules, 1970

289. At the time the CHEJVA was signed on 29 July 1993, the Mining Concession Rules, 1970 were in force in the Province of Balochistan (the "**1970 BMC Rules**")[118]

290. At the time of signature, BHP had identified certain consents, approvals and assurances under the 1970 BMC Rules, which BHP, in its view, needed to seek from the Government of Balochistan in order to secure rights necessary to implement the CHEJVA.[119] Rule 98 of the 1970 BMC Rules authorized the Government "*to relax any or all of the provisions of these Rules in cases of individual hardship and under special circumstances to be recorded in writing and on terms and conditions to be fixed by it.*"[120]

291. The Parties agreed, in Clause 2.1, that the entry into force of the CHEJVA was conditional upon their receiving from the Federal and/or Provincial Government all consents and approvals necessary under Pakistani law within six months after signing:

> *"2.1 This Agreement shall be conditional upon the Parties receiving from the Federal Government and/or the Provincial Government (as the case may be) within six (6) months of the date of this Agreement or such other period as the parties may agree:*
> *1. all consents and approvals necessary under Pakistani law, and*
> *2. all assurances as to fiscal parameters for investment in any future mining venture which either of the Parties may have need for.. . .*
>
> *2.3 If pursuant to Clause 2.1 any necessary or required Governmental consent, approval or assurance is not obtained within six (6) months of the date of this Agreement, unless otherwise agreed by the Parties, this Agreement shall absolutely cease and determine and neither Party shall have any rights or claims against the other as a result thereof."*[121]

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[116] Federally Administered Tribal Areas (FATA), Islamabad Capital Territory (ICT) and International Offshore Water Territory (IOWT). **Exhibit CE-416**.
[117] **Exhibits CE-190 (1995 NMP), RE-16, RE-17 and RE-19**; **Exhibit CE-416**.
[118] **Exhibit RE-2**.
[119] **Exhibit CE-187**.
[120] Memorial, ¶ 67. **Exhibit RE-2**, Rule 98**.**
[121] **Exhibit CE-1**, Clauses 2.1, 2.3.

292. Three months after the date of signing, on 16 September 1993, Mr. Martin Harris, Senior Lawyer for BHP wrote to Mr. Ata Mohammad Jafar, the Chairman of the BDA, as follows:

> "*In reviewing the Rules we have sought to identify the consents, approvals and assurances which we must seek from the Government to* [illegible] *the Joint Venture, as referred to in Article 2 of the Joint Venture Agreement (the "Agreement"). We understand that this. involves seeking Gazetted Notified Orders securing rights needed to implement the Agreement to the extent such rights are not available under or are inconsistent with the Rules.*
>
> *Rule 98 allows the Government to relax the Rules on terms and conditions. Primary responsibility for considering cases involving relaxation of the Rules appears to lie with the Mines Committee (Rule 2(f)). Subject to any current delegation of the Mines Committee's powers, we would suggest application be made to the Committee for Notified Orders as described in the attachment to this letter.. . .*
>
> *We envisage that once Notified Orders relaxing the Rules have been made, these would be incorporated into a deed guaranteeing, inter alia, that the Notified Orders would not be revoked or overridden. The parties to the deed would be BHP Minerals, the Balochistan Development Authority, the Balochistan Government and the Central Government. The Central Government would have to be a party as, although the Rules are promulgated by the Balochistan Government, they are created pursuant to the Regulation of Mines Oilfields and Mineral Development (Federal Control) Act, 1948, under which the Central Government* [illegible] *overriding powers*."[122]

293. Attachment "A" to the letter identified 13 provisions of the 1970 BMC Rules that required relaxation to enable the Joint Venture to conduct its exploration activities.[123] BHP listed the consents, approvals and assurances and described the "*Application for Mining Leases*" in relevant part, as follows:

> (1) Grant of Exploration Area.
>
> (2) Area Available for Prospecting Licenses
>
> (3) Application for Prospecting Licenses
>
> (4) Satisfaction of Conditions Attaching to Prospecting Licenses
>
> (5) Exclusive Right

[122] **Exhibit CE-187**.
[123] Memorial, ¶ 69; Counter-Memorial, ¶ 89. **Exhibit CE-187**.

(6) Other Minerals

(7) Government's Rights: Pre-emption, Acquisition, Merger, and taking Control in National Emergency

(8) Assignment

(9) Application for Mining Leases

Here BHP stated:

> "*It is essential that the Joint Venture, or a sole '*Participating Party*' under Clause 11* [of the CHEJVA]*, is entitled to convert the relevant P*[rospecting] *L*[icense] *into a M*[ining] *L*[ease] *if it wishes to develop a mine. Currently, the right of a holder of a PL to receive a ML is described in Rule 23 as a '*preferential right*' only. The subjective discretion of the licensing authority* [under the 1970 BMC Rules] *must be waived in favour of an absolute right of the Joint Venture, or a sole '*Participating Party*', to a M*[ining] *L*[ease]*, provided they comply with routine administrative requirements. Clause 11.8.2 of the Agreement anticipates this right of transition.*
>
> *International mining companies will view this aspect of a country's mining regulations as one of the most important.*"[124]

(10) Royalty

(11) Penalties, Compensation and Cancellation

(12) Employment and Training

(13) Mining Lease.

294. In response, on 23 October 1993, Mr. Jafar, as Chairman of the BDA, requested from the Secretary, Government of Balochistan, Industries, Commerce and Mineral Resources Department, pursuant to rule 98 of the 1970 BMC Rules, the relaxation of the 13 provisions of the 1970 BMC Rules identified by BHP.[125]

295. The request was discussed on 30 October 1993 at a meeting under the Chairmanship of Additional Chief Secretary (Dev.) Mr. Ata Muhammad Jafar attended by representatives of the Planning & Development Department, the Chief Minister's Inspection Team, the Finance Department, the Industries Department, the BDA and BHP.[126]

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[124] Memorial, ¶ 70. **Exhibit CE-187,** ¶ 9.
[125] Memorial, ¶ 71; Counter-Memorial, ¶ 90. **Exhibit CE-188**; *see* **Exhibit RE-2,** Rule 98.
[126] **Exhibit CE-188**.

296. On 20 January 1994, by Order of the Governor of Balochistan, the Government of Balochistan granted BHP the following relaxations (the "**1994 Relaxations**"):

> "*In exercise of the powers confirmed by rule 98 of the Mining Concession Rules 1970, the Government of Balochistan is pleased to grant the following relaxation as a special case in favour of BHP Company enabling the company to carry out its exploration work with out* [sic] *any complications:*
>
> *1. Grant of Exploration Area.*
>
> *2. Area available for prospecting Licence.*
>
> *3. Application for prospecting Licence.*
>
> *4. Satisfaction of conditions attaching to prospecting Licences.*
>
> *5. Exclusive right.*
>
> *6. Other Minerals.*
>
> *7. Government rights pre emption acquisition merger, and taking control in national emergency.*
>
> *8. Assignment.*
>
> *9. Application for Mining Lease.*
>
> *10. Roility* [sic].
>
> *11. Penlities* [sic] *compensation and cancellation.*
>
> *14. Employment and training.*
>
> *15. Mining Lease.*"[127]

297. When the CHEJVA was submitted to the Chief Minister of Balochistan for his approval for the Chairman of the BDA to sign it, the Chief Secretary commented on 23 July 1993 that "*as the date for signing the agreement has already been fixed (29th July), we may authorize the Chairman B.D.A. to go ahead subject to the inclusion of a specific clause that this agreement would be of a provisional nature and any reasonable additions / alternations proposed by P & DD / F.D., in a period of one month from the signing of the*

[127] Memorial, ¶ 72. **Exhibit CE-189**; *see* **Exhibit CE-188**, at 4-5**.**

agreement, shall be incorporated in the agreement."[128] The Chief Minister agreed with the views of the Chief Secretary.[129]

298. At a meeting of representatives of BHP and the BDA on 29 July 1993, this proviso was discussed and the parties agreed that, first, this provision was already incorporated in the agreement in Article 24.1 (amendment of the Agreement); second, since all proposed amendments were subject to approval by the Provincial Government and related departments, if there were any suggestions from the Planning and Development and Finance Department, these would be automatically subject to further discussion and would be incorporated in due course; and, third, the Agreement was in any case provisional according to Clause 2.1. Both parties signed the minutes of this meeting.[130]

299. On 11 November 2000, after TCCA, as nominee of Mincor, exercised Mincor's option to enter into the Alliance Agreement with BHP on 24 October 2000, the Government of Balochistan, Industries Department, confirmed that the 1994 Relaxations of the 1970 BMC Rules it had granted to BHP "*still h*[e]*ld good.*"[131]

2. The Pakistan National Mineral Policy, 1995

300. In 1995, two years after the CHEJVA was signed, Pakistan enacted the National Mineral Policy, 1995 (the "**1995 NMP**") to guide the formulation of new provincial mineral rules and regulations. In its Objectives, the 1995 NMP stated that "[t]*he Government of Pakistan is . . . launching a major policy initiative in order to expand mineral sector activity mainly through private investment*."[132] The Objectives reiterated that minerals are a provincial subject under the Constitution, except oil, gas and nuclear minerals and those occurring in certain special areas, and that "*the Provincial Government*[s] *are responsible for development and exploitation of minerals which fall in their domain*."[133]

301. Article 5.2 of the 1995 NMP provided that existing government corporations could "*retain a majority share in joint venture mineral projects to be managed by the private sector: local or foreign*."[134] Article 11 stated that there would be no mandatory State participation; however, the Governments would encourage joint ventures between foreign

[128] **Exhibit RE-39** (N.B. The translation of this handwritten comment provided at pp. 152-163 does not appear to be correct. The handwriting is clear enough to be able to quote it as done here.)
[129] **Exhibit RE-39**.
[130] **Exhibit RE-43**.
[131] **Exhibit CE-195**.
[132] **Exhibit CE-190 (1995 NMP)**, Article 1.1.
[133] 1995 NMP, Article 2.1.
[134] 1995 NMP, Article 5.2.

and local private investors, and such joint ventures could be entered into with agencies of the Federal and Provincial Governments.[135]

302. Article 8.1 of the 1995 NMP provided that the existing provincial mining statutes would be replaced by new mining regimes, which would reflect modern international standards:

> "*The existing regulatory regime is being revised and updated to change some features which have been considered unattractive to investors and to put in place a set of rules which are internationally competitive. The new rules would meet the concerns of the investors on such matters as transparency, criteria for dealing with applications and the grant of licenses and leases, expeditious decision making process, security of tenure, provision of adequate information on mineral titles, independent dispute resolution mechanism etc., and to equitably meet the objectives of the investors as well as aspirations of the Governments.*"[136]

303. Article 8.6.1 of the 1995 NMP provided that the holder of an Exploration License could apply for a mining lease over an area subject to a maximum of 250 square kilometers within its Exploration License in respect of the minerals discovered.[137] In addition, Article 8.6.2 of the 1995 NMP provided:

> *"The Licensing Authority shall not unreasonably refuse an application for the grant of an M[ining] L[ease]. Where the Licensing Authority considers that the applicant has satisfied the specified criteria for assessment and grant of an ML, the ML will be granted."*[138]

304. Article 8.12.1 of the 1995 NMP confirmed the right of the Provincial Government to enter into an agreement with a mining investor to provide the investor with additional legal security. Article 8.12.1 provided:

> *"The Provincial Government may enter into an agreement with an investor, within the framework of the law, to stabilize the terms or to predetermine procedures with respect to certain matters relating to the carrying out of operation under a license/lease, if the government is satisfied that substantial foreign investment in exploration and mining operations is likely to be made and it is desirable in the interest of the development of mineral resources to do so."*[139]

[135] 1995 NMP, Article 11.
[136] 1995 NMP, Article 8.1
[137] 1995 NMP, Article 8.6.1.
[138] Memorial, ¶ 5; 1995 NMP, Article 8.6.2.
[139] 1995 NMP, Article 8.12.1.

305. Article 8.12.2 clarified that such an "*agreement may cover, for example, the right of the licensee to obtain a mining lease*" and "*the settlement of disputes through . . . international arbitration*."[140]

306. Article 8.13 of the 1995 NMP provided that any dispute between "*a foreign investor and the government arising out of or in connection with the terms of an agreement or of a granted mineral title . . . shall be submitted to the International Centre for Settlement of Investment Disputes (ICSID) for arbitration*."[141]

307. The 1995 NMP stipulated that the rate of corporate income tax would be 35% for private or non-resident companies, and for mining companies.[142] In addition, the simplified and uniform royalty rate in all of the provinces would be 3% for precious metals and 2% for base metals (which included copper).[143]

3. The Balochistan Mineral Rules, 2002

a. Enactment of the Mineral Rules, 2002

308. On 8 March 2002, Balochistan implemented the 1995 NMP by enacting the Balochistan Mineral Rules, 2002 (the "**2002 BM Rules**").[144] In the Foreword, the Director General of Mines and Minerals stated that the rules, "*being considered unattractive to investors*," had been revised and updated "*to put in place a set of rules internationally competitive*" and the 2002 BM Rules "*attract the attention of the investors on such matters as transparency, criteria for dealing with applications and the grant of Licenses and Leases, expeditious decision making process, security of tenure, provision of adequate information on mineral titles, independent resolution mechanism, etc., and to equitably meet the objectives of the investors as well as aspirations of the Government*."[145] The Province had enlisted the technical assistance of the Government of Australia in the drafting of the rules.[146]

309. Rule 7 of the 2002 BM Rules provided:

> *"No person shall conduct exploration / prospecting operations, mining operations or reconnaissance operations except under a mineral title*

[140] 1995 NMP, Article 8.12.2.
[141] 1995 NMP, Article 8.3.
[142] 1995 NMP, Article 9.2.1.
[143] 1995 NMP, Article 10.2.
[144] **Exhibit RE-1**.
[145] **Exhibit RE-1**, Foreword.
[146] **Exhibit RE-1**, Foreword.

> *or mineral concession granted by the licensing authority pursuant to these Rules."*[147]

310. The mineral titles that could be issued, subject to the Rules, included exploration licenses and mining leases.[148]

311. Rule 9(1) of the 2002 BM Rules followed Article 8.12 of the 1995 NMP[149] and confirmed the right of the Provincial Government to enter into an agreement with a mining investor. Rule 9(1) provided as follows:

> *"The Government may, at the request of a person proposing to carry on mineral operations, enter into an agreement with that person relating to a mineral title, not inconsistent with these Rules or any other law, if the Government is satisfied that substantial foreign investment is likely to be made in mineral operations and that the carrying on of the undertaking in question is desirable in the interest of the development of the mineral resources of Balochistan."*[150]

312. Rule 9(2) provided that the Federal Government could, at the request of the Government, be a party to, and to the negotiation of, a mineral agreement.[151]

313. Rule 9(3) provided, in pertinent part, that a mineral agreement "*may, in particular, make provision with respect to . . . the grant . . . of a mineral title.*"[152]

314. Rules 9(5) and 9(6) provided for priority of the Rules over the provisions of a mineral agreement. Rule 9(5) stated as follows:

> *"Any provision contained in a mineral agreement which is inconsistent with any provision of these rules or any other law shall, to the extent of the inconsistency, be of no force or effect."*[153]

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[147] 2002 BM Rules, rule 7.
[148] 2002 BM Rules, rule 7(2)(b), (d).
[149] Rule 8.12 of the 1995 NMP provided as follows:
"*8.12.1 The Provincial Governments may enter into an agreement with an investor, within the framework of the law, to stabilize the terms or to predetermine procedures with respect to certain matters relating to the carrying out of operation under a license/lease, if government is satisfied that substantial foreign investment in exploration and mining operations is likely to be made and it is desirable in the interest of the development of mineral resources, to do so. The Federal Government may also become signatory to such an agreement, if so requested by a Provincial Government, after independently examining viability of the project and credit worthiness of the party*."
Section 8.12.2 provided that the agreement might cover, for example, the right of the licensee to obtain a mining lease.
[150] 2002 BM Rules, rule 9(1)
[151] 2002 BM Rules, rule 9(2).
[152] 2002 BM Rules, rule 9(3)(a). Under rule (2)(d), mineral titles which could be issued included mining leases.
[153] 2002 BM Rules, rule 9(5).

315. Rule 9(6) provided:

> *"Nothing contained in a mineral agreement shall be construed as absolving any party thereto from complying with any requirement laid down by law or from applying for, and obtaining, any licence, approval, permission or other document required by law."*[154]

316. Rule 29 of the 2002 BM Rules set forth the requirements for an application for a renewal of an exploration license. In case of a second renewal, Rule 29(2)(c)(iii) provided that an application shall not be made "*unless the applicant can satisfy the authority that such a renewal is necessary for the completion of a full feasibility study of the discovered deposits and the proposed activities could not have been reasonably completed during the period of the first renewal.*"[155]

317. Pursuant to rule 33(3) of the 2002 BM Rules, an exploration license holder must submit quarterly reports to the Licensing Authority summarizing "*the location and results of all photogeological studies, imaging, geological mapping, geochemical sampling, geophysical surveying, drilling, pitting and trenching, sampling and bulk sampling and other activities undertaken by the licensee in the course of the exploration operations in, or in connection with, the exploration area covered by the exploration license.*"[156]

318. Rule 47(1) of the 2002 BM Rules specified that an application for the grant of a mining could only be made by a corporation formed under Pakistan law.[157]

319. Rules 47(2) set forth the requirements for an application for a mining lease. It provided as follows:[158]

> *"(2) An application for a mining lease –*
> *(a) shall contain the information referred to in Rule 18(1)(a);*
> *(b) shall be accompanied by the description, maps and plan referred to in Rule 18(l)(d);*
> *(c) shall be made in respect of an area of land not exceeding 250 square kilometres and identify the mineral or group of mineral in respect of which tile lease is sought;*
> *(d) shall contain the particulars referred to in Rule 8(1)(f) (technical and financial resources);*
> *(e) shall be accompanied by –*
> 1. *a technological report of mining and treatment possibilities and the intention of the applicant in relation thereto;*

[154] 2002 BM Rules, rule 9(6).
[155] 2002 BM Rules, rule 29(2)(c)(iii).
[156] 2002 BM Rules, rule 33(1) - (3).
[157] 2002 BM Rules, rule 47(1).
[158] 2002 BM Rules, rule 47(2).

2. *where the applicant is a person referred to in Rule 50(1) the statement of in Rule 33(1 (h) duly certified by a recognized firm of auditors or chartered accountants;*

(f) shall be accompanied by the relevant feasibility studies, and shall include, for the approval of the licensing authority, detailed plans for development and operation of the mine and the programmed of proposed mining operations, including a forecast of –

1. *the date by which the applicant intends to work;*
2. *the capacity and expected rate of production and scale of operations;*
3. *the anticipated overall recovery of ore and mineral products; and*
4. *the nature of the products;*

(g) shall –

1. *be accompanied by an environmental impact assessment in terms of the Environmental Protection Act:*
2. *identify the extent of any adverse effect which the plan for development and operation of the mine, and. the carrying out of the programme of proposed mining operations would be likely to have on the environment and on any monument or relic in the area over which the lease is required; and*
3. *contain proposals for eliminating or controlling that effect;*

(h) shall contain proposals for the prevention of pollution, the treatment and disposal of wastes, the safeguarding, reclamation and rehabilitation of land disturbed by mining operations, the protection of rivers and other sources of water and for monitoring and managing any adverse effect of mining operations on the environment;

(i) shall identify any particular risks (whether to health or otherwise) involved in mining the mineral or group of minerals which it is proposed to mine, and proposals for their control or elimination;

(j) shall contain or be accompanied by –

1. *a statement giving a detailed forecast of capital investment, operating costs and revenues and the anticipated type and source and extent of financing;*
2. *a statement giving particulars of expected infrastructure requirements; and*
3. *proposals in respect of the matters specified in Rule 13(1)(b), (c), (d), (e), (f), (g) and (h);*

(k) shall state the period, not exceeding thirty years for which the lease is required;

(l) shall be accompanied by such other documents and information as the licensing authority may require in relation to the application; and

(m) may contain any other matter which in the opinion of the applicant is relevant to the application.

(3) An applicant for a mining lease shall comply with the requirements of sub-rules (1) and (7) of Rule 10."

320. As of 1 October 2010, Rule 47(2) was amended as to include a new sub-clause (n):[159]

> "*(n) a concrete proposal for value addition of the ore to be produced / exploited from the applicant's mining lease within the country is submitted, or if the facility is not available in the province, the Ore could be taken out of the province with the prior approval of the Provincial Government.*"

321. Rule 48 set forth the conditions upon which a mining lease should be granted, or refused. Section 48 provided as follows:[160]

> *"**48. Grant or refusal of mining lease**. -(1) Subject to these Rules, where the holder of exploration licence or a mineral deposit retention licence, makes an application for a mining lease in respect of-*
> *(a) an area of land in, or which constitutes, the exploration area or, as the case may be, the retention area; and*
> *(b) any mineral or group of minerals included in exploration license or such mineral deposit retention licence, as the case may be, the licensing authority shall grant the mining lease.*
> *(2) The licensing authority shall not grant a mining lease in relation to any area of land in respect of any mineral or group of minerals if, at the time of the application, any person other than the applicant holds-*
> *(a) any exploration licence conferring an exclusive right to carry on exploration operations in that area of land in respect of that mineral or group of minerals;*
> *(b) any mining concession in relation to that area of land in respect of that mineral or group of minerals; or*
> *(c) any mineral deposit retention licence in relation to that area of laud and in respect of that mineral or group of minerals, unless –*
>
> 1. *that other person agrees to the grant of the mining lease; and*
> 2. *the licensing authority deems it desirable to grant the mining lease in the interest of the development of the mineral resources of Balochistan.*
>
> *(3) Subject to sub rules- (4) and (5), a mining lease shall not be granted*
> *(a) unless –*
>
> 1. *the feasibility studies show that the mine can be profitably developed and operated;*
> 2. *the proposed plans for development and operation of the mine and the programme of the mining operations of the applicant will ensure the efficient, beneficial and timely use of the mineral resources;*

[159] **Exhibit RE-1**, p. 153.
[160] 2002 BM Rules, rule 48.

> 3. *the applicant in question has or can obtain the technical and financial resources and experience to carry out mining operation effectively;*
> 4. *the applicant is a fit and proper person to hold the lease;*
> 5. *the proposals submitted with the application are satisfactory; and*
> 6. *it is in the interest of the development of the mineral resources of Balochistan to grant the lease;*
>
> *(b) if at the time of the application the applicant in question is in default.*
> *(c) in respect of an area of land exceeding 250 square kilometres unless the licensing authority is satisfied, on reasonable grounds that special circumstances exist which justify the grant of the lease in respect of a larger area for the efficient development of the mineral resources.*
> *(4) The licensing authority shall not refuse to grant a mining lease to the holder of a mineral title referred to in sub-rule (l) –*
> *(a) in accordance with sub-rule (3) (a), unless the licensing authority has –*
>
> 1. *by notice in writing, informed the applicant, of its intended refusal and the reasons therefore;*
> 2. *afforded the applicant an opportunity to make, within such reasonable period as may be specified in the notice, representations in relation to all matters relating to its intention and, if the applicant so desires, to make proposals in relation to any such matters; and*
> 3. *taken any such representations into consideration;*
>
> *(b) in accordance with sub-rule (3) (b), unless the licensing authority has, by notice in writing, informed the applicant, of its intended refusal –*
>
> 1. *setting out particulars of the alleged default; and*
> 2. *requiring the applicant to make representations to the licensing authority in relation to the alleged default or to remedy the default on or before a date specified in the notice, and the applicant has failed to remedy the default or make such representations as, in the opinion of the authority, would remove the ground for the intended refusal.*
>
> *(5) The licensing authority shall not refuse to grant a mining lease on the ground that any proposals submitted with the application are inadequate or unsatisfactory unless the licensing authority has, by notice in writing, informed the applicant accordingly and afforded the applicant a reasonable opportunity to modify those proposals."*

322. The 2002 BM Rules confirmed that the 1970 BMC Rules "*are hereby*" repealed and provided that any license or lease granted or renewed before the 2002 BM Rules entered into force *"shall be deemed to be granted, renewed or saved for the subsisting period in*

accordance with the provisions of these Rules as if these Rules were in force at the time such license or lease was granted, renewed or saved."[161]

b. Amendment of the 2002 BM Rules

323. On 1 October 2010, Balochistan amended the 2002 BM Rules to add a new sub-clause (vii) to rule 48, sub-rule 3, clause (a), after sub-clause (vi), which required that a mining lease application include "*a concrete proposal for value addition of the ore to be produced / exploited from the applicant's mining lease within the country*."[162]

4. The New Pakistan National Mineral Policy, 2013

324. In February 2013, the Federal Government enacted the new National Mineral Policy (the "**2013 NMP**"). Its objective was to extend the drive to ensure the modernization of the mining sector regulatory instruments. This was to be done, *inter alia*, by:

> *"*[p]*roviding for mineral titles to be granted or renewed for sufficient periods to allow for the full commercial exploration, development and exploitation of any mineral deposit by the mineral title holders;*
> *Eliminating discretionary powers, provide time frames and ensuring simplicity of procedures and transparency of decisions; and*
> *Updating the mining laws to deal with international mining practices in Pakistan such as open pit mining and working practices."*[163]

325. Article 7.8 of the 2013 NMP expanded on Article 8.12.1 of the 1995 NMP and provided for the mineral agreement to have priority over any inconsistent law or rules subsequently amended:

> *"7.8.1 The Provincial Governments may enter into an agreement with an investor, within the framework of the law, to define the terms or to predetermine procedures with respect to certain matters relating to the carrying out of operations under license/lease, if government is satisfied that substantial foreign investment in exploration and mining operations is likely to be made and it is desirable in the interest of the development of mineral resources, to do so. The Federal Government may also become signatory to such an agreement, if so requested by a Provincial Government, after independently examining viability of the project and credit worthiness of the party. When the Federal Government is requested, the terms of such mineral agreement would be mutually agreed between the Federal Government, the respective Provincial Government and the mining company.*

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[161] Memorial, ¶¶ 127. 128. 2002 BM Rules 124 and 125.
[162] Memorial, ¶ 275. **Exhibit CE-161.**
[163] **Exhibit CE-416**, Article 7.1 (Objectives).

7.8.2 In order to facilitate negotiations, the Federal Government will develop a model mineral agreement designed to provide additional comfort to a mining company and its lenders. The model mineral agreement will contain terms, including without limitation, with respect to the application, grant, duration, renewal, assignment and termination of mineral titles and the rights and obligations of mineral title holders that will protect the economic feasibility of the project and stabilize the legal and fiscal regimes (taxes, fees and royalties) which the mining company will be subject to over the life of the project with necessary protection to the mining company in the event of changes thereto. This will allow the mining company and its lenders to make the necessary investment decisions. The model mineral agreement shall form the basis of negotiations with a mining company for a mineral agreement and may be varied for project specific reasons on a case to case basis to deal with project specific issues. The Federal Government will stand as guarantor of the Provincial Government's obligations, if so requested by the latter.

The existing Mineral Rules will be amended to remove any conflict/overlapping with or other effect on, and to give effect to, the rights and obligations of the mining company under the mineral agreement in line with best international practices and in the meantime, the respective Government shall pass an appropriate order through a notification under the applicable law exempting the class of minerals or the specific minerals covered by mineral agreements from the application of the relevant provisions of the Mineral Rules until the same are amended, such government will also give protection to the incentives and concessions given to mining companies under a mineral agreement through statutory amendments principally in line with those of the mineral sector.

The mineral agreement would have an overriding effect in case anything contained therein is inconsistent with any law or rules subsequently amended."[164]

C. Exploration Work at Reko Diq

1. BHP's Reconnaissance and Prospecting Work at Chagai

326. After the CHEJVA had entered into force, BHP undertook reconnaissance and exploration activities in the Chagai district in the context of the Joint Venture.

[164] **Exhibit CE-416**, Article 7.8.

327. From 1993 to 1995, based on satellite imaging and geochemical analysis, BHP identified 10 areas for further exploration, one of which included Reko Diq.[165]

328. On 22 July 1996, the Joint Venture applied for 10 Prospecting Licenses, covering a total of 1,000 square kilometers, for these 10 areas.[166] On 8 December 1996, the Licensing Authority granted the requested Prospecting Licenses, including PL-4 covering the Reko Diq, entitling the Joint Venture to conduct drilling and analysis work within the license areas.[167]

329. In 1997, BHP completed its first-phase drilling at Reko Diq and at five other prospecting areas. Several early drill holes at Reko Diq indicated the presence of minerals.[168]

330. On 19 November 1998, the Joint Venture sought the renewal of two Prospecting Licenses for the Reko Diq area (PL-4) and the Koh-i-Sultan area and abolished the remaining eight Prospecting Licenses.[169] On 5 July 1999, the Joint Venture surrendered the Koh-i-Sultan Prospecting License.[170]

331. On 28 July 1999, the Joint Venture applied for a new, larger Prospecting License for Reko Diq covering an area of 973.75 square kilometers.[171] On 21 February 2000, the Licensing Authority granted the new Prospecting License over the area requested and designated it "*PL-14*." The Licensing Authority further approved the merger of the original Reko Diq Prospecting License PL-4 with the new Reko Diq Prospecting License PL-14.[172]

2. TCC's Initial Exploration Work (2002-2005)

332. After entering into the 2002 Alliance Agreement with BHP, TCC focused its exploration work in the context of the Joint Venture primarily on the copper deposit called Tanjeel, also known as H4, located approximately four kilometers east of the Western Porphyries.[173] According to an Information Memorandum published by TCC in July 2005 (the "**Information Memorandum**"), TCC's objective was to become a major regional supplier of copper to the Asian market. Its strategy was first to develop the Tanjeel

[165] **Exhibit CE-271**, pp. 41, 42.
[166] **Exhibit CE-271**, p. 42.
[167] **Exhibits CE-271 and RE-2,** Rule 27(a).
[168] **Exhibit CE-271**, p. 42.
[169] Memorial, ¶ 89. **Exhibit CE-271**, pp. 42-43.
[170] Memorial, ¶ 89. **Exhibit CE-271**, pp. 41, 43.
[171] Memorial, ¶ 90.
[172] **Exhibit CE-271.**
[173] Memorial, ¶¶ 129, 37.

project, which contained copper, and later to develop the large Western Porphyries, which contained copper and gold.[174]

333. In July 2001, TCC completed a scoping study on the Tanjeel project.[175]

334. On 18 March 2002, the Government of Pakistan declared the H4 copper project an Export Processing Zone ("**EPZ**"), which allowed TCC to enjoy favorable tax treatment, relaxed import regulations and other benefits.[176]

335. In June 2003, the scoping study was updated on the basis of additional data obtained as a result of TCC's exploration work, and a valuation study in relation to the Reko Diq project was completed.[177]

336. In the Information Memorandum, TCC reported that a bankable feasibility study was being prepared for the Tanjeel project, with a targeted completion date of December 2005.[178]

337. In the Quarterly Report for the period ended 31 December 2005,[179] TCCA reported that it continued the exploration of EL-5, including ground magnetic surveys and drilling, and progress of the Bankable Feasibility Study on Tanjeel (formerly known as H4), in particular,

> *"[t]he initial results of the definitive engineering study on the Tanjeel Project have identified significant capital cost increases. These suggest that the development path for the project, on which the Feasibility Study is based, may no longer be optimal.*
>
> *TCC therefore decided to pause the definitive engineering study, while the essential parameters of the project to take account of the new cost structure were reviewed. This work should be completed by the end of January 2006, after which, and subject to its outcome, the engineering study would recommence. In the meantime, the other aspects of the Bankable Feasibility Study are continuing."*[180]

338. TCCA also reported that the sample preparation and laboratory analysis of the Western Porphyries drilling program (H14 and H15) continued during the Quarter, and that a total

[174] **Exhibit CE-199**, p. 7.
[175] **Exhibit CE-199**, p. 10.
[176] Memorial, ¶130. **Exhibit CE-196**.
[177] **Exhibit CE-199**, p. 11.
[178] **Exhibit CE-199**, p. 8.
[179] Even though TCCA was not yet a party to the CHEJVA, the joint venture was controlled and funded by TCCA. *See* **Exhibit CE-204**, p. 2.
[180] **Exhibit CE-204**, pp. 5, 7.

of seven drill holes (comprising 2,016 meters RC[181] and 2,174 meters diamond core) were sampled.[182]

339. Finally, TCCA reported its total expenditures (operating expenditures plus capital expenditures) incurred up to 31 December 2005 since the grant of the Exploration License EL-5, on 18 May 2002, as US$ 12.772 million, of which US$ 2.803 million had been expended during the last quarter.[183]

340. Shortly before the 2006 Novation Agreement was signed on 1 April 2006, a meeting of the OC was held on 11 February 2006. It was attended by Mr. Arbab Muhummad Yousaf, Chairman, BDA; Mr. Muhammad Farooq, Director, BDA; Mr. Tim Hargreaves, CEO, TCCP; Mr. Chris Arndt, Operations Manager, TCCA; and Mr. Zafar Iqbal, Finance Manager TCCP.[184]

341. At this meeting, Mr. Hargreaves reported that, although the last meeting had been held more than a year ago, on 16 December 2004, there had been frequent contacts and dialogue within the joint venture, including key meetings on, *inter alia*, the proposed legal structure and project agreements for the H4 (now Tanjeel) project; the development concept, including necessary extension of the drilling program in light of recent expansion of the resource estimate; the draft Shareholders Agreement and principles of the 2006 Novation Agreement; and alternative commercial structures of the CHEJVA, such as a net profit interest for the BDA instead of direct equity.[185]

342. Mr. Arndt then reported on the joint venture activities of 2005, a copy of which was appended to the minutes of the meeting.[186] In response to the request from the Chairman of BDA that for future meetings the reports be circulated in advance, Mr. Arndt agreed and added that "*the information contained was a summary of that contained in the quarterly reports which had already been submitted*."[187]

343. Mr. Arndt pointed out that 2005 had been the most active year of TCC's operations and had included an unprecedented exploration drilling program of over 23,000 meters and very extensive feasibility studies, demonstrating the potential of Reko Diq caldera with a global resource of over 2 billion tons.[188]

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[181] The term "*RC*" refers to "*reverse circulation*" drilling.
[182] **Exhibit CE-204**, p. 8.
[183] **Exhibit CE-204**, p. 6.
[184] **Exhibit CE-55**.
[185] **Exhibit CE-55**.
[186] **Exhibit CE-55**.
[187] **Exhibit CE-55**, p. 2.
[188] **Exhibit CE-55**, p. 3.

344. Mr. Iqbal also pointed out that over 50% of the total investment during the past five years had been made during the year, reflected in the total expenditure for the year 2005 of US$ 8.04 million.[189]

345. At the same meeting, TCCA reported on the status of the feasibility study on the Tanjeel project. In response to a question from the Chairman of the BDA, Mr. Hargreaves noted that at the previous OC meeting, it had been estimated that the feasibility study would be completed by July 2005. However, as discussed at the 25 July 2005 meeting, by mid-2005, it became clear that that schedule would not be met. He explained that the delay was due to a number of reasons, including growth of the overall resource, requiring additional drilling time; shortages of specialist engineering resources to complete the engineering study; global increases in the costs of materials, equipment, labor and specialist services, meaning that the overall project costs increased by more than 50% from pre-feasibility estimates and required re-working of parts of the study; and recognition of the need to broaden the original scope of the feasibility study to that of a bankable feasibility study which required commencement and advancement of negotiations with lenders for project financing, finalizing the structure for the mining venture (being an incorporated joint venture) and negotiation of agreements, including a Mineral Agreement, with the GOB and the Government of Pakistan (the "**GOP**") to provide fiscal stability satisfactory to lenders.[190]

346. Further, Mr. Hargreaves noted that the cost estimates derived in the Engineering Design and Cost Study were significantly higher than those anticipated in the earlier scoping studies. He concluded:

> *"When these costs are considered in the context of the long term copper price forecast in the Marketing Study the project, in its current scope and form, is considered to be marginal. It is therefore appropriate to seek alternative solutions involving the identification of a project with more attractive economics."*[191]

347. Mr. Hargreaves outlined potential alternative solutions, one of which was "*consideration of undertaking the development of the Reko Diq project as a whole, following further exploration activity on Western Porphyries and completion of an appropriate bankable feasibility study*."[192] These options were to be considered after completion of the Antofagasta transaction.[193]

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[189] **Exhibit CE-55**.
[190] **Exhibit CE-55**.
[191] **Exhibit CE-55**, p. 4.
[192] **Exhibit CE-55**, p. 4.
[193] **Exhibit CE-55**, p. 5.

348. At this meeting, it was resolved that "*the term for completion of the feasibility study be extended at least until the next Operating Committee to allow for a joint review of the results and costs to date*" and that "*the scope of the feasibility study includes finance and legal structures, including completion of the Shareholders Agreement and Mineral Agreement and that these aspects of the study are delayed pending the outcome of the Antofagasta transaction*."[194]

349. As noted at paragraph 217 above, shortly before it was acquired by Atacama, TCCA entered into the 2006 Novation Agreement with the Governor of Balochistan and BHP on 1 April 2006.

3. TCC's Expanded Exploration Work (2006-2009)

a. The Scoping Work and Study

350. In May 2006, TCCA expanded the scope of its exploration program from Tanjeel to other ore deposits within Reko Diq, in particular the H13, H14 and H15 orebodies at the Western Porphyries. TCC also performed additional drilling at Tanjeel to explore the hypogene copper orebody below the supergene copper body on which TCC's exploration work had focused so far.

351. In the Quarterly Report for the period ended 30 June 2006, TCCA reported:

> *"Work on the engineering aspects of the Tanjeel Bankable Feasibility Study has been suspended, pending the completion of the drill out of the Western Porphyries and further deeper drilling to test the hypogene resource beneath the chalcocite blanket, which has yet to be delineated."*[195]

352. TCCA listed the major milestones required to complete the Bankable Feasibility Study as including a Shareholders Agreement with the BDA, a Mineral Agreement with the GOB and GOP, obtaining required permits from the GOB and financing.

353. As for drilling, TCCA reported that the major drill out of the Western Porphyries (H-15) was in progress. During the second quarter 2006, a total of 5,075.8 meters drilled in 15 drill holes (comprising 1,419 meters of RC and 3,656.8 meters of diamond core drilling) was completed.[196]

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[194] **Exhibit CE-55**, p. 8.
[195] **Exhibit CE-56**, p. 8.
[196] **Exhibit CE-56**, p. 10.

354. Total expenditures (operating expenditures and capital expenditures) by TCCA since the grant of the Exploration License EL-5 amounted to US$ 16.76 million, of which US$ 1.663 million had been expended during the quarter.[197]

355. An OC meeting was held on 15 July 2006. It was attended by Mr. Muhammad Farooq, Chairman, BDA; Mr. Azim Nousherwani, General Manager Planning, BDA; Mr. Eduardo Flores, CEO, TCCA; Mr. Tim Hargreaves, CEO, TCCP; Mr. Chris Arndt, Operations Manager, TCCA; and Mr. Zafar Iqbal, Finance Manager, TCCP.[198]

356. Mr. Arndt presented a summary of joint venture activities during the first half of 2006, a copy of which was appended to the minutes of the meeting.[199] He reported that a major drilling program had commenced during the past six months and that it was planned to drill approximately 70,000 meters in the Western Porphyries on H-13, H-14 and H-15 and, in addition, to drill approximately 20,000 meters for H-4, H-35, H-36, H-8, Bukit Bashir and possibly H-79. He reported, further, that in addition to the drillout of H-13, H-14 and H-15, other work on the pre-feasibility study on the Western Porphyries had commenced, or would commence shortly, including geotechnical studies, metallurgical studs, hydrological studies and infrastructures studies.[200] Finally, Mr. Arndt reported on the status of the Bankable Feasibility Study on the Tanjeel orebody and stated that work had been suspended, pending the completion of the drill out of the Western Porphyries.[201]

357. Mr. Arndt reported that as a result of the drilling carried out at Reko Diq over the past year, the global resource for Reko Diq had been calculated as follows:[202]

[197] **Exhibit CE-56**, p. 4.
[198] **Exhibit CE-57**.
[199] **Exhibit CE-57**, p. 2.
[200] **Exhibit CE-58**, p. 11.
[201] **Exhibit CE-58**, p. 11.
[202] **Exhibit CE-58**, p. 12.

CURRENT MINERAL RESOURCES AT REKO DIQ*

Indicated Mineral Resources
(using a 0.3% copper or 0.3% copper-equivalent cut-off grade)

Tanjeel Project	152 million tonnes @ 0.7% copper
Western Porphyries (H14/15)	943 million tonnes @ 0.54% copper and 0.28g/t gold
H8 Complex	177 million tonnes @ 0.4% copper and 0.2g/t gold
Total Indicated Mineral Resource	1.27 billion tonnes @ 0.54% copper and 0.24g/t gold

Inferred Mineral Resources
(using a 0.3% copper or 0.3% copper-equivalent cut-off)

Tanjeel Project	15 million tonnes @ 0.5% copper (0.3% copper cut-off)
Tanjeel Hypogene	47 million tonnes @ 0.4% copper (0.3% copper cut-off)
Western Porphyries (H14/15)	666 million tonnes @ 0.54% copper and 0.31g/t gold
H13 Complex	213 million tonnes @ 0.4% copper and 0.4g/t gold
H8 Complex	159 million tonnes @ 0.4% copper and 0.2g/t gold
H35 Complex	45 million tonnes @ 0.3% copper and 0.6g/t gold
Total Inferred Mineral Resource	1.14 billion tonnes @ 0.48% copper and 0.31g/t gold
Total Indicated and Inferred:	**2.42 billion tonnes @ 0.51% copper and 0.27g/t gold**

CURRENT ORE RESERVES AT REKO DIQ*

The Ore Reserve for the Tanjeel Project is a sub-set of the Mineral Resource for the Project:

Probable Ore Reserve (Tanjeel Project)	128.8 million tonnes @ 0.7% copper (0.26% cyanide soluble copper cut-off)

358. At this meeting, Mr. Flores also gave a review of the pre-feasibility study. He stated that:

> *"the company wished to evaluate the potential of the Reko Diq caldera as a whole rather than focus on individual ore bodies. In this context, the Western Porphyries appeared likely to be the largest ore body but the other ore bodies also needed additional drilling to confirm resources including the Tanjeel ore body in which the supergene deposit had been extensively drilled but the underlying hypogene ore body still required further appraisal. He stated that the proposed 18 month program included 94,000 meters of additional drilling of which 70,000 would focus on the Western Porphyries."*[203]

359. At this OC meeting, the Joint Venture partners resolved that "*the pre-feasibility studies as outlined in the work program should commence immediately and that this program should include both the drill out of the Western Porphyries as well as drilling to upgrade the resources of the other significant ore bodies including the hypogene copper ore body below the Tanjeel supergene deposit.*"[204]

[203] **Exhibit CE-57**.
[204] **Exhibit CE-57**.

360. On 18 July 2006, the Licensing Authority advised TCCA to apply for a mining lease of H-4 (Tanjeel), stating:

> *"TCC in its progress reports and presentations had been informing of preparing feasibility studies to launch H-4 (Tanjeel) project on completion of ore reserves estimates. TCC has also reported to have further proven the reserves at H-4 thus increasing the ore reserves estimates. Consequent upon proving the reserves, no further exploration at H-4 is warranted and the deposit is deemed to the ready for commercial exploitation.*
>
> *In pursuance to the Balochistan Mining Concession Rules no Exploration Licence could be granted / renewed for more than 10 years. Whereas, at H-4 exploration is underway since 1993. You are, therefore, advised to apply for mining lease of H-4 deposits so that mining operation could be launched, as the GOB as well as Government of Pakistan is taking keen interest in this project."*[205]

361. On 12 September 2006, the Licensing Authority sent a reminder letter to TCCA, stating that "[a]*fter lapse of 5-years, we believe TCC must have finalized the feasibility study on H4 prospect, incurring reported expenditure of US$ over 10 million*" and requesting TCC to provide a copy of the feasibility study of the H-4 project, in accordance with the Balochistan Mineral Concession Rules, "*on priority*."[206]

362. On 28 September 2006, TCCA responded to the Licensing Authority's request as follows:

> *"*[P]*lease note that TCC-BDA had earlier this year decided to re-scope the feasibility study in order to include therein Western Porphyries and other parts of the Reko Diq area and are currently undertaking pre-feasibility work in respect of the Reko Diq area. As and when the Feasibility Study is completed we will attach it with our application for a mining lease for the area proposed to be mined.*
>
> *Please note, however, that all preliminary engineering reports have been provided to the Government of Balochistan and reports comprising more than 3,000 pages were also delivered to BDA in early 2006. Please also note that in compliance with our obligations under the Balochistan Mineral Rules 2002, we have been regularly providing our quarterly reports, which contain full details of all work carried out."*[207]

[205] **Exhibit RE-66**.
[206] **Exhibit RE-67**.
[207] **Exhibit CE-59**.

363. In the Quarterly Report for the period ended 31 December 2006, TCCA reported that work on the Tanjeel Bankable Feasibility Study had been suspended pending the completion of the drill-out of the Western Porphyries and the completion of a Pre-Feasibility Study on the broader Reko Diq resource. It listed the major milestones to complete the Bankable Feasibility Study as follows: Shareholders Agreement with the BDA; Mineral Agreement with GOB and GOP; reaching agreement with the GOB and the GOP on the implementation of modalities for critical infrastructure (*e.g.*, power, roads and training institutions); obtaining necessary permits and approvals from the GOP and the GOP to implement the project; and completion of financing.[208]

364. TCCA reported that drilling continued on the Western Porphyries complex (H-13, H-14 and H-15) and recommenced on the Tanjeel deposit during the quarter; a total of 12,146.9 meters drilled in 32 drill-holes (comprising 5,069.5 meters of RC and 7,077.4 meters of diamond core drilling) was completed.[209]

365. According to the latest information, the current resource at the Western Porphyries (H-14 and H-15 only) stood at:

> "***Indicated and Inferred Mineral Resource (0.3% copper-equivalent cut-off grade):***
>
> ***1.61 billion tonnes © 0.54% copper and 0.30g/t gold***
>
> *containing 8.69 million tonnes of copper (19 billion pounds) and 15.53 million ounces of gold.*"[210]

366. TCCA reported its total expenditures (operating expenditures plus capital expenditures) as follows: US$ 23.493 million since grant of license, and US$ 4.153 million during the fourth quarter 2006.[211]

367. An OC meeting was held on 24 February 2007. It was attended by Mr. Muhammad Farooq, Chairman, BDA; Mr. Tim Hargreaves, Board Advisor, TCCA; Mr. Tim Livesey, Project Director, TCCA; Mr. Chris Arndt, Operations Manager, TCCA; Mr. Zafar Iqbal, Commercial Manager, TCCA; and three observers, Mr. Gerhard Von Borries, Project VP, Antofagasta; Mr. Phil Wilson, Project Engineer, Barrick Gold; and Mr. Maqbool Ahmad, Acting Secretary Mines, Balochistan .[212]

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[208] **Exhibit CE-209**, p. 3.
[209] **Exhibit CE-209**, p. 11.
[210] **Exhibit CE-209**, p. 12.
[211] **Exhibit CE-209**, p. 6.
[212] **Exhibit CE-60**.

368. At this meeting, Mr. Livesey gave a summary of joint venture activities during 2006, a copy of which was appended to the minutes of the meeting.[213] He then presented an outline of the 2007 work program, a copy of which was also attached to the minutes. Mr. Livesey stated that "*since the Tanjeel Feasibility Study was commenced in 2005 and its suspension in early 2006, there had been major changes to the project including the resource upgrade of the Western Porphyries as well as the increase in worldwide mining costs which had increased the Tanjeel project costs and made the economics less attractive. It was necessary to study a range of development options in light of the new information*."[214] He explained that:

> *"a new scoping study of the global resource at Reko Diq was required which would consider the early 2006 global resource upgrade to 2.4 billion tonnes and review a suite of options for development of a large scale mine but would also include the concept of a smaller start up project."*[215]

369. Mr. Livesey stated that the object was to complete the study before the end of 2007.[216]

370. Mr. Livesey commented on what he called the "*GOB's* [expression of] *concern at the lack of submission of reports for the previous Tanjeel Feasibility Study*."[217] He stated that the engineering reports, all of which were in draft form at the point of suspension, had been delivered to the BDA in early 2006. He added that it could be misleading to submit these draft reports to the GOB since they would effectively become public documents containing outdated information, particularly on costs, and, given that they contained over 3,000 pages of information, there was a risk of extracts of information causing further confusion. He stated that "*this created a difficult situation for GOB, particularly in light of the Constitutional Petition in which it was alleged that very little work had actually been undertaken*."[218] It was resolved that the draft reports would remain in the custody of the BDA and not be formally released but that the GOB specialists would be welcome to review the reports in the GOB's office if required to verify the extent of work that had been done.[219]

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[213] **Exhibit CE-60**.
[214] **Exhibit CE-60**, p. 3.
[215] **Exhibit CE-60**, p. 3.
[216] **Exhibit CE-60**.
[217] **Exhibit CE-60**, p. 4.
[218] **Exhibit CE-60**, p. 4. See paragraph 393 *et seq*. below for a discussion of the Constitutional Petition.
[219] **Exhibit CE-60**, p. 5.

371. The OC resolved that:

> *"the Work Program and Budget for 2007 as presented be approved, including the exploration and scoping study, details of which is still being finalized, subject to revision at the next Operating Committee Meeting when the scoping study and air strip costs have been refined."* [220]

372. During the next three quarters, TCCA reported that drilling continued on the Western Porphyries complex (H-14 and H-15). In the first quarter, TCCA reported that the aim of its ground magnetic survey was to complete all of EL-5 on at least 100 meter spaced lines to identify any areas worthy of prospecting outside the Reko Diq caldera and also to gain an accurate visual appreciation for the structure of the Reko Diq caldera and to understand the spatial distribution of the porphyry systems that were located within.[221] In addition, in the second quarter, two concurrent geological mapping programs had identified two new prospects, Siapat and Nawar, located approximately four kilometers from the Bukit Pasir complex, and re-mapped the H-13 complex area for drilling in the coming quarter.[222] In the third quarter, drilling was also conducted in the H-13 complex, and new prospects were identified north of Koh-i-Dalil, near the Humai village and in the Sam Koh area (southeast of Koh-i-Dalil). Samples were collected from these areas for pathfinder assay.[223]

373. TCCA reported on its drilling program as follows:

Quarter ended	Total Meters	Drill-holes	Reverse Circulation (RC) (meters)	Diamond Core (meters)
31 March 2007[224]	19,735.8	36	10,549.1	9,186.7
30 June 2007[225]	11,994.3		7,873.5	4,120.8
30 September 2007[226]	16,259.79		3,766.5	12,493.29

[220] **Exhibit CE-60**, p. 5.
[221] **Exhibit CE-417**, p. 9.
[222] **Exhibit CE-418**, p. 10.
[223] **Exhibit CE-419**, p. 11
[224] **Exhibit CE-417**, p. 10.
[225] **Exhibit CE-418**, p. 12.
[226] **Exhibit CE-419**, p. 12.

374. TCCA also reported total expenditures (operating expenditure plus capital expenditure) for the three quarters as follows:

Quarter ended	Total expenditures since grant of Exploration License EL-5	Total expenditures during quarter
31 March 2007[227]	US$ 29.012 million	US$ 5.519 million
30 June 2007[228]	US$ 36.585 million	US$ 7.573 million
30 September 2007[229]	US$ 48.039 million	US$ 11.454 million

375. TCC prepared the Scoping Study jointly with Hatch Ltd., a leading engineering consultancy. It aimed to build and evaluate a matrix of different project configurations based on, *inter alia*, various locations, mine sizes, processing technologies, power generation methods and transportation routes, and then to identify the most promising options for the development of the Reko Diq project.[230]

376. Specifically, the Scoping Study examined thirteen final project development options, each with estimated cost and revenue projections. The Final Scoping Study Report, dated 12 October 2007, recommended that four of the options examined be promoted for further consideration: Three configurations at the Western Porphyries based on different processing capacities, and one configuration at Tanjeel.[231]

b. The 26 October 2007 OC Meeting

377. The next OC meeting was held on 26 October 2007. It was attended by Mr. Mohammed Farooq, Chairman, BDA; Mr. Barry Flew, CFO, TCCA; and Mr. Eduardo Flores, CEO, TCCA. In addition, certain persons attended by invitation: Mr. Maqbool Ahmed, Secretary, Mines & Minerals, GOB; Col. Sher Khan, Corporate Security and External Affairs Manager, TCC; Mr. Qasi Shujatt, HR Manager, TCC; Mr. Asad-Ur-Rehman, Senior Project Geologist, TCC; and Mr. Francisco Charlin, Corporate Counsel, Antofagasta.[232]

[227] **Exhibit CE-417**, p. 6.
[228] **Exhibit CE-418**, p. 5.
[229] **Exhibit CE-419**, p. 5.
[230] Memorial, ¶ 163. **Exhibit CE-153**
[231] Memorial, ¶ 164. **Exhibit CE-153**, p. 16.
[232] **Exhibit CE-64**.

378. At the meeting, TCCA, as Manager, represented by Mr. Flew and by Mr. Flores (for the relevant period), presented a summary of activity carried out and expenditure incurred up to September 2007. They highlighted that work had been continued to determine the extent of reserves with the Western Porphyries as the "*main prize*" and, possibly, to develop other ore bodies on a smaller scale as a starter project. Following detailed mapping, the focus of the geological team had shifted primarily to the drill out of the resource at the Western Porphyries. In addition, the scoping study for the pre-feasibility and feasibility study had been carried out.[233]

379. According to the minutes of the meeting, the parties agreed that there was significant evidence that ore discovered in EL-5 could lead to a larger mining project than the one that was originally envisaged; however, the joint venture faced a number of technical and other challenges which would affect its ability to complete a full feasibility study during the first renewal period. These challenges included, *inter alia*:

> *"- After new work and additional analysis the Tanjeel project found not to be economic on its own.*
> - *Only additional work outside the Tanjeel area by the JV developed a play for a larger scale project based on the newly discovered WP deposits, which discoveries also transformed the Tanjeel ore deposits to a potential economic and value adding activity.*
> - *Progress on some pre-feasibility work was made during the first renewal period but scoping study level analysis on WP could only be completed in the Q3 of 2007 thus positioning the JV to immediately proceed to the next step – commencement and completion of a full feasibility study.*
> - *Insufficient time available during the first renewal period for completion of elements of a feasibility study of this type – such as environmental impact assessments, sustainability of water resources, availability of power, transport and logistics.*
> - *Challenge to the JV's right to EL-5 which was subject to proceedings in the Balochistan High Court and which is now pending appeal in the Supreme Court.*
> - *Inability to make progress on the Mineral Agreement over the past four months.*
> - *Delay in obtaining Government approvals for TCC to open its branch office in Pakistan."*[234]

380. According to the minutes of the meeting, "[i]*n view of the potential for developing the project, TCC and BDA agreed that the JV through TCC as Manager should move*

[233] Memorial, ¶ 166. **Exhibit CE-64**, pp. 2-3.
[234] **Exhibit CE-64**, p. 3.

immediately to commence and complete feasibility study. In this connection TCC presented a work plan and preliminary budget for full feasibility study on option 72 ktpd and parallel pre-feasibility study on expansion options. The parties agreed the conceptual preliminary budget of US$ 106.5 million TCC was authorized to make carry out the feasibility."[235]

381. At the meeting, TCC pointed out that Exploration License EL-5 was to expire in February 2008 and that an application for renewal of the license had to be filed with the Government of Balochistan by 22 November 2007. TCC stated, *inter alia*, that "*given the wide area over which discoveries had been made and the time that would be needed to carry out the feasibility study to tie all the deposits together, the ongoing challenges to EL 5 in the Courts of Pakistan and the expected additional delays in finalization of the Mineral Agreement*," it recommended that the request for renewal be over 90% of the existing EL-5 area and that the term of renewal be three years. According to the minutes, BDA endorsed the recommendation and TCC was given "*full authority*" to apply for such renewal. In addition, "*BDA committed its full support to the JV's case before the Government of Balochistan*."[236]

382. On 2 November 2007, TCCA, on behalf of the joint venture, applied to the Director General, Mines & Minerals, GOB for a renewal of Exploration License EL-5 for revised/ reduced plans of 435.02 square kilometers (107516.65 acres) for a further period of three years (20 February 2008 to 19 February 2011).[237]

383. Rule 29(2)(c)(iii) of the 2002 BM Rules required that an application for the renewal of a license shall not be made:

> *"in the case of a second renewal, unless the applicant can satisfy the authority that such a renewal is necessary for the completion of a full feasibility study of the discovered deposits and that the proposed activities could not have been reasonably completed during the period of the first renewal."*[238]

384. In its application of 2 November 2007, TCCA enclosed a justification for its application, summarizing its activities carried out during the first renewal period and explaining a number of technical and other challenges which affected its ability to complete a full feasibility study during the first renewal period. TCCA explained its request for the extension as follows:

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[235] Memorial, ¶ 167; **Exhibit CE-64**, p. 3.
[236] **Exhibit CE-64**, p. 4.
[237] **Exhibit RE-15**.
[238] **Exhibit CE-05**.

> *"The Applicant at a Joint Operating Committee meeting held on October 26, 2007 approved the immediate commencement of the Feasibility Study and continued field work in the area and proposed a budget of over US$ 100 million in this regard.*
> *With EL-5 to expire in February, 2008 the Applicant will be able to commence activities for drawing up the Feasibility Study in the first renewal period but will not be able to complete the same given the time that will be needed to carry out the Feasibility Study to tie the development of all the deposits, which are spread over a large area of EL-5 (some of which are still being reviewed through further drilling work) together into one mining project. Additional work is also need*[ed] *to better understand the deep structure as possible interconnection of deposits significantly increases the resource size. This taken together with the ongoing challenges to EL 5 in the courts of Pakistan and the expected additional delays in the finalization of the Mineral Agreement, the Applicant considers that it requires a renewal for the full three year period over 90% of the existing EL-5 area to be in a position to fully develop the discoveries.*
>
> *The Balochistan Development Authority is fully aware of the grounds and reasons on which the renewal is being sought and fully endorses the request."*[239]

385. TCCA also attached as Annexure C "*Work Programme and Budget for Second Renewal Period*" outlining its proposal for the Feasibility Study and describing its Projected Exploration Program for 2008 to 2011, which focused on the Reko Diq Complex, the Kohi Dalil Complex, the infrastructure areas and the EL-5 Region. The proposed budget for the second renewal period totaled US$ 106,500,500.[240]

386. On 1 December 2007, the Licensing Authority granted the joint venture's application for the second renewal of Exploration License EL-5.[241]

c. Continuing Exploration and Engineering Work in Support of the Pre-Feasibility and Feasibility Studies

387. After the 26 October 2007 OC meeting, TCCA started work on a Pre-Feasibility Study for Initial Mine Development for a base case project at the Western Porphyries and an Expansion Pre-Feasibility Study for expansion of the project to include Tanjeel and other deposits within Reko Diq.[242]

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[239] **Exhibit RE-15**, Exhibit 1, p. (handnumbered) 318.
[240] **Exhibit RE-15**, Annex C, p. (handnumbered) 372.
[241] Memorial, ¶ 167. **Exhibit CE-20**.
[242] Memorial; ¶170.

388. Thereafter, until completion of the Pre-Feasibility Study for Initial Mine Development in July 2009,[243] TCCA continued its drilling program and reported on a quarterly basis on its progress, as follows:

Quarter ended	Total Meters	Reverse Circulation (RC) (meters)	Diamond Core (meters)
31 December 2007[244]	Work carried out included drilling (H-13, H-14 and H-15), mapping of porphyries (H-8, H-14 east and H-15 west), drawing cross sections and continuation of ground magnetic survey.		
	29,752.5	10,223.35	19,529.15
31 March 2008[245]	Work carried out included drilling (H-14 and H-15), mapping of porphyries, drawing cross sections and continuation of the pre-feasibility, feasibility study and hydro investigation programme.		
	31,491.67	7,393.1	24,098.57
30 June 2008[246]	Work carried out included resource drilling (H-14 and H-15), geotechnical drilling, engineering drilling, condemnation drilling, mapping of porphyries, drawing cross sections, continuation of the pre-feasibility, feasibility study, hydro investigation programme, ESIA and environmental baseline studies.		
	37,101.07	4,872	32,229.07
30 September 2008[247]	Work carried out included resource drilling (H-14 and H-15), geotechnical drilling, engineering drilling, condemnation drilling, mapping of porphyries, drawing cross sections, continuation of the pre-feasibility, feasibility study, hydro investigation programme, ESIA, HIA (health impact assessment) and environmental baseline studies.		
	37,689.13	9,483	28,206.13

[243] *See* **Exhibits CE-73, CE-74, CE-75, CE-159 and CE-160**.
[244] **Exhibit CE-65**, pp. 4 and 12.
[245] **Exhibit CE-154**, pp. 4 and 13.
[246] **Exhibit CE-155**, pp. 5 and 15.
[247] **Exhibit CE-156**, pp. 5 and 14.

31 December 2008[248]	Work carried out included resource drilling, geotechnical drilling, engineering drilling, condemnation drilling, mapping of porphyries, drawing cross sections, continuation of the pre-feasibility, feasibility study, hydro investigation programme, ESIA, HIA (health impact assessment) and environmental baseline studies. Drilling in WP, Tanjeel, H-13, H-14, H-8, H-35.		
	38,048.09	17,367.8	20,680.29
31 March 2009[249]	Work carried out included infill resource drilling, geotechnical drilling, engineering drilling, condemnation drilling ongoing, metallurgical drilling ongoing (H-13, H-4 Tanjeel, WP), environmental drilling, geological mapping, drawing cross sections, continuation of the pre-feasibility, feasibility study, hydro investigation programme, ESIA, HIA (health impact assessment) and environmental baseline studies.		
	26,687.62	10,572.65	16,114.97
30 June 2009[250]	Work carried out included infill resource drilling, geotechnical drilling, engineering drilling, condemnation drilling (H-8 west), metallurgical drilling ongoing (H-13, H-14 and H-15 and Tangeel), environmental drilling, geological mapping, drawing cross sections, continuation of the pre-feasibility, feasibility study, hydro investigation programme, ESIA, HIA (health impact assessment) and environmental baseline studies. Drilling in H-13, H-14 and H-15, H-8 west, H-35 complex and condemnation areas.		
	11,857		

[248] **Exhibit CE-68**, pp. 5 and 14.
[249] **Exhibit CE-157**, pp. 5 and 20.
[250] **Exhibit CE-158**, pp. 5 and [].

389. TCCA also reported its total expenditures (operating expenditure plus capital expenditure) for the last quarter of 2007, the four quarters of 2008 and the first two quarters of 2009, as follows:

Quarter ended	Total expenditures since grant of Exploration License EL-5	Total expenditures during quarter
31 December 2007[251]	US$ 61.108 million	US$ 13.069 million
31 March 2008[252]	US$ 73.338 million	US$ 12.230 million
30 June 2008[253]	US$ 108.969 million	US$ 36.631 million
30 September 2008[254]	US$ 131.054 million	US$ 22.085 million
31 December 2008[255]	US$ 146.837 million	US$ 15.783 million
31 March 2009[256]	US$ 177.234 million	US$ 30.397 million
30 June 2009[257]	US$ 195.464 million	US$ 18.23 million

390. As a result of the drilling, TCC further raised its resource estimate for Reko Diq to 22.6 million tons of copper and 42.3 million ounces of gold, as shown in the following table:[258]

[251] **Exhibit CE-65**, p. 5.
[252] **Exhibit CE-154**, p. 5.
[253] **Exhibit CE-155**, p. 6.
[254] **Exhibit CE-156**, p. 6.
[255] **Exhibit CE-68**, p. 6.
[256] **Exhibit CE-157**, p. 6.
[257] **Exhibit CE-158**, p. 6.
[258] **Exhibits CE-73**, **CE-74**. One troy ounce gold equals 31.1 grams.

Table 8.3 Resources and Reserves at Reko Diq (updated 02 May09)

Prospect	Tonnage (Mt)	Cu (%)	Au (g/t)	Date
H14-H15 (Measured + Indicated + Inferred)	3 632	0.51	0.30	Apr 09
H13 (Measured + Indicated + Inferred)	513	0.3	0.24	Apr 09
Tanjeel (Measured + Indicated + Inferred)	175	0.64	0	Apr 09
H8 (Indicated + Inferred) *	335.7	0.38	0.19	Nov 05
H35 (Inferred) **	45.4	0.29	0.61	Oct 05
Grand Total	**4 701**	**0.48**	**0.28**	**May 09**

* H8 – Resource Estimate Report, December 2005, Hartley, TCC – presented in Appendix 3
** H35 – Resource Estimate Report, October 2005, Hartley, TCC – presented in Appendix 3

This represented a nearly 100% increase over the mineral resource estimate that TCC had produced in early 2006.[259]

391. After making application in February 2008, while it was still working on the Pre-Feasibility Study, on 22 May 2008, TCC paid the Balochistan Board of Revenue over US$ 11 million[260] for a 30-year Surface Rights Lease, which secured its rights, as joint venture partner, of access and occupation over an area of 147 square kilometers (144568 acres) that overlap with the area delineated by Exploration License EL-5.[261] This land would eventually be needed to construct facilities and other infrastructure to support mining operations, including a tailings dam, a landfill, a waste-management facility, a new airstrip, a construction camp, and a permanent village.[262]

392. In July 2009, TCC completed the Pre-Feasibility Study for initial mine development. This Pre-Feasibility Study, which had been prepared jointly with global engineering firm SNC-Lavalin, totaled more than 1,500 pages.[263] It confirmed that the recommended "*base case*" configuration would entail processing 110,000 tons of ore per day from the main Western Porphyries deposits, H14 and H15.[264]

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[259] *See* **Exhibit CE-54**.
[260] Rupees 5,000.- per acre.
[261] **Exhibits CE-43**, **CE-66**.
[262] Memorial, ¶ 174. **Exhibit CE-43**, p. 1; **Exhibits CE-182**, pp. 8, 9, **CE-220 and CE-221**.
[263] **Exhibits CE-73** (Figure 8.9 Drilling by Sub-programme (2006 to End April 2009) and Figure 8.10 Drill Holes Completed by Year and Sub-programme), **CE-74** (Table 8.3 (Resources and Reserves)), **CE-75** (Project Expenditures), **CE-159** (Mining and Mineral Reserve) and **CE-160** (Processing).
[264] Memorial, ¶ 175. Livesey IV, ¶ 40. **Exhibit CE-159**, p. 9-2.

D. In November 2006, the Validity of the CHEJVA Was Challenged in the Balochistan High Court

393. On 28 November 2006, on the basis of a news article reporting TCC's acquisition by Antofagasta and Barrick, three Pakistani politicians from the Jamaat E Islami Party and National Workers Party filed a constitutional petition under Article 199 of the Pakistani Constitution in the Balochistan High Court seeking invalidation of the CHEJVA.[265]

394. The petitioners alleged, among other things, that (i) the 1970 BMC Rules did not contemplate joint venture arrangements such as the CHEJVA; (ii) the 1994 Relaxations granted by Balochistan to the 1970 BMC Rules were illegal; (iii) the 2002 BM Rules were adopted under improper influence from TCC; and (iv) "*no real work*" had been carried out by TCC and BHP.[266] The petitioners requested that the CHEJVA, and all actions taken pursuant to it, be declared "*illegal, ultra vires, unconstitutional and mala fides and liable to be set aside*."[267] The Provincial Government, the Federal Government, the BDA, BHP, TCC, TCC's owners, and a former director of TCC were all named as respondents in the action.[268]

395. In their submissions to the High Court, Pakistan and Balochistan defended the validity of the CHEJVA and the work that TCC and BHP had conducted under the auspices of the Joint Venture. The Provincial Government assured the High Court that Balochistan had not "*committed any illegality or done anything in bad faith*" and that Balochistan "*acted in the best interest of the people of Balochistan and any suggestion to the contrary is false*."[269] Pakistan likewise submitted that the petitioners' claims were "*not maintainable*" and should be "*dismissed in the interest of justice*."[270]

396. On 26 June 2007, the Balochistan High Court issued a judgment upholding the validity of the CHEJVA and dismissing the petitioners' claims in their entirety.[271] Specifically, the High Court rejected the petitioners' arguments, holding that:

> (i) (i) *"*[the] *CHEJVA was rightly executed, as Article 173 of the Constitution empowers the Provincial Government to enter into such agreement and BDA has entered into the agreement as an Agent of the Government of Balochistan;"*[272]

[265] *See* **Exhibit CE-208**.
[266] **Exhibit CE-208**, pp. 5–7, 9–10, 13, 14.
[267] **Exhibit CE-208**, p. 14.
[268] **Exhibit CE-208**.
[269] **Exhibit CE-208**, pp. 8, 13.
[270] **Exhibit CE-210**. pp. 2. 153.
[271] *See* **Exhibit CE-61**.
[272] **Exhibit CE-61**, p. 28.

(ii) in the Relaxations to the 1970 BM Rules granted by Balochistan, "*the Government has exercised its powers strictly in accordance with the forecorner* [four corners] *of the Rules;"*[273]

(iii) *"there is nothing on record to prove* [that the 2002 BM Rules were framed under the influence of TCC]*;"* and the 2002 BM Rules *"were framed, after promulgation of Mineral Policy of 1995, wherein the Mining Rules of all the Provinces were re-framed;"*[274] and

(iv) considering BHP's exploration operation by which Reko Diq was identified to have copper-gold deposits and license PL-4 covering this area was retained and TCC's huge investment and extensive drilling, *"the question that no work was done is baseless."*[275]

397. Further, with respect to the work carried out by BHP and TCC, the High Court observed that:

> *"*[i]*t was due to the efforts of* [BHP] *that minerals were discovered, whereas the same would remain hidden for unknown time and the people of Balochistan would not be deriving any benefits.*
> . . .
> [I]*t is but natural that* [TCC] *would be keen in doing the mining at the earliest. Since exploration is a time-consuming work, which involves drilling, collection of samples and tests, . . . thus it can be safely concluded that, lot has been done and efforts have been made to start the mining, which . . . is a slow and time consuming process*
>
> . . .
> *Suffice it to say that mining areas are not put to auction. Mining licenses are issued at different stages, as it is a risky business and after exploration by a party when the area is proved, then it becomes his vested right to do mining."*[276]

398. On 23 August 2007, the petitioners appealed the High Court's judgment to the Pakistan Supreme Court.[277]

[273] **Exhibit CE-61,** p. 29.
[274] **Exhibit CE-61,** p. 29.
[275] **Exhibit CE-61,** p. 32.
[276] **Exhibit CE-61**, pp. 50, 52,
[277] **Exhibit CE-217**.

E. Starting in 2007, Claimant Attempted to Negotiate a Mineral Agreement with the Governments of Pakistan and Balochistan

399. While TCC was implementing its exploration program, it also sought to negotiate with the Federal and Provincial Governments a mineral agreement, which would set forth the basic economic and financial terms and certain stability provisions for a future mining phase of the project (the "**Mineral Agreement**").[278] Mineral agreements are not mandatory, but they are expressly contemplated in the 2002 BM Rules and Pakistan's 1995 NMP.[279]

400. In late January 2007, TCC met in Islamabad with representatives of Pakistan and Balochistan to propose the negotiation of the Mineral Agreement.[280] The two Governments designated the Balochistan Chief Secretary and the Secretary of the Federal Ministry of Petroleum and Natural Resources (the "**MPNR**") as the Government officials responsible for conducting the negotiations. The parties agreed to defer the submission of the draft agreement until the Balochistan High Court had ruled on the Article 199 petitions referred to in paragraph 393 above.[281]

401. On 4 July 2007, TCC wrote to the Chief Minister of Balochistan and, on 5 July 2007, to the Federal Minister of Petroleum and Natural Resources, requesting the start of negotiations of the Mineral Agreement and enclosing a proposal on how the negotiations could be organized and conducted so the agreement could be finalized in a timely manner.[282] In its letters, TCCA informed the GOB and the GOP that its proposed agreement would include provisions dealing with the following areas:

(i) taxes – federal and provincial tax regime that would apply to the Project, including the rate, calculation and payment of royalties to the GOB and taxes to the GOP;

(i) mining and other commitments – commitments by the project company in respect of development of the Project and social, employment and procurement matters;

(ii) infrastructure – provision of infrastructure (in particular roads, railway and power) for the Project by the GOP and the GOB;

(iii) mineral titles and other property rights – the grant of and rights under mineral titles as well as other property rights required for the development of the Project;

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[278] Memorial, ¶ 177.
[279] **Exhibit CE-5**, Rule 9; **Exhibit CE-190**, Clause 8.12. *See* paragraph 311 above.
[280] Memorial, ¶ 179. **Exhibit CE-60**, p. 4.
[281] Memorial, ¶ 179.
[282] Memorial, ¶ 180. **Exhibits CE-214** and **CE-215**.

(iv) consents and other government obligations – various obligations on the GOP and the GOB in respect of consents and other legislative protection and other assistance that would be required by the project company in respect of the development of the Project; and

(v) other areas – provisions dealing with other areas that have commonly been included in stabilization agreements for mining projects and/or other state support agreements for similar projects.[283]

402. In its letters, TCCA stated that in order "[t]*o underpin the legal framework set up by this Mineral Agreement, it would be necessary to make certain changes to Pakistani federal and provincial law*" which would mainly relate to federal and provincial tax law, and the Balochistan Mineral Rules.[284] TCCA explained that it was requesting this agreement in order to "*create the necessary stability and certainty*" for TCCA's investment in the construction and operation of the mine, once the mining lease had been granted.[285]

403. In its enclosed proposal for the organization and conduct of the negotiations, TCCA recommended the establishment of a joint Pakistan-Balochistan Steering Committee, which would negotiate the Mineral Agreement with TCCA.[286]

404. On 11 July 2007, Antofagasta's chairman, Mr. Jean-Paul Luksic, and Barrick's then CEO, Mr. Greg Wilkins, provided the Prime Minister of Pakistan with a proposed draft for the Mineral Agreement as a basis for the negotiations.[287] On 27 July 2007, TCC sent copies of the proposed draft Mineral Agreement to the Governments of Pakistan and Balochistan.[288]

405. On 3 September 2007, the Prime Minister of Pakistan established a "*Steering Committee for the Development of Reko Diq Copper – Gold Project*" (the "**Steering Committee**") for the purpose of "*finaliz*[ing] *the terms and conditions of the Mineral Agreement with TCC*" and "*coordinat*[ing] *with the Federal & Provincial Governments*."[289] It was chaired by the Minister of Petroleum & Natural Resources Mr. Amanullah Khan Jadoon and consisted of thirteen high-level Federal and Provincial Government officials including, among others, Balochistan's Chief Secretary, the Chairman of the BDA (who represented Balochistan at the Joint Venture's OC), and the Secretary of the Balochistan Mines &

[283] **Exhibits CE-214** and **CE-215**.
[284] **Exhibits CE-214** and **CE-215**.
[285] Memorial, ¶ 180. **Exhibit CE-214**, p. 1; **Exhibit. CE-215**, p. 1.
[286] Memorial, ¶ 181. **Exhibit CE-214**, p. 4.
[287] Memorial, ¶ 182. *See* **Exhibit CE-216**.
[288] Memorial, ¶ 182. *See* **Exhibit CE-216**.
[289] Memorial, ¶ 184. **Exhibit CE-62**, p. 2.

Mineral Development Department ("**MMDD**"), (who under the 2002 BM Rules is the appeal authority for decisions of the Licensing Authority).[290]

406. The Federal Government also hired German consultants M/S RMG to advise it regarding the Mineral Agreement.[291]

407. In mid-December 2007, TCCA met in Dubai with representatives of Pakistan and Balochistan to formally kick off the Mineral Agreement negotiations and TCCA made a full day presentation regarding TCCA, Reko Diq, the Project, the Pakistan Mineral Policy and the draft Mineral Agreement.[292]

408. On 23 February 2008, the Steering Committee met for the first time to discuss the draft Mineral Agreement.[293]

409. Five days earlier, on 18 February 2008, Pakistan had held general elections for the Pakistan Parliament and the four Provincial assemblies, including that of Balochistan. The elections resulted in the formation of a new Federal Government led by Prime Minister Yousaf Raza Gilani and a new Government of Balochistan led by Mr. Aslam Raisani, both of the Pakistan Peoples Party. The formation of the new Governments resulted in a re-constitution of the Steering Committee and temporarily delayed the Governments' consideration of TCCA's proposed draft Mineral Agreement.[294]

410. On 7 August 2008, Pakistan and Balochistan provided TCCA with their comments and counterproposals to the Mineral Agreement.[295]

411. On 18 August 2008, TCCA wrote to the Federal MPNR to express its key concerns about the counterproposal and to request further meetings to negotiate the Agreement.[296] According to TCCA, the Governments' joint draft provided, *inter alia*, for (i) the application of the Pakistani income tax regime in place of the proposed expansion of the existing EPZ regime granted in respect of the initial phase of the Reko Diq project; (ii) an increase in the royalty rate to 5% from 2%, contrary to the 2002 BM Rules and the 1995 NMP; (iii) discretion on the part of the BDA in granting mineral titles, such as a mining lease, reintroducing general legal and contractual uncertainty and denying TCCP security of tenure in respect of such mineral titles (key elements in creating a secure regime to allow large scale projects); (iv) watering down of the territorial exclusivity over

[290] Memorial, ¶ 183. *See* **Exhibit CE-62**.
[291] Memorial, ¶ 184. *See* **Exhibits CE-69**, p. 3, **CE-71**, p. 2.
[292] Memorial, ¶ 185. *See* **Exhibit CE-219**, p. 4.
[293] Memorial, ¶ 186. **Exhibit CE-222**.
[294] Memorial, ¶ 187.
[295] Memorial, ¶ 190. **Exhibit CE-226**.
[296] Memorial, ¶ 193. **Exhibit CE-227**.

mineral titles; and (iv) the Mineral Agreement being at all times subject to the 2002 BM Rules in force at the time (rather than providing, as requested by TCCA, that the terms of the Mineral Agreement override any inconsistency with the 2002 BM Rules, or amending the 2002 BM Rules to ensure compatibility with the Mineral Agreement).[297] In addition, the Governments' counterproposal included provisions regarding the construction of facilities for smelting and refining, as well as downstream facilities more generally – neither of which, according to Claimant, was required by the CHEJVA or the 2002 BM Rules.[298]

412. On 8-9 September and 15-24 October 2008, TCC held two rounds of negotiations with a subcommittee of the Steering Committee.[299] By letter dated 24 October 2008 to Mr. G.A. Sabri, Secretary, Federal MPNR, Ms. Catherine Boggs, the CEO of TCCP, listed the final issues that needed to be resolved. These issues included:

> 1. Tax Regime – stability in regards to the tax regime that would be applicable for the life of the project, in particular, reduction of the corporate tax rate applicable to mining projects from 35% to 25%; reduction from 5% to 0% of the customs duties, sales tax, excise duty rates and other taxes on the importation of plant, machinery, equipment, specialized motor vehicles and supplies applicable to Tethyan and its contractors and subcontractors; reduction of the applicable tax on profit on foreign debt from 10% to 0%; reduction of the dividend withholding rate from 10% to 3.75%; extension of the concentrating/refining profits exemption from 5 to 10 years; and confirmation through an Advisory Opinion that any internal reorganizations within the group companies of which TCC is relevant will not constitute an event subject to capital gains taxes.
>
> 2. State Bank of Pakistan – authorization from the State Bank of Pakistan that Tethyan can maintain the proceeds from sales of its copper concentrate in bank accounts outside of Pakistan.
>
> 3. Applicable termination payment – proposed formula for use by either party for calculating damages in the event of termination of the agreement, *i.e.*, the higher of the total investment or the discounted future cash flow of the project, subject to such mitigation and compensatory adjustments that the arbitration tribunal determines are appropriate.

[297] Memorial, ¶¶ 191 and 192. **Exhibit CE-226**, Clauses 14, 17, 5.5, 8.5 and 1.6; *see* **Exhibit CE-5**, Clause 101 & Third Schedule, Part II; **Exhibit CE-190**, Clause. 10.2.
[298] Memorial, ¶ 192. **Exhibit CE-226**, Clauses. 5.5, 8.5
[299] Memorial, ¶ 194.

> 4. Confirmation of Necessary Consents – consents and approvals necessary for the project during its construction and operation (Governments' agreement in principle to confirm that Tethyan would receive these consents, subject to the company fulfilling the requirements of the law for obtaining such consent or approvals).
>
> 5. Drafting issues – TCCA and Governments' apparent agreement in principle, but subject to agreement on the final language, on (i) uninsurable events; (ii) lapse of consent/change of law; (iii) infrastructure and applicable tax credits; (iv) consideration of future downstream processing facilities; (v) sales of product locally; (vi) assignment of GOP and GOB's rights and obligations under the Agreement.[300]

413. TCCP concluded that "*as you can see, we believe that other than agreement on stability of and the applicable tax regime, we are very close to reaching agreement on all of the commercial terms of the agreement.*"[301]

414. The topics discussed were also confirmed by Mr. Muhammad Rashid, Section Officer, of the Federal MPNR, in a draft Record Note on the negotiations 15-17 and 22-23 October 2008, as follows:

> "*The Additional Secretary M/o PNR while recapping the discussions of first meeting held on 8-9th September 2008 highlighted the impotence* [sic] *of the Reko Diq Copper Project (RDCP) for the mineral sector and economy of Pakistan and mentioned that GOP and GOB were desirous to conclude the DMA in accordance with exiting* [sic] *framework of fiscal and legal regimes of the country in the shortest possible period and will provide all the requisite support in this regard. The left over negotiable issues such as tax and royalty regimes, authorization from the State Bank of Pakistan, infrastructure provisions, compensation formula for calculating damages in. the event of termination of the agreement/project, schedule with an indicative list of the consents and approvals, drafting issues such as (i) uninsurable events; (ii) infrastructure and applicable tax credits; (iii) consideration of future downstream processing facilities; (iv) sales of product locally; (v) assignment of GOP and GOB's rights and obligations under the Agreement were discussed in depth during the above negotiation proceedings*."[302]

415. On 27 October 2008, Ms. Boggs also wrote to Mr. Ahmad Baksh Lehri, the Additional Chief Secretary (Development) of the GOB, listing the five remaining issues to be

[300] **Exhibit CE-230**.
[301] Memorial, ¶ 194. **Exhibit CE-230**, p. 3.
[302] **Exhibit RE-77**.

resolved, summarizing TCCP's proposals and attaching draft amendments to the 2002 BM Rules which she stated "*would apply to all mining projects, not only to Tethyan, and are designed to make consistent the manner in which the BMR are applied to a licensee having a Mineral Agreement*."[303] TCCP proposed the following amendments:

> "*Amendments to the BMR:*
>
> *Similar to the Balochistan Mineral Rules 1970 which provided that the Mineral Agreement provisions would take precedence over the rules in the event of conflict or inconsistency, and Section 3A of the Regulation of Mines and Oil-Fields and Mineral Development (Government Control) Act, 1948, we would request the GOB to graciously consider to introduce the following generally applicable amendments to the BMR:*
>
> *Rule 9* *sub-rule (1): at line 3, delete the words* 'not inconsistent with these Rules or any other law.*'*
>
> *sub-rule (5): replace entirely by:* 'The provisions of a mineral agreement executed between the Government of Balochistan and a mineral title holder, shall be considered to be complementary to these Rules for the particular mineral title holder and shall take precedence over the provisions of these Rules in case of any inconsistency at any given time.*'*
>
> *sub-rule (6): add* 'Except as provided in sub-rule 9(5),' *at the beginning of the Rule.*
>
> *Rule 102* *add* 'Subject to Rule 103*' at the beginning of the Rule.*
>
> *Rule 103: rename and replace entirely the Rule, as follows:* '103 Mineral Agreement Royalty. Where pursuant to Rule 9, a mineral agreement makes specific provision for the payment of royalty by the holder of a mineral title, in respect of any mineral or group of minerals won, mined or found, the rate of royalty shall be payable in accordance with the provisions of the mineral agreement, notwithstanding the rate from time to time stated in the accordance with these Rules.*'"*[304]

416. On 13 January 2009, the Federal MPNR convened a second meeting of the full Steering Committee for 23 January 2009.[305] The first agenda item provided that TCC and a

[303] **Exhibit RE-64**.
[304] **Exhibit RE-64**.
[305] Memorial, ¶ 196. **Exhibit CE-69**.

Chinese state-owned construction firm, China Metallurgical Group Corporation ("**MCC**"), would present to the Steering Committee some competing "*Financial and Technical Proposals*" for Reko Diq.[306] The agenda stated that the Steering Committee would consider "*the future course of actions on the proposals submitted by TCC and MCC.*"[307] MCC was invited to attend the Steering Committee meeting.[308]

417. On 22 January 2009, TCCP sent a letter of protest to Pakistan's MPNR rejecting any suggestion that TCC compete with MCC for a project to which TCC was contractually entitled, in which it was a partner of the Provincial Government, and in which it had already invested almost US$ 200 million for exploration and feasibility work.[309] By the same letter, TCC explained that it would "*not be able to attend the proposed meeting, because it is not in conformity of the terms of reference of the Steering Committee,*" but emphasized that TCC would otherwise be "*prepared to meet with the Steering Committee to continue* [its] *negotiations in good faith.*"[310]

418. On 23 January 2009, the Steering Committee proceeded with its meeting in TCC's absence and rejected MCC's proposal.[311] It was decided that:

> "*GOP/GOB to continue with TCC, as entertaining of MCC proposal at this stage may lead to legal implications and affect creditability of Pakistan in the International Mineral Sector*."[312]

419. The Working Paper for the Steering Committee meeting reasoned that:

> "[u]*nder the Balochistan Mineral Rules (BMR) 2002, the license holder is legally entitled* [to the] *conversion of prospecting license into mining lease, once the area is proved and certain laid down requirements under the rules are fulfilled by the licensee. The project area of Reko Diq Copper Project has been granted to TCC (Pvt) Ltd by the GOB who carried out intensive exploration work and has spent about US$ 46 million on the establishment of over 4.0 billion tons of copper ore reserves*."[313]

420. On 13 March 2009, the Steering Committee convened for a third time to discuss the outstanding issues regarding the Mineral Agreement. The list of issues for

[306] Memorial, ¶ 196. **Exhibit CE-69**, p. 1.
[307] Memorial, ¶ 196. **Exhibit CE-69**, p. 1.
[308] Memorial, ¶ 196. **Exhibit CE-69**, p. 2.
[309] Memorial, ¶ 197. **Exhibit CE-70**.
[310] Memorial, ¶ 197. **Exhibit CE-70**.
[311] Memorial, ¶ 198. *See* **Exhibit CE-71**, pp. 3–4; **Exhibit CE-72**.
[312] **Exhibit RE-78**.
[313] Memorial, ¶ 198. **Exhibit CE-69**, p. 5.

discussion/finalization – which was similar to the list in Ms. Boggs' letter five months earlier – included the following:

> *"(a) Stability/exemption in Tax Regime.*
> *(b) Authorization from State Bank of Pakistan to maintain the proceeds from sale.*
> *(c) Drafting of legal issues relating to stability in royalty regime and exemption from Balochistan Mining Concession Rules, 2002 and stamp duty on transfer etc.*
> *(d) Value addition upto* [sic] *final refinery stage.*
> *(e) Any other matter with the permission of the chair."*[314]

421. The working paper for the Steering Committee meeting noted that:

> *"The feasibility study is under way for a mega project involving an investment of . . . over US$ 5 billion with the capacity to produce 0.45 million tonnes of copper concentrate annually by year 2013. On commissioning the annual copper concentrate export from the project would be more than US$ one billion (LME prices). This development augurs well for the mining industry of Pakistan and place* [sic] *Pakistan on the world map of copper and gold mining."*[315]

422. On 21 July 2011, a review meeting was held under the Chairmanship of Dr. Asim Hussain, the Minister for Petroleum and Natural Resources/ Chairman Steering Committee on Reko Diq Project to review the latest status of the project and formulation of a joint strategy of the GOP and the GOB for a future course of action. The representative of the GOB, Mr. Mushtaq Ahmad Raisani, Secretary, MMDD, informed that the application of TCC for mining lease could not have been processed earlier because the apex court had issued a restraining order on 3 February 2011 which had been recalled on 25 May 2011. He declared that "*the GOB will decide on the application of TCC for mining lease to the true spirit of BMR, 2002 and the direction of the honorable Supreme Court*."[316]

423. At this review meeting, on a query from the Chair regarding value addition up to final refining, TCC's CEO Mr. Livesey responded that TCC had ore processing capacity up to concentrate stage and processing beyond that stage was not financially viable to it. TCC mentioned that it would "*provide financial assistance of US$ 1.000 million to carry out technical feasibility study on smelting and refining*."[317]

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[314] **Exhibit CE-71**.
[315] Memorial, ¶ 200. **Exhibit CE-71**, p. 3.
[316] **Exhibit CE-118**.
[317] **Exhibit CE-118**.

424. When the Director General pointed out that Jinchuan Group China had offered to set up a full facility for processing of concentrate up to final refining of gold and copper based on the concentrate produced by TCC at Reko Diq, Mr. Livesey stated that "*the company will have no objection to this proposal. TCC are willing to negotiate an off take agreement for the sale of concentrate within Balochistan*."[318]

425. On 5 August 2009, to address the issue that Balochistan wanted to provide in the Mineral Agreement for a smelter at Reko Diq, TCCA submitted to Pakistan and Balochistan a paper regarding copper smelting and refining. The paper explained, among other things, that smelting was a low-margin business that typically depended on massive volume from multiple sources.[319] The paper concluded that:

> "*Building a smelter and refinery as part of the Reko Diq Project (1) is not economically justified; (2) the additional capital costs would make the Reko Diq project unprofitable and therefore unviable; and (3) is not necessary in order to ensure that TCC and the GOB are properly paid for the metal content of the concentrate that is produced* [by TCC's planned mining operation].
>
> . . .
>
> *We have discussed with the GOB and the GOP the concept of either the provincial or federal government constructing and operating a smelter and refinery of its own to process concentrate from Reko Diq. . . . if such a facility were built, TCC/GOB could sell a portion of its concentrate to an in-country smelter at best international, commercially negotiated prices.*"[320]

426. On 2 September 2009, at a meeting of the Federal Board of Investment, the Director General (Minerals) of the Federal MPNR indicated that Pakistan and Balochistan were willing to negotiate the outstanding issues of the Mineral Agreement, including tax exemptions and incentives and "[v]*alue addition up to final refinery stage*."[321] TCCA reiterated its commitment to the Reko Diq project, but emphasized that a smelter/refinery at Reko Diq was not "*financially viable*."[322] TCC suggested that the "*Government of*

[318] **Exhibit CE-118**.
[319] Memorial, ¶ 202. **Exhibit CE-237**, pp. 3, 17; *see also* **Exhibit CE-83**, pp. 21–25, 37–44.
[320] Memorial, ¶ 202. **Exhibit CE-237**, p. 3.
[321] Memorial, ¶ 203. **Exhibit CE-78**, ¶ 2.
[322] Memorial, ¶ 203. **Exhibit CE-78**, ¶ 6.

Pakistan may buy the concentrate [from the Joint Venture's mining operation] *and build their own smelter*."[323]

427. On 2 December 2009, TCCA wrote to the Balochistan Chief Secretary, Mr. Nasir Khosa, expressing concern that "*it has been a number of months since TCCP received any formal communication from the GOB,*" in particular regarding the smelter paper submitted to the GOB in August, and urged the Governments to resume the negotiations of the Mineral Agreement in preparation for project financing and implementation.[324] Although the issue of agreeing the Mineral Agreement was subsequently discussed during meetings with various officials of the Pakistan and Balochistan Governments, negotiations were not resumed; the Mineral Agreement was never finalized.[325]

F. Starting in 2007, Claimant Attempted to Negotiate a Mining Venture Agreement[326] with the Government of Balochistan in respect of Exploration License EL-5

428. Under Clause 11.7 of the CHEJVA, the Participating Parties were obligated to segregate from the Exploration Area the Mining Area established by the Feasibility Study and establish a joint venture (Mining Venture) with respect to such area. Under Clause 11.8.2 of the CHEJVA, the Joint Venture or a Participating Party was entitled to convert the Prospecting License into a Mining Lease, but under rule 47(1) of the BM Rules, an application for a mining lease could only be granted to a body corporate formed under the Companies Ordinance 1984 and other provisions of the laws of Pakistan. For these reasons, TCCA proposed using its wholly-owned subsidiary TCCP, which had been established in Pakistan, as the vehicle for the Mining Venture.

429. Although TCCA had not yet delivered its Initial Mine Feasibility Study – and thus the GOB had not yet been required to elect whether to become a Participating Party, TCCA proposed to establish the new joint venture for Exploration License EL-5 by having the parties transfer their interests in Exploration License EL-5 to TCCP in exchange for shares of the corporation and enter into a project agreement to regulate their relationship as shareholders in TCCP during the Mining Venture, replacing the CHEJVA in this respect, in accordance with Article 12.7 of the CHEJVA.

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[323] Memorial, ¶ 203. **Exhibit CE-78**, ¶ 6; *see also* **Exhibit CE-288** (ICC Tr.) 14:2–15:5, 16:12–17:19, 25:8–27:2; 41:11–23 (Livesey).
[324] Memorial, ¶ 203. **Exhibit CE-241**.
[325] Memorial, ¶ 204. **Exhibits CE-84 and CE-90** (Chief Secretary Lehri); **CE-85** (MPNR Secretary Lashari); **RE-143** (Prime Minister Gilani); and **RE-80** (MPNR Additional Secretary Chaudhry).
[326] The Mining Venture Agreement is sometimes also referred to as the "*Shareholder Agreement*" or the "*Project Agreement*."

430. Thus, for its part, TCCA would merge its branch office which held its 75% interest in Exploration License EL-5 and other assets and rights related to the exploration work undertaken pursuant to EL-5 to its subsidiary TCCP. On 16 January 2008, the TCCA Pakistan branch office and TCCP petitioned the Lahore High Court to sanction a Scheme of Arrangement for Amalgamation ("**Amalgamation**") by which the TCCA Pakistan branch office's entire business, together with all the property, assets, rights, liabilities and obligations of every description (including but not limited to the licenses) would be amalgamated with and transferred to TCCP.[327]

431. In connection with the Amalgamation, TCCA was required to obtain the consent of the Balochistan MMDD. The MMDD issued a "*No Objection Certificate*" dated 5 November 2007, subject to the following condition:

> *"There is no objection to the transfer-assignment of the area covered by EL-5 by TCC to TCCP. Such no-objection is subject to registering the shareholder status of the component companies including the 25% share held by the Government of Balochistan (through BDA) and 75% shareholding of TCC."*[328]

432. TCCA was also required to obtain the consent of the BDA, which issued its "*No Objection Certificate*" on 3 January 2008, also subject to the condition:

> *"There is no objection to the transfer-assignment of the area covered by Exploration License EL-5 by TCC to TCCP, such No-objection is subject to registration of the share holding status of the component Companies including the 25% share held by the Government of Balochistan (through BDA) and 75% share holding of TCC."*[329]

433. The Amalgamation was approved by order of the Islamabad High Court on 11 April 2008.[330]

434. As stated above, TCCA had proposed that the GOB transfer its 25% interest in Exploration License EL-5 to TCCP in exchange for a 25% share of TCCP and simultaneously enter into a shareholders/project agreement with TCCA. TCCA had delivered a draft shareholder/project agreement to the Secretary Law and Secretary Minerals, GOB on 17 April 2007.[331] On 21 April 2008, TCC had sent the draft to Chief

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[327] **Exhibit CE-21**; **Exhibit RE-61**.
[328] **Exhibit RE-61**, p. 103.
[329] **Exhibit RE-61**, p. 104.
[330] **Exhibit CE-21**. The petition was transferred from the Lahore High Court to the newly established Islamabad High Court, as both TCCA's Pakistani Branch and TCCP were registered and located in Islamabad. Reply, ¶ 117.
[331] **Exhibit CE-224**.

Secretary Nasir Mahmood Khosa, and requested his assistance in finalizing the document within a short time period.[332]

435. On 24 October 2008, TCCP received comments to the draft Project Agreement from the law firm of Hussain & Hussain on behalf of the GOB.[333] The major issues for the GOB related to shareholder funding and equity debt: The GOB proposed that all shareholder funding would be provided by TCCA in the form of shareholder loans and that TCCA would fund the GOB's share of all costs to be incurred by TCCP until the initial commencement date (so-called equity debt amounts).[334]

436. On 23 May 2009, TCCP proposed alternative structures for the GOB's interest, whereby instead of making an equity contribution, the GOB would have a free carry, *i.e.*, it would be a shareholder of TCCP and be entitled to receive dividends in proportion to its (reduced) 6% interest and a 2% royalty, or, in the alternative, a net profit interest (NPI) in an incorporated joint venture, *i.e.*, it would not be required to make any contributions to investment; it would receive 25% of net profits after payback of investment and, prior to that date, if there were profits, it would receive advance minimum payments of PKR 800 million (then approximately US$ 10 million) per year credited against future payments or, if there were no profits, it would receive minimum guaranteed payments of PKR 400 million per year credited against future payments.[335]

437. As stated at paragraph 427 above, on 2 December 2009, TCCA wrote to the Balochistan Chief Secretary, Mr. Nasir Khosa, expressing concern that "*it has been a number of months since TCCP received any formal communication from the GOB,*" in particular regarding the proposals in June and again in August to change the 25% GOB equity to a 25% Net Profit Interest, and urged the Governments to resume the negotiations of the Project Agreement in preparation for project financing and implementation.[336]

438. The transaction was never consummated.[337]

G. In December 2009, the Balochistan Cabinet Approved a Proposal for the "*Reko Diq Copper & Gold Project*"

439. On 16 May 2009, the Balochistan MMDD submitted a first proposal for the "*Reko Diq Gold/Copper Project*" to the Central Development Working Party ("**CDWP**"), an organ

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[332] **Exhibit CE-224.**
[333] **Exhibit CE-231**.
[334] **Exhibit CE-231**. See draft Sections 5.2 and 5.4, as well as sections relating to default (Section 7.1) and remedies (Section 7.3).
[335] **Exhibit CE-236**.
[336] Memorial, ¶ 203. **Exhibit CE-241**.
[337] Reply, ¶ 121.

of the Federal Planning Commission. It proposed the processing of 5000 tons of copper ore per day to produce copper metal and other valuables with a total expenditure of Rs 4619.3 million.[338]

440. On 1 September 2009, Additional Chief Secretary Ahmad Bakhsh Lehri submitted on behalf of Balochistan a request to Pakistan for funding of the Planning Commission's proposed project.[339]

441. On 17 September 2009, Dr. Samar Mubarakmand, Member (Science & Technology) of the Planning Commission, presented the project to the CDWP, which returned it for lack of information/details, such as operational, financial and commercial plans/strategy.[340]

442. On 19 October 2009, the MMDD submitted a revised (second) proposal to the Planning Commission, making specific reference to Reko Diq orebodies, including the Western Porphyries and Tanjeel, including a cost analysis for processing 15000 tons per day and increasing the total expenditure to Rs 5892 million.[341]

443. On 27 October 2009, the Government of Balochistan constituted a Board of Governors for the Reko-Diq Project consisting of seven members, including Dr. Mubarakmand, Member, GOP Planning Commission, as Chairman, and the Secretary of the MMDD.[342]

444. On 9 December 2009, the MMDD submitted a further revised (third) proposal for the Reko Diq Gold/Copper project, which was approved by the Planning Commission on the same day. The proposal included in the annual operating and maintenance cost the "*Mining of Ore 15000 ton/day*" and an increased total expenditure of Rs 8698.7 million.[343]

445. On 12 December 2009, the Secretary of the MMDD issued a notification, to be published in the next issue of Balochistan Gazette, that the affairs of the Reko Diq project had been transferred from the BDA to the Balochistan MMDD. A copy of the notification was forwarded, *inter alia*, to Mr. Peter A. Jezek, the CEO of TCCP.[344]

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[338] **Exhibit CE-111**, p. 15.
[339] **Exhibit CE-77**.
[340] **Exhibit CE-240** (Annex - I).
[341] **Exhibit CE-80**.
[342] **Exhibit CE-239**.
[343] **Exhibit CE-242**, p. 126; Mubarakmand Annex 3.
[344] Memorial, ¶ 224. **Exhibit CE-163**. The MMDD nominated as its two members of the Operating committee the Secretary of the MMDD, who was a member of the Board of Governors of Balochistan's Reko Diq Copper & Gold Project (discussed in more detail beginning at paragraph 439 above), and the Director General of the MMDD, who exercised the function of the Licensing Authority, the organ responsible for granting mining leases. **Exhibit CE-139**.

446. On 24 December 2009, the Balochistan Cabinet decided "*in principle*," on the basis of the PC-1 proposal approved by the Planning Commission, "*to* [take] *over* [the] *Rekodiq Copper & Gold Project from TCCP*." The Cabinet "*further decided **not** to go ahead with the proposed Mineral and Shareholders agreements with TCCP"*; the "[f]*urther course of action would be decided by the Chief Minister*."[345]

447. On 25 December 2009, the online edition of the Pakistani daily newspaper *The Dawn* reported that the Balochistan Cabinet had unanimously decided to "*cancel*" TCC's "*exploration contract*" at Reko Diq. According to the article, Chief Minister Raisani had told the press that the "[c]*ancellation of the Reko Dik copper and gold project agreement is a step towards getting control over provincial resources in accordance with the wishes of the people."* The article reported that:

> "*the provincial department of mines and mineral [development] had submitted a PC-1 for setting up a plant in Reko Dik for processing 15,000 tons of ore . . . Official sources said the Balochistan government had handed over affairs of the project to the department of mines and mineral development and acquired the services of eminent nuclear scientist Dr Samar Mubarakmand who would head its board of governors.*"[346]

448. On 31 December 2009, the Secretary of the MMDD issued a memorandum to Balochistan's Chief Secretary commenting on TCC's "*tremendous efforts in discovering and exploring the Reko-Diq Copper & Gold prospects*" and observing that TCC's project would provide significant benefits to employees and the broader population in the areas of education, health and sanitation.[347] Specifically, the Secretary of the MMDD pointed out:

> "*Mining is one of the most difficult activities to be carried out requiring huge amount of investment, rich expertise and skills, and very careful planning and proper management to make it a success. The way of* [TCC's] *working and performance reflect that their attitude is serious and they are committed to develop the project. They appear professional businessmen with the required will, resources and rich expertise in developing such kind of resources.*"[348]

449. The memorandum further stated that, since "*the Government of Balochistan has decided to take over the project from TCCP*," the MMDD recommends "*establish*[ing] *a camp*

[345] Memorial, ¶ 225. **Exhibits CE-31**, p. 16 and **CE-409**; **Exhibit RE-62**.
[346] Memorial, ¶ 226. **Exhibit CE-81**.
[347] **Exhibit CE-31**, p. 19.
[348] **Exhibit CE-31**, p. 19.

office . . . at the site to closely monitor the project till proper taking / handing-over of the project."[349]

450. After learning of the Cabinet's decision from news sources, Antofagasta's Chairman Mr. Luksic traveled to Pakistan to discuss the news reports with Chief Minister Raisani. In a 13 January 2010 meeting, the Chief Minister assured Mr. Luksic and TCC that, contrary to what had been reported in the press, the Provincial Government had not decided to take over TCC's project.[350]

451. On 11 February 2010, the Secretary of the MMDD reported in a memorandum to Chief Minister Raisani that:

> "*a committee under the Chairmanship of Dr. Samar Mubarak Mand* [sic] . . . *had been constituted for negotiating the services of Legal Expert for Reko-Diq Gold / Copper Project. In the aftermath of the decision of the Provincial Cabinet to take over the Reko-Diq Project from Tethyan Copper Company Pakistan (TCCP) . . . it was deemed necessary to engage Legal Advisor / Consultant for advi[c]e before issuing legal notice to TCC for cancellation of Exploration Agreement.. . .*
>
> [T]*he consultant has proposed to conduct litigation / arbitration on behalf of the Government of Balochistan Mines & Mineral Dev.: Deptt:* [*sic*] *if and when the need arises*
>
> *Kind approval of the Honorable Chief Minister Balochistan is solicited to hire the services of Mr. Ahmer Bilal Soofi, ABS & Co. Islamabad."*[351]

452. On 4 March 2010, TCC met with Chief Secretary Lehri to discuss its concerns about Balochistan's reported plans with regard to Reko Diq. According to contemporaneous notes taken by TCC, Mr. Lehri assured TCC that "*the PC-1 project was not intended to replace the TCC project*" but "*was designed to fill the gap created by TCC rejection of smelter/refinery being a part of the TCC Reko Diq project*." He further reportedly stated that "*TCC (Antofagasta/Barrick) was the best company to implement the Reko Diq project*" and that it made "*no sense for the Government trying to implement the mining project itself.*" [352]

453. On 18 March 2010, the CDWP recommended the Reko Diq Gold/Copper project for submission to the Executive Committee of Pakistan's National Economic Council

[349] **Exhibit CE-31,** p. 20.
[350] Memorial, ¶ 228; Boggs, ¶ 82.
[351] **Exhibit CE-31**, p. 21-22.
[352] **Exhibit CE-84**.

("**ECNEC**"), which is chaired by the Prime Minister, or, in his absence, the Federal Minister of Finance, at an estimated cost of Rs 8698.70 million.[353]

454. On 22 May 2010, Balochistan's Directorate of Public Relations issued a press release describing an "*official handout*" issued the day before, which reportedly stated that "*the foremost objective of the provincial government would be to take full control of Reko-Diq Copper and Gold Project from its present operators . . . and thereafter . . . run the project itself.*"[354]

455. On 28 May 2010, a meeting of the Board of Governors was held under the chairmanship of Chief Minister Raisani. Dr. Mubarakmand briefed the participants about the issues on the agenda, as follows:

> *"[C]urrently the contracting company is undertaking exploration, however they are not willing to refine the metals locally, instead they plan to transport the concentrate offshore for its refining. With deposits worth billions of dollars discovered till now, it is worth considering that the ore may be kept within the country and refined locally. In this regard, guidance of the Chief Minister is required."*[355]

456. The Board discussed various issues, such as: Whether there is enough expertise available in Pakistan to design, implement and operate the refining plant; whether the GOB should opt for a joint project with TCC on a profit-sharing basis in which plant design, installation and operation will be GOB's equity and the remaining part (mining) can be TCC's equity, most likely in the ratio of 80:20; whether only giving prospecting license will earn a bad reputation for the country; whether local investors may be offered investment opportunity in the project; whether the youth of the Province should be trained; and whether arrangements could be made for electricity from Iran and the availability of water. Then, the Board decided that:

> *"(i) The Government of Balochistan will fund the project from its own resources.*
>
> *(ii) Rupees one billion will be earmarked for the project by the Balochistan Government in the next Provincial PSDP (2010-11).*
>
> *(iii) The future role of Tithium Copper Company (TCC) will be decided by the Government of Balochistan, after they apply for mining lease.*

[353] **Exhibit RE-87**, p. 6.
[354] **Exhibit CE-89**.
[355] **Exhibit CE-31**, p. 26; **Exhibit RE-63**.

> *(iv) Plants for refining and production of pure copper and gold will be designed, developed and commissioned in Balochistan and under no circumstances will the pure metals be allowed to leave the country. Downstream industries for the manufacture of copper wire, copper tubes, copper sheets and gold biscuits/bars will be established subsequently.*
>
> *(v) Arrangements for availability of electricity from Iran at the site will be made by the Government of Balochistan."*[356]

457. On 31 May 2010, TCC wrote to Chief Secretary Lehri to express its concerns and request confirmation that the statement in the press release, published on 22 May 2010, did not in fact "*represent the official position of the Government of Balochistan.*"[357]

458. On 2 June 2010, TCC met with Chief Secretary Lehri to discuss the press release. According to TCC's contemporaneous notes of the meeting, the Chief Secretary assured TCC that there "*has been some misunderstanding*." Mr. Lehri reportedly asserted that the first meeting of the Board of Governors - Reko Diq Refinery ("**BOG**") had been held to discuss the decision of the GOB to install a smelter/refinery which would be operated through its own resources and would buy concentrates ore from Tethyan and Saindak. He then exhorted TCC "*to make efforts to satisfy the hostile cabinet and clarify their doubts on the project and the agreement.*"[358]

459. On the same day, TCC also met with the Secretary of the Federal Board of Investment, who said that he had visited Balochistan a few weeks earlier and come back with the positive impression that there was general support of the project and Mr. Lehri was quite positive.[359] In addition, TCC met with the Director General (Minerals) of the Federal MPNR, Mr. Irshad Khokhar, who also informed the Tethyan team of the meeting of the BOG for the Reko Diq Refinery. According to TCC's contemporaneous notes, Mr. Khokhar assured TCC that Balochistan's "*refinery would get its concentrate / ore from Tethyan and Saindak,*" and that TCC's application for a mining lease "*would be approved*" under the Balochistan Mining Rules.[360]

460. On 8 June 2010, the Federal MPNR denied TCC's pending applications for security clearances for its expatriate employees, which were required to obtain work visas.[361] At the same time, Balochistan also began to deny TCC's requests for No-Objection

[356] **Exhibit CE-31**, p. 28.
[357] **Exhibit CE-89**.
[358] **Exhibit CE-90**.
[359] **Exhibit CE-92**.
[360] **Exhibit CE-91**.
[361] **Exhibits CE-93 and CE-94**.

Certificates ("**NOCs**"), which were required for expatriate workers to travel to the Reko Diq site.[362]

461. On 2 July 2010, TCC met with Dr. Mubarakmand and Dr. Nadeem ul Haque, the Deputy Chairman of the Planning Commission and a Minister of State in the Federal Government, and Dr. Pervez Butt, the member (Energy) of the Planning Commission, to explain its exploration work and plans to mine Reko Diq. According to TCC's contemporaneous notes of the meeting, the members of the Planning Commission did not disclose information about the scope of Balochistan's Reko Diq Copper & Gold Project at the meeting, but they did express reservations of the GOB toward the TCC Project. Dr. Mubarakmand commented as follows:

> "*a. The Royalty of 2% which they consider very low.*
>
> *b. Why should Tethyan construct a pipeline to take the concentrate out of the country?*
>
> *c. Why should Tethyan spend so much money on the pipeline and road to Gwadar from the mine when this money should be spent to refine the copper and gold in the country?*"

462. Mr. ul Haque said he understood that selling concentrate the seller gets the full price of the valuable metals contained and that smelters get only a fee. Dr. Butt asked if any representative of GOB was present when the drilling of core was in progress. At the end, "*Dr. Nadeem asked the CEO* [of TCC] *how the P*[lanning] *C*[ommission] *could help the company in the progress of* [TCC's] *project*."[363] TCC's CEO Mr. Von Borries responded by stating:

> " - *Help in providing tech assistance to GOB to understand such a big and technical project.*
>
> - *Help to start a conversation with GOB/GOP.*
>
> - *The importance of the visit of CEO Barrick and his delegation to the Chief Minister and Prime Minister."*[364]

463. On 14 July 2010, executives from TCC and Barrick, including Barrick's CEO Mr. Aaron Regent, met with Chief Minister Raisani and Chief Secretary Lehri. According to Claimant's witness Ms. Catherine Boggs, the Chief Minister told the delegation that he

[362] Livesey IV, ¶ 90.
[363] **Exhibit CE-245**.
[364] **Exhibit CE-245**.

wanted to develop Reko Diq exclusively with TCC, and not with any third parties; Mr. Lehri, in turn, reiterated that the Government's May 2010 press release, which described Balochistan's intention to take over the project from TCC, had been a "*misunderstanding*" and did not reflect the official position of the Provincial Government.[365]

464. On 14 July 2010, the TCC and Barrick executives met with then Prime Minister Gilani. According to a press release issued on the same date by the Pakistan Government's Press Information Department:

> *"The Prime Minister said that Pakistan really want[s] foreign investment and intends to encourage the best firms and companies which can give the best results.*
> . . .
>
> *The Prime Minister informed the delegation which intends to invest in exploration and development of Rekodiq Copper-Gold Mines Project in Balochistan, that the Federal Government has discussed and decided in principle to fully support the consortium and expects the project would be launched at the earliest.*
>
> *The Prime Minister directed the Ministry of Finance and Ministry of Petroleum and Natural Resources to hold further discussions with the consortium and to coordinate with the Government of Balochistan to finalize the details."*[366]

465. The same day, TCC and Barrick's delegation also met with the Federal Minister of Finance, Minister of Petroleum and Natural Resources, and Chairman of the Board of Investment. Following the meetings, the Pakistani newspaper the *Daily Times* reported:

> *"Talking to media on the occasion Federal Minister for Finance said that such a huge investment in Pakistan's mining sector shows the interest of the world-class investors in Pakistan. He said that the government of Pakistan would provide maximum cooperation to the investors to make this project a success.*
>
> *Secretary Finance Salman Siddique expressed hope that the entry of the world's largest mining company in Pakistan's mining sector would help Pakistan attract more investment, transfer of technology and human resource development within the country. He also extended full*

[365] Memorial, ¶ 237; Boggs, ¶¶ 85-87.
[366] **Exhibit CE-95**.

> *assurance of cooperation to the investors for their success in Reko Diq Project."*[367]

466. On 15 July 2010, Pakistan's Planning Commission –which was chaired by the Prime Minister – submitted Balochistan's Reko Diq Copper & Gold project for approval to the ECNEC – which was also chaired by the Prime Minister.[368]

467. On 4 November 2010, the Pakistani daily newspaper *The Dawn* reported that "[t]*he chief minister said the Rs1 billion PC-1* [for Reko Diq] *was likely to be approved by the Executive Committee of the National Economic Council at its next meeting and after that the Balochistan government would start work on the project*." The Chief Minister further reportedly stated that "*all agreements which undermined the rights and interests of the people of Balochistan would be scrapped*."[369]

468. The same day, the Balochistan daily newspaper *Balochistan Express* reported that Chief Minister Raisani stated:

> *"We, the government, are capable of exploring, exploiting and refining the mineral wealth (gold, silver and copper) to international standards. If Balochistan Government operates the Reko Dik project, it will benefit the people and it will leave a good impact on the Pakistani economy."*[370]

469. On 9 November 2010, TCC wrote to Chief Secretary Lehri protesting these statements, pointing out that as the statements were made by the Chief Minister, they apparently represented the official position of the Government of Balochistan and could not only constitute a violation of Clause 24.6 of the CHEJVA but also harm the reputation of TCC and the Government of Balochistan. He requested that the Chief Secretary advise the company of his Government's official position.[371] It appears that TCC did not receive any response.

470. On 3 December 2010, Dr. Mubarakmand discussed the gold and copper resources at Reko Diq in a talk show on the *Duniya* television network. He stated that Pakistan possessed the technical capability for the mining of copper and gold and it remained to be seen whether the government of Balochistan would sanction the mining contract to Pakistan or the foreign companies. In response to the interviewer's comment that the government of Balochistan should give the contract to the local companies rather than the outsiders so that the flow of the money remains in Pakistan rather than going to foreign companies,

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[367] **Exhibit CE-246**.
[368] Memorial, ¶ 240; Mubarakmand, ¶ 10.
[369] **Exhibit CE-260**, p. 5.
[370] **Exhibit CE-262,** p. 8.
[371] **Exhibit CE-260**, p. 1.

Dr. Mubarakmand said that this was "*the reason why* [he] *had developed a technical project and presented it to the Chief Minister*" and that "*if the project* [was] *approved in the ACNEC meeting on December 9, 2010, the Baluchistan government* [had] *the funds for us to start work on this project*." [372]

471. On 9 December 2010, the ECNEC considered the Summary dated 15 July 2010, submitted by the Planning Commission on the Reko Diq Gold/Copper Project, approved the project at the revised cost of Rs 8812.22 million (approximately US$ 102.7 million) and "*directed that if an agreement has not been signed with any firm for mining and refining, etc, then Govt. of Balochistan may decide as to whether the project is to be executed by them*."[373]

472. On 15 December 2010, Dr. Mubarakmand gave a telephone interview on *Dawn* television about the project. The interviewer commented that "*it is generally said that mining contracts are awarded to those companies who do the exploration work*"[374] and asked Dr. Mubarakmand what the best international practices were in this regard. Dr. Mubarakmand responded:

> *"Under the international best practices it is not necessary that one who does exploration will also get the mining license. People initially enter into an exploration contract with the Government which owns the minerals. This contract contains terms and conditions whether or not the exploration license will convert into a mining license and upon which terms. So the exploration license which they* [Tethyan Copper Company] *obtained from the Balochistan Government must in my opinion contain such terms and conditions. The Balochistan Government and this company must be aware of such terms and conditions in accordance with which a mining license can or cannot be awarded. This condition must be there."*[375]

H. On 26 August 2010, Claimant Delivered the Feasibility Study

473. On 26 August 2010, Claimant delivered the Initial Mine Development Feasibility Study (the "**Feasibility Study**") to the Government of Balochistan and triggered the period for giving notice of intent to participate in the development of the mineral deposit as a Mining Area under the CHEJVA.

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[372] **Exhibit CE-105**.
[373] Memorial, ¶ 285. **Exhibit CE-106**. *See* Minutes at **Exhibits CE-352** and **RE-88.**
[374] **Exhibit CE-108**.
[375] **Exhibit CE-108**.

1. The Feasibility Study

474. As stated at paragraph 377 above, TCC had presented the results of the scoping study at the OC meeting held on 26 October 2007.

475. Also, as stated at paragraph 356 above, TCCA's work on the feasibility study for Tanjeel (H-4) had been suspended in 2006.

476. Further, as stated at paragraph 392 above, TCCA had completed the Pre-Feasibility Study for Initial Mine Development, focusing on H-14 and H-15, in July 2009.

477. Thereafter, TCCA had continued to work on the area within Exploration License EL-5, as reported in the Quarterly Reports for the periods ended 30 September 2009,[376] 31 December 2009,[377] 31 March 2010[378] and 30 June 2010.[379]

478. The Feasibility Study was completed in June 2010.[380] Then, the Expansion Pre-Feasibility Study, expanding the mining project to other deposits, including Tanjeel (H-4) and the H-8, H-13; H-35 and H-79 deposits, was completed in July 2010.[381]

479. The Feasibility Study was presented at the OC meeting on 25 August 2010.[382] The meeting was attended by Mr. Gerhard Von Borries, CEO (Chairman), TCCA; Mr. Gordon Thorpe, CFO, TCCA; and, for the first time, officials of the MMDD, Mr. Mushtaq Ahmed Raisani, Secretary, and Mr. Bashir Mastoi, Director General, as Balochistan's representatives.[383] In addition, the following persons from TCC attended by invitation: Mr. Sher Khan, Director, Security & Government Relations; Mr. Jack McMahon, Senior Operations Manager; Mr. Naseer Ahmed, Reko Diq Site Manager; Mr. Barry Flew, Finance Manager; Mr. Asad-ur-Rehman, Senior Project Geologist; and Mrs. Samia Ali Shah, Manager, Corporation Communications.

480. According to the minutes of the meeting, Mr. Flew presented the major project achievements of the owners since 2006, which included, *inter alia*, "[a] *scoping study*

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[376] **Exhibit CE-162**.
[377] **Exhibit CE-82**.
[378] **Exhibit CE-164**.
[379] **Exhibit CE-165**.
[380] Livesey IV. *See* **Exhibits CE-96, CE-247, CE-97, CE-98, CE-99, CE-248, CE-166, CE-249, CE-250, CE-251, CE-252, CE-347, CE-100, CE-348, CE-253, CE-167, CE-254, CE-255, CE-168, CE-101, CE-169 and CE-349.**
[381] Livesey IV. *See* **Exhibits CE-243 and CE-244**.
[382] Memorial, ¶271. **Exhibits CE-102, CE-170** and **CE-256**.
[383] This was the first OC meeting attended by the representatives of the MMDD, which had replaced the BDA "*as the partner representing the GOB in the CHEJVA*" as of 12 December 2009. **Exhibit CE-102**.

was completed in September 2007 and in October 2007 the OCM approved the JV to conduct a Feasibility Study on the Western Porphyries and Pre-Feasibility study on the expansion phases."[384] After updates on the site operations by Mr. McMahon, on the community programs by Mr. Ahmed and on the exploration activities by Mr. Rehman, Mr. Von Borries presented an extensive review of the Feasibility Study.[385]

481. The PowerPoint presentation prepared for the meeting included a detailed discussion of the mining operation contemplated by the Feasibility Study.[386] Among other things, it included a map of the area for which TCC proposed to apply for a mining lease: It depicted the mineralized porphyry centers H-14 and H-15 as "*Initial Mine*;" Tanjeel (or H-4) and H-13 as "*Expansion*;" and H-8, H-35 and H-79 as "*Upside Potential*."[387] The map also explained that the "*Phased Approach to Development*" would start with an "*Initial Mine Development*" consisting of "*110,00 tonnes per day milled from H14 and H15*," and an "*Expansion Project*" entailing "*220,000 tonnes per day, from H14, H14* [sic]*, H13 & Tanjeel*." It also showed an "*Upside Potential*" entailing "*H8, H79, H35*."[388]

482. On 26 August 2010, TCCA formally submitted the Feasibility Study to the Government of Balochistan.[389] It comprised of 21 volumes and 235 appendices, and almost 18,000 pages in total. It assessed the economic, financial and technical feasibility of a base case mining project centered on the Western Porphyries (H-14 and H-15) and also contemplated its future expansion to Tanjeel (H-4) and other adjacent orebodies (H-8, H-13, H-35 and H-79).[390]

2. Balochistan Did Not Elect to Participate in the Mining Venture

483. The formal handover of the Feasibility Study on 26 August 2010 triggered the 90-day period under Clause 11.3.1 of the CHEJVA, during which each party to the Joint Venture was required to give notice of its decision regarding participation in mine development.[391]

484. On 8 November 2010, TCC formally elected, in accordance with Clause 11.3.2 of the CHEJVA, to participate in mine development and informed the MMDD of its decision by copy of its letter to the Manager of the Joint Venture.[392]

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[384] **Exhibit CE-102**, p. 2. *See also* **Exhibit-156**, p. 5.
[385] **Exhibit CE-102**, pp. 2 and 3.
[386] **Exhibit CE-170** and **CE-256.**
[387] **Exhibit CE-256**, p. 40.
[388] **Exhibit CE-256,** p. 40.
[389] **Exhibit CE-22**.
[390] Memorial, ¶ 242. **Exhibits CE-97**, **CE-98** and **CE-99.**
[391] Memorial, ¶ 274. **Exhibit CE-1**, Clause 11.3.1.
[392] Memorial, ¶ 281. **Exhibit CE-23**.

485. An OC meeting was held on the same day. It was attended by Mr. Mushtaq Ahmed Raisani, Secretary, MMDD; Mr. Mohammad Azam, Director General, MMDD; Mr. Gerhard Von Borries, CEO (Chairman), TCCA; and Mr. Gordon Thorpe, CFO, TCCA. The following persons also attended by invitation: Mr. Barry Flew, Finance Manager, TCC; Mr. Sebastian Carmona, Mine Planning Engineer, TCC; Mr. Kalemullah, Deputy Secretary, MMDD; and Mr. Mohammad Ali Kakar, Additional Secretary, MMDD.[393]

486. According to the minutes of the meeting, Mr. Von Borries "*presented the key steps going forward and whether the GOB was going to make their election to participate in the project before the 24th November*."[394] Mr. Raisani said that the review of the Feasibility Study required at least six months and mentioned that they intended to use external advisors GTZ.[395] Mr. Von Borries explained that, assuming the GOB elected to participate, both partners needed to form a Mining Venture in order to submit the Mining Lease Application before the expiration of the Exploration License EL-5 on 19 February 2011. In response to the question whether the GOB would sign a Memorandum of Understanding in order to file a Mining Lease Application, Mr. Raisani said that "*the GOB would agree with the MOU and make its election to participate after the presentation to the cabinet*."[396]

487. According to the record, the 24 November 2010 deadline passed without response from the Provincial Government.[397] As a result, under CHEJVA Clause 11.3.3, Balochistan was deemed to be a "*Non-participating Party*" with respect to the planned mining venture.[398]

488. By letter dated 30 November 2010, TCCA, as Manager of the Joint Venture, informed the MMDD that, as no notification of intention to participate had been received from the Government of Balochistan prior to the 24 November 2010 deadline, the Election Date, as defined in the CHEJVA, was 8 November 2010, the date that TCC gave notice of its intention to participate. TCCA suggested that the parties "*should meet at the earliest convenience to discuss and formulate the future course of action pursuant to the CHEJVA.*"[399]

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[393] **Exhibit CE-103**.
[394] **Exhibit CE-103**, p. 3.
[395] *Deutsche Gesellschaft für Technische Zusammenarbeit* (German Society for Technical Cooperation). **Exhibit CE-103**, p. 3.
[396] **Exhibit CE-103**, at 3.
[397] Memorial, ¶ 282. **Exhibit CE-24**.
[398] *See* **Exhibit CE-1**, Clause 11.3.3.
[399] Memorial, ¶ 283. **Exhibit CE-24**.

489. On 18 December 2010, four weeks after the election deadline had passed, Balochistan requested an extension of the 90-day period for the election to participate in the mining venture so that the assessment of the Feasibility Study could be completed by the experts. It also noted that, as will be discussed in detail beginning at paragraph 495 below, the case was "*subjudice to the Supreme Court of Pakistan*"[400] as the result of petitions filed at the beginning of November 2010.

490. On 29 December 2010, TCCA, as Manager, responded that the deadline for electing to participate had expired on 24 November 2010. It reminded the GOB that the Exploration License held by the Joint Venture expired on 19 February 2011 and requested Balochistan's "*advice as to how to move forward in considering your request. Please provide us with this suggestion so that we may respond promptly*."[401] It appears that TCCA received no response.[402]

491. On 3 March 2011, TCC formally notified Balochistan of its intention to purchase the Provincial Government's minority interest in the Joint Venture in accordance with Clause 11.5.1 of the CHEJVA and its wish to engage with the GOB in agreeing the fair value of its Transfer Interest.[403] Under Clause 11.5.3 of the CHEJVA, the GOB was obligated "*in good faith* [to] *negotiate in order to agree upon the fair value to be paid*" for its interest.[404] In this notice, TCC stated that "*it is still the sincere wish of TCC and its shareholders to have the GOB as a 25% partner in the Reko Diq project*" and noted that "*TCC would welcome the opportunity to discuss how this can be achieved*."[405]

492. On 28 March 2011, and again on 9 May 2011, Balochistan's MMDD requested that any negotiations regarding Balochistan's participation in the mining venture or the purchase of Balochistan's 25% stake be postponed as the matter was "*subjudice in the Hon'ble Supreme Court of Pakistan and the Provincial Government at this stage is not in a position to negotiate / discuss the provisions of CHEJVA for becoming either a participating or non-participating party, as well as consideration of Joint application for mining lease till the decision of the Hon'ble Supreme Court of Pakistan is arrived*."[406] The MMDD referred to a Supreme Court order dated 3 March 2011, which held "*in*

[400] Memorial, ¶ 289. **Exhibit CE-266**.
[401] Memorial, ¶ 290. **Exhibit CE-109**.
[402] Memorial, ¶ 290.
[403] Memorial, ¶ 310. **Exhibit CE-25**.
[404] Memorial, ¶ 310. **Exhibit CE-2**, Clause 8.2 (amending **Exhibit CE-1**, Clause 11.5).
[405] Memorial, ¶ 310. **Exhibit CE-25**.
[406] **Exhibit CE-114**.

abeyance the compliance by GoB or TCC of their respective obligations under the CHEJVA."[407]

493. On 29 April 2011, TCCA gave notice, pursuant to Clause 15.2 of the CHEJVA, of its intent to submit the matter of the fair value of the Non-participating Party's Transfer Interest to an independent expert and proposed the Deutsche Bank as an expert, requesting the GOB's consent to such appointment.[408]

494. By letter dated 16 May 2011, TCCA referred to MMDD's reference to an order of the Supreme Court dated 3 March 2011 and replied that it was not aware of any such order passed by the Supreme Court.[409] It requested the GOB to provide an answer to TCC's proposal of the independent expert within the timeframe set forth in the CHEJVA.[410] It appears that TCC received no response to this letter and no further response from Balochistan.[411]

I. In November 2010, Petitions Were Filed with the Pakistan Supreme Court to Enjoin the Governments of Pakistan and Balochistan from Issuing a Mining Lease and to Direct that the Extraction and Refining Process Be Carried Out Within Pakistan

495. On 6 November 2010, a Pakistani attorney, Mr. M. Tariq Asad, filed a petition under Article 184(3) of the Pakistani Constitution before the Pakistan Supreme Court against the Federal Government, the Provincial Government and other respondents, including Dr. Samar Mubarakmand.[412]

496. The petition requested the Court to, *inter alia*, (i) direct the Federal Government through its MPNR, the Chief Secretary of Balochistan, the Head of the Department of Mines and Mineral Development of Balochistan, the Steering Committee and the Board of Revenue of Balochistan to refrain from issuing a mining license in an arbitrary and unlawful manner and without the consultation of the Parliament of Balochistan; (ii) direct the Federal Government, the Chief Secretary of Balochistan and the Head of the Department of Mines and Mineral Development of Balochistan to explain why the mining process could not have been carried out by the MPNR and Mining Department, and why such efforts had not been made thus far; and (iii) further direct these three respondents to

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[407] Memorial, ¶ 311. **Exhibits CE-114** and **CE-116**.
[408] **Exhibit CE-115**.
[409] **Exhibit CE-117**.
[410] Memorial, ¶ 312. **Exhibit CE-117**, p. 1.
[411] Memorial, ¶ 312.
[412] Memorial, ¶ 291. **Exhibit CE-172**. Article 184(3) of the Pakistani Constitution empowers the Supreme Court to, among other things, undertake judicial review of executive actions if the Supreme Court considers that a question of public importance has arisen that relates to the enforcement of fundamental rights. **Exhibit CE-150**, Article 184(3).

complete the whole process of gold mining, either independently or with the joint venture, within Pakistan territory and restrain them from taking the raw material out of Pakistan, so that the entire process could take place in Pakistan, preferably by the Federal Government and Balochistan's MMDD.[413]

497. On 8 November 2010, the Watan party filed a further Article 184(3) petition with the Supreme Court of Pakistan.[414]

498. On 15 December 2010, the Pakistan Supreme Court commenced hearings on the Constitutional petitions and the appeal from the 26 June 2007 judgment of the Balochistan High Court.[415]

499. On 4 January 2011, a third Article 184(3) petition regarding the Reko Diq project was filed before the Supreme Court on behalf of the Sanjrani tribe of the Chagai Hills area. The petition claimed, among other things, that the Federal and Provincial Governments lacked authority to execute agreements or grant land rights in the Chagai district for mining or exploration purposes without the tribe's express permission.[416]

500. On 22 January 2011, the Government of Balochistan filed a new submission claiming that TCC was not entitled to a mining lease and that the Provincial Government would carry out the project on its own. Balochistan acknowledged that its position had changed since its 22 November and 11 December 2010 submissions as a result of "*certain important developments* [that] *have taken place*," specifically that "*very recently on 9.12.2010, the Executive Committee of the National Economic Council (ECNEC) has approved the Re[k]o Diq Gold / Copper Project to be effectively executed by the Government of Balochistan itself.*"[417] An additional "*important development*" concerned the Chief Minister of Balochistan having "*taken note of certain information and directed a special inquiry into relaxation of rules and related matters etc.*"[418]

501. Balochistan requested the Supreme Court to permit the Government of Balochistan to execute the decision of the ECNEC dated 9 December 2010 while declaring that, in the circumstances of the case, "*no entity has any vested right for the mining concession*" and that "*only the Government of Balochistan can take any decision in this regard in the best national interest.*"[419]

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[413] Memorial, ¶ 292. **Exhibit CE-172**.
[414] Memorial, ¶ 293. **Exhibit CE-173**.
[415] Memorial, ¶ 296. **Exhibits CE-217** and **CE-269**.
[416] Memorial, ¶ 298. **Exhibit CE-268**, p. 9.
[417] Memorial, ¶ 303. **Exhibit CE-269**, ¶ 3.
[418] **Exhibit CE-269**, ¶ 13.
[419] **Exhibit CE-269,** p. 6.

502. On 24 January 2011, 26 senators from the Parliament of Pakistan filed a fourth Article 184(3) petition regarding the Reko Diq project seeking, among other things, to enjoin the Federal and Provincial Governments from entering into a mineral agreement with TCC.[420]

503. On 3 February 2011, the Supreme Court of Pakistan ordered that "*no decision shall be taken by the Government of Balochistan in respect of the grant of the mining lease on the application submitted by any of the parties without prejudice to their legal rights till the decision of the instant proceedings*."[421]

504. On 25 May 2011, the Supreme Court recalled its 3 February 2011 restraining order and directed the Licensing Authority to "*expeditiously decide TCC's application for the grant of mining lease transparently and fairly in accordance with the law and the rules*."[422] At the same time, the Court postponed its own proceedings until a decision regarding the mining lease would be taken, noting that "*it will not be proper for us to pre-empt the decision of the Government of Balochistan by entering into the merits of the case at this juncture*."[423]

J. On 15 February 2011, TCCP Applied for a Mining Lease and, on 15 November 2011, Balochistan Rejected the Application

505. On 8 February 2011, TCCA, in its function as Manager of the Joint Venture, informed the Secretary of the MMDD that the Mining Lease Application in relation to the Mining Area had to be filed with the Licensing Authority ahead of the expiration of Exploration License EL-5 on 19 February 2011 and that, in accordance with the requirements of rule 47(1) of the 2002 BM Rules, the application would be filed by TCCP which was a company incorporated under the laws of Pakistan.[424] TCCA enclosed a letter for signature by which MMDD would have requested TCCA, as Manager, to take all necessary steps to file the Mining Lease Application by TCCP on behalf of the Joint Venture.[425] It appears that TCCA received no response.

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[420] Memorial, ¶ 304. **Exhibit CE-270**.
[421] Memorial, ¶ 305. **Exhibit RE-6**, p. 5.
[422] **Exhibit CE-176**, ¶ 14.
[423] Memorial, ¶ 313. **Exhibit CE-176**, ¶ 13.
[424] **Exhibit CE-113**.
[425] **Exhibit CE-113**. The request read as follows:

> "*The Mines and Mineral Development Department on behalf of the Government of Balochistan is pleased to request the Manger of the Chagai Hills Exploration Joint Venture to take all necessary steps in order to file the Mining Lease Application by Tethyan Copper Company Pakistan (Private) Limited on behalf of the Chagai Hills*

1. TCCP Filed the Mining Lease Application

506. On 15 February 2011, TCCP submitted to the Licensing Authority an Application for a Mining Lease (the "**Application**") over an area of 99.473 square kilometers of Reko Diq situated within the boundaries of Exploration License EL-5. The Application was supported by the Feasibility Study and other documents required under rule 47 of the 2002 BM Rules.[426]

507. On 21 July 2011, the Federal Minister, MPNR, Dr. Asim Hussain, as Chairman of the Steering Committee on the Reko Diq project, held a meeting to review the status of the project and to formulate a joint strategy of the GOP and the GOB for the future course of action. The meeting was attended by representatives of the MPNR, the Secretary of the BOI, Mr. Mushtaq Raisani, Secretary, MMDD, on behalf of the GOB, representatives of TCC, including Mr. Livesey, CEO, and a Senior Trade Commissioner from the Government of Canada. Secretary Raisani informed those present that the Mining Lease Application could not be processed earlier because the Apex Court had issued a restraining order on 3 February 2011, which had been recalled on 25 May 2011. He stated that the "*GOB will decide on the application of TCC for mining lease to the true spirit of BMR, 2002 and the direction of the honorable Supreme Court*."[427]

508. Upon inquiry from the Chair regarding value addition up to final refining[428] and the GOB share in the profit, Mr. Livesey responded that the GOB would get a 25% share in the profit over the life of the mine, provided that it invested as per its shareholding in accordance with the joint venture agreement. Further, TCC would assist the GOB in managing a loan from the financial institutions if the Government of Balochistan was unable to arrange funds investment as per share. In addition, TCC would evaluate alternate proposals to the current 25% equity and submit them to the GOB during the third quarter, 2011.[429]

509. As for the value addition, Mr. Livesey stated that TCC had ore processing capacity up to the concentrate stage and processing beyond this stage was not financially viable to TCC;

Exploration Joint Venture with the licensing authority in relation to the Mining Area (as defined in the Chagai Hills Exploration Joint Venture Agreement ("CHEJVA")) for the Mining Operations (as defined in CHEJVA)of the Reko Diq project."

[Pursuant to Clause [] of the CHEJVA, the BDA was responsible for applying for mining leases.]

[426] Memorial, ¶¶ 307-309. **Exhibit CE-6**.

[427] **Exhibit CE-118**; **Exhibit RE-79**.

[428] As noted at paragraph 323 above, on 1 October 2010 – after TCCA delivered its Feasibility Study on 26 August 2010 and before TCCP filed the Mining Lease Application on 15 February 2011, Balochistan amended the 2002 BM Rules to require that a mining lease application include a proposal for value addition of the ore to be produced/exploited from the mining lease.

[429] **Exhibit CE-118**.

however, TCC would provide financial assistance of US$ 1 million to carry out a technical feasibility study on smelting and refining.[430]

510. Mr. Khokar, Director General (Minerals), MPNR, pointed out that the Jinchuan Group China had offered the Ministry that they could set up a full facility for the processing of concentrate up to the final refining of gold and copper based on the concentrate produced by TCC at Reko Diq. Mr. Livesey responded that the company "*will have no objection to this proposal. TCC are willing to negotiate an off take agreement for the sale of concentrate within Balochistan*."[431]

511. At the end of the meeting, it was decided that the GOB would complete its review of the Feasibility Study and decide the Mining Lease Application within a period of four months, as per directions of the Supreme Court judgment dated 25 May 2011. In addition, TCC would submit a detailed proposal regarding profit of the GOB over the life of the mine and investment facilitation options.[432]

512. On 12 September 2011, TCCA wrote to the Licensing Authority, offering to meet with them if they had any questions or concerns about the Mining Lease Application.[433]

2. Balochistan Rejected the Mining Lease Application

513. On 21 September 2011, the Licensing Authority issued a notice of its intent to reject the Mining Lease Application (the "**Notice of Intent to Reject**") as "*not satisfactory*," stating that it was not in the interest of the Government and people of Balochistan that the lease be granted on documents which were "*incomplete*" and "*sketchy*."[434] The Notice of Intent to Reject stated:

> "*1. That from the record, it appears that the Balochistan Development Authority had signed a Chagai Hills Exploration Joint Venture Agreement with BHP, thereafter M/S Tethyan Copper Company Pakistan (Pvt) Ltd for exploration, evaluation of Gold, Copper and Associated Minerals during the period Of license existing for exploration and prospecting of the area. The record reflects that neither any company was registered and incorporated under the Companies Act 1984 with the registrar of Firm's nor in any other law;*

[430] **Exhibit CE-118**. In fact, the minutes state that TCC would provide financial assistance to "*US$ 1.000 million*"; it is undisputed between the Parties, however, that the amount offered was US$ 1 million, rather than US$ 1 billion.
[431] **Exhibit CE-118**.
[432] **Exhibit CE-118**.
[433] **Exhibit CE-120**.
[434] Memorial, ¶ 318. **Exhibit CE-7**.

2. That the company did not make proper feasibility or exploration of the discovered deposits and achieve the targets required under the rules.

3. That the second renewal application submitted by the applicant, had given declaration that the applicant will submit the complete feasibility of the entire lease/exploration area. The applicant has utterly failed to submit the said feasibility report and meaning thereby that they have failed to conduct and complete exploration in the exploration license / granted area.

4. That on account of non-exploration and failure to explore the area during the last 17 years, the Government of Balochistan and the local inhabitants of the area has been deprived of the fruitful results.

5. That the present application has been filed on behalf of M/S Tethyan Copper Company Pakistan (Pvt) Ltd and not on behalf of co sharer, who was alleged to be co-associate in the working project under the Rule -48 of the Balochistan Minerals Rule 2002. Since the applicant alone was not allottee of exploration licence and thus legally applicant is not competent to make application for grant of Mining lease.

6. That the Mines Committee has noted the fact that the application was received on 18-02-2011 and the licence had expired on 19-02-2011 later on request was made to the Secretary, Mines & Mineral Department, Government of Balochistan on 03-03-2011 for participating in the mining lease. This fact indicates that the application was filed alone by the company and co sharer was not made party in it. In such circumstance, the application is incomplete and is in violation of rule 48 of the Balochistan Minerals Rule, 2002.

7. The relevant portion on the feasibility study report submitted by the expert committee was also examined by the Mines Committee and found following observation:

(i) That the Company has failed to comment or dilate upon rest of discover deposits except H-14 and H-15;

(ii) The proposed development, operation and scheme of the mines in programme of the mining operation for the 11 other potential resources is missing/omitted to be considered in feasibility report;

(iii) That the information given by the company in all respect keeping in to consideration the Balochistan Minerals Rule, 2002, the Company has further failed to identify all the resources and achievements of all the targets within stipulated time.

(iv) Misrepresentation for obtaining exploration licenses EL-6, EL-8, EL-26 and EL-27 wherein there is no share of partner. Despite being a world class Exploration/ Mining Company so called partner has failed to submit the technical, financial, economical viability report of the entire resources of EL-5 enjoying with special relaxations in all respect allegedly granted by the Government of Balochistan for the last 17 years.

(v) There is a default and violation committed under rule 29 (2) (c) (iii) of Balochistan Minerals Rules, 2002 as well as failure to provide the required information as contemplated under rule 47 of Balochistan Minerals Rules, 2002.

8. That the submission of the application relating to H-4, H-8, H-13, H-35 and H-79 etc is in violation of rule-48 of Balochistan Minerals Rule, 2002.

9. That feasibility report is silent about the processing, smelting and refining of the metals / minerals to be extracted from the mining area.

10. That in view of aforementioned reasons, the Committee found that the application submitted by the applicant is not satisfactory. It is also not in the interest of the Government and people of Balochistan that the lease cannot be granted on a documents which is in complete and sketchy.

Your reply to the aforementioned reasons / objections may be submitted within a period of 30 days."[435]

514. On 30 September 2011, TCCP requested the Licensing Authority to grant it an extension of sixty days in addition to the thirty days to submit its representations and/ or proposals, in consonance with the requirement of "*reasonable period*" for response as laid down in rules 48(4) anf 48(5) of the 2002 BM Rules.[436]

515. On 7 October 2011, the Licensing Authority informed TCCP that the Mines Committee had turned down its request for extension and that its response was due by 20 October 2011.[437]

516. On 14 October 2011, TCCP informed the Licensing Authority that it considered its letter to be unreasonable, given that an extension would cause it no prejudice; the matters potentially in dispute were complex, of great value and highly important to the region;

[435] **Exhibit CE-7**.
[436] **Exhibit CE-27**.
[437] **Exhibit CE-28**.

and an extension of time might help the parties to better understand each other's positions. TCCP suggested a meeting to discuss the issues and requested the Licensing Authority to suggest suitable potential dates.[438]

517. On 15 October 2011, TCCP filed a formal appeal against the denial of its request for an extension of time before the Secretary, MMDD.[439]

518. On 17 October 2011, the Licensing Authority informed TCCP that it might make its representations within the stipulated time period, by 20 October 2011.[440]

519. On 19 October 2011, Claimant submitted its interim response (the "**Interim Response**") to the Notice of Intent to Reject, explaining, *inter alia*, that:

(i) The Mining Lease Application contained documents showing that TCCP had been validly registered and incorporated under the Pakistan Companies Ordinance 1984.

(ii) Clause 11.8.2 of the CHEJVA entitled TCC to submit the Mining Lease Application on its own if Balochistan did not elect to participate in the mining venture.

(iii) Balochistan never expressed any concerns or reservations to TCC that the scope of TCC's exploration or feasibility work was unsatisfactory or that the expected Mining Lease was in jeopardy.

(iv) TCC had no obligation under contract or the 2002 BM Rules to smelt the copper-gold concentrates that are produced.

(v) Balochistan itself had advised the Pakistan Supreme Court in December 2010 – some four months after receiving the Feasibility Study – that it had "*been kept abreast of all relevant development*[s];" "[it is] *constantly viewing that nothing is done which will in any manner adversely affect the interest of province of Balochistan*;" and that the petitioners attacking the exploration and feasibility work performed at Reko Diq "*have failed to identify a single matter whereby the interest of the province and the people* [o]*f Balochistan have even remotely been adversely affected*."[441]

[438] **Exhibit CE-29**.
[439] Memorial, ¶ 323. According to Claimant, on 17 October 2011, the Secretary of the MMDD returned the appeal on procedural grounds and, on 18 October 2011, TCC rectified the stated procedural deficiency.
[440] **Exhibit CE-30**.
[441] Memorial, ¶¶ 324, 325. **Exhibit CE-8**.

520. On the same date, Claimant also served a Notice of Dispute under the CHEJVA on the Government of Balochistan, which invited the GOB to enter into discussions to reach an amicable resolution of the dispute.[442]

521. By letter dated 15 November 2011, the Licensing Authority rejected Claimant's application for the grant of a Mining Lease, stating in a single sentence that its "*reply was found unsatisfactory under Rules 10, 29(2)(c)(iii)[,] 47, 48, 52 etc of Balochistan Mineral Rules 2002*."[443]

522. On 22 November 2011, the Pakistan news service *PakTribune* reported that the Balochistan government had cancelled the license of the Reko Diq gold and copper mines given to a foreign company, Tethyan Copper Company (TCC), and decided to run the project itself. The report was based on comments Balochistan Mines Secretary Mr. Mushtaq Raisani had made to a UK-based TV channel. He reportedly said that TCC had submitted the feasibility report of a limited area and did not include the whole area in its report and thus:

> *"*[u]*nder the law, the provincial government can cancel the contract of a company that does not meet the criterion."*[444]

523. Secretary Raisani reportedly added that the government had now decided to take forward this project utilizing its own resources."[445]

524. One week later, on 30 November 2011, Secretary Raisani issued an official denial, published in the *Intekhab-Urdu*, of this news item.[446]

3. Balochistan Rejected TCCP's Administrative Appeal

525. On 28 November 2011, TCCP filed an administrative appeal under rule 70 of the 2002 BM Rules requesting the Secretary MMDD to set aside the order and to grant TCC's Mining Lease Application.[447]

526. On 22 December 2011, the MMDD gave notice of the hearing on TCCP's appeal, scheduled for 31 December 2011.[448]

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[442] Memorial, ¶ 326. **Exhibit CE-9**.
[443] Memorial, ¶ 327. **Exhibit CE-11**.
[444] **Exhibit CE-34**.
[445] **Exhibit CE-34**.
[446] **Exhibit CE-123**.
[447] Memorial, ¶ 330. **Exhibit CE-36**; **Exhibit R-126**.
[448] **Exhibit CE-275**.

527. On 27 December 2011, counsel for TCCP requested the Secretary MMDD to direct the Director General MMDD to provide a copy of its comments to TCCP and to change the date of the hearing to give TCCP sufficient time to prepare a rejoinder/replication after holding consultations with its management which was, at that time, out of Pakistan on account of Christmas and winter vacations.[449] The late December hearing date was adjourned.[450]

528. On 17 February 2012, the MMDD gave notice to TCCP that the hearing on its appeal would be held on 27 February 2012.[451]

529. On 22 February 2012, the Licensing Authority submitted its comments on TCCP's appeal.[452]

530. On 28 February 2012, the MMDD gave notice to the parties that the appeal would be heard on 12 March 2012.[453]

531. On 29 February 2012, the Supreme Court of Pakistan issued an order directing the Secretary of the MMDD "*to dispose of the appeal by antedating the hearing to 3rd March, 2012 and to decide the same on such date. The decision of the appeal at the earliest is important for the reason that the International Chamber of Commerce has allowed 15 days time to the Government of Balochistan to nominate an Arbitrator*."[454]

532. On the same day, the MMDD changed the hearing date to 2 and 3 March 2012.[455]

533. By letter dated 2 March 2012, TCCP objected to this sudden change of schedule, noting that Mr. Livesey was out of the country; TCCP's senior counsel could not arrive in time for the hearing; and the rescheduling would not allow TCCP sufficient time to prepare and submit its written rejoinder.[456]

534. The hearing on TCCP's administrative appeal was held on 2 and 3 March 2012. On 3 March 2012, the MMDD issued its order that the decision of the Licensing Authority to reject the Mining Lease Application of the TCCP was upheld as reasons for declining the

[449] **Exhibit CE-276**.
[450] Memorial, ¶332; **Exhibit CE-280**.
[451] **Exhibit CE-280**.
[452] Memorial, ¶ 335. **Exhibit CE-129**. [In paragraph 2.1, the Licensing Authority referred to the Chagai Hill Exploration joint venture being executed on 19 July 1993 between "*BHP and Government of Balochistan through Balochistan Development Authority*."]
[453] Memorial, ¶ 336. **Exhibit CE-130**.
[454] Memorial, ¶ 337. **Exhibit CE-131**.
[455] Memorial, ¶ 338. **Exhibit CE-132**.
[456] Memorial, ¶ 339. **Exhibit CE-136**.

mining lease were duly examined by the concerned mines committee, and therefore the appeal was dismissed.[457]

535. The media announced on the evening of 3 March 2012 that TCCP's appeal had been rejected; TCCP received a copy of the decision of the MMDD on 5 March 2012 during oral proceedings before the Supreme Court.[458]

536. The MMDD order concluded that the rejection of the Mining Lease Application was an appropriate exercise of the Licensing Authority's obligation to enforce the 2002 BM Rules because, among other things, the Scheme of Amalgamation approved by the Islamabad High Court in 2008 had not effectively transferred TCCA's majority interest in Exploration License EL-5 to TCCP, and the Feasibility Study "*covered only a small area of 4.5 K.M*" and assessed the "*economic viability of only two deposits out of thirteen (13) discovered*."[459]

537. The denial of the administrative appeal was the final decision of the Government of Balochistan on the Mining Lease Application.[460] As a result, pursuant to rule 24(2)(b)(ii) of the 2002 BM Rules, Exploration License EL-5 expired on the date of the rejection of the appeal.[461]

538. On 10 March 2012, one week after Balochistan had denied the administrative appeal, the Advocate General of Balochistan petitioned the Pakistan Supreme Court to declare the 2007 judgment of the Balochistan High Court, which upheld the validity of the CHEJVA and found that TCC had a vested right to a mining lease,[462] as having "*no legal effect*" on the Government of Balochistan.[463]

K. Events Following the Rejection of the Appeal

539. Following the denial of TCCP's administrative appeal on 3 March 2012, Balochistan took steps to implement its Reko Diq Copper & Gold Project.[464]

[457] **Exhibit CE-137**.
[458] Memorial, ¶¶ 340-341. **Exhibit CE-137**.
[459] Memorial, ¶ 342. **Exhibit CE-138**.
[460] Memorial, ¶ 343. **Exhibit CE-5**, Rule 70(4).
[461] Memorial, ¶ 343. **Exhibit CE-5**, Rules 24(2)(b)(ii), 12.
[462] **Exhibit CE-61**.
[463] Memorial, ¶ 344. **Exhibit CE-139**.
[464] Memorial, ¶ 345.

1. Balochistan Applied for a Mining Lease Over Reko Diq and Sought Relaxation of the 2002 BM Rules

540. On 12 April 2012, the *Express Tribune* reported that, at the request of the Balochistan government, the Export Processing Zone Authority had declared the Reko Diq mining area an export processing zone which would provide favorable tax treatment, relaxed import regulations and other benefits.[465]

541. On 19 April 2012, Balochistan requested the Licensing Authority to relax rule 48(1) of the 2002 BM Rules for the grant of a mining lease over an area of "*99.63 square kilometer*" to the Reko Diq Copper & Gold Project. In its letter to the Licensing Authority, the Government reasoned that "*under rule 48(1) of* [the BM Rules], *the only E/L (Exploration License) holder can submit application for the grant of M/L. under 3(c) [of the BM Rules]*."[466]

542. On 25 April 2012, Balochistan prepared, but did not file, an application for a mining lease for an area identical to the Mining Area that TCCP applied for in its Mining Lease Application of 15 February 2011. [467]

543. Sometime in May or June 2012, Chief Minister Raisani "*instructed [Dr. Mubarakmand] to go ahead with the project*."[468]

544. On 20 May 2012, Balochistan submitted a PC-1 project proposal to Pakistan's Planning Commission regarding a water supply project for its Reko Diq Copper & Gold Project.[469] The project envisaged supplying the water from the "*Baghicha Site*" – the same underground water source that TCC discovered and identified in its Feasibility Study as the water source for TCC's proposed mining operation.[470]

545. On 30 May 2012, Balochistan also applied for surface rights at Reko Diq. The surface rights application covers an area of 20.42 square kilometers overlapping TCC's exclusive Surface Rights Lease and proposed Mining Area.[471]

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[465] **Exhibit CE-142**.
[466] Memorial, ¶ 351. **Exhibit CE-283**, p. 20.
[467] Memorial, ¶ 352. *See* **Exhibits CE-283**, p. 5 and **CE-369**.
[468] Memorial, ¶ 356; Mubarakmand, ¶ 17.
[469] **Exhibit CE-283**, p. 6.
[470] *See* **Exhibit CE-282**.
[471] *Compare* **Exhibit CE-283**, pp. 5, 19 *with* **Exhibit CE-184**, p. 17.

546. In July 2012, employees of MCC's Saindak mine and Balochistan officials reportedly succeeded in entering Reko Diq to take samples from the Western Porphyries and Tanjeel, as well as from other locations within the Reko Diq Mining Area.[472]

547. On 13 August 2012, a meeting chaired by Chief Secretary Babar Yaqoob Fateh Muhammad recommended that, because the Reko Diq Copper & Gold Project was a "*component of Gov*[ernmen]*t of Balochistan*," it did not require a mining lease and should "*be permitted to start physical activities at site, initially at Tanjeel*." The meeting further decided that the "[a]*rea specified in* [the Project's] *mining/exploration applications may not be allotted to any other party*."[473]

2. The Reko Diq Board of Governors Granted Permission to Start Balochistan's Project

548. On 12 September 2012, the Reko Diq Board of Governors met in Islamabad and "*resolved to grant permission for the project to begin operations*" at Tanjeel. Specifically, the Reko Diq Board of Governors decided:

(i) The Reko Diq Copper & Gold Project – now renamed the "*Balochistan Copper Gold Project*" – would not require a mining lease since it was "*an implementation unit of the Government of Balochistan*." Instead, the MMDD would "*initiate a summary for approval of the [Balochistan] Chief Minister*" based on the work and site plan submitted by Balochistan's project.

(ii) The Government of Balochistan "*will grant permission to [the Balochistan Copper Gold Project] to start their operations at the designated sites, including exploration, mining and refining*."

(iii) The 99.63-square kilometer mining area "*may be reserved for the [Balochistan] project for their future activities and that the same may not be allotted to any other agency or organization*."

(iv) The PC-1 proposal and feasibility study for the water project from Baghicha Site would be "*worked out within the next two/three days and finalized expeditiously*."[474]

[472] Memorial, ¶ 358; Livesey IV, ¶121.
[473] Memorial, ¶ 359. **Exhibit CE-283**.
[474] Memorial, ¶ 361. **Exhibit CE-282**.

549. On 24 December 2012, the Licensing Authority reserved the areas of EL-5, EL-6, EL-8, EL-27 and EL-28 in favor of Balochistan Copper Gold Project "*in the national interest*."[475]

3. Dr. Mubarakmand's Work Plan and Timetable

550. Dr. Mubarakmand developed a work plan and a timeline which he submitted as Annex 6 to his witness statement in this proceeding.[476]

551. The following steps have been taken: On 14 October 2012, Balochistan issued a tender notice for "*Core and R.C. Drilling of 3000 meters*" at the Reko Diq site;[477] on 4 November 2012, a convoy of vehicles from the Saindek mine, led by an employee of Balochistan's Reko Diq Copper & Gold Project, traveled to the Reko Diq site and visited several sites within the Mining Area, including Tanjeel and the Western Porphyries;[478] in early January 2013, Balochistan started performing surface civil engineering works at Tanjeel to prepare helicopter landing pads and other site works;[479] on 30 January 2013, the Governor of Balochistan presided over a meeting regarding Balochistan's Reko Diq project at which Dr. Mubarakmand reportedly stated that "[a]*s first phase, excavation work would be carried out on first reserves that contain 2.2 billion of tons of copper and gold worth 104 billion dollar*[s];"[480] and at the 30 January 2013 meeting, the Governor of Balochistan "*directed the authorities concerned to immediately release funds so that work on the project could be started without any delay*."[481]

L. On 12 November 2012, the Pakistan Supreme Court Resumed Hearings on the Constitutional Petitions and the Balochistan High Court Appeal.

552. On 12 November 2012, the Pakistan Supreme Court again resumed hearings on the Constitutional petitions and the Balochistan High Court appeal. These hearings continued on a near-daily basis until 21 December 2012.[482]

553. On 7 January 2013, the Supreme Court issued a short Order declaring the CHEJVA and agreements based on the CHEJVA "*illegal, void and* non est."[483]

554. On 10 May 2013, the Supreme Court rendered the reasons for its Order. They rely on a finding that the conclusion of the CHEJVA by the BDA in 1993 was *ultra vires* and thus

[475] **Exhibit CE-377**.
[476] Mubarakmand, ¶ 21, Annex 6.
[477] Memorial, ¶¶ 366. **Exhibit CE-180**.
[478] Memorial, ¶ 368.
[479] Memorial, ¶ 370.
[480] Memorial, ¶ 372. **Exhibit CE-291**.
[481] Memorial, ¶ 373. **Exhibit CE-291**.
[482] Memorial, ¶ 374.
[483] Memorial, ¶ 374, **Exhibit CE-289**.

void and *non est*; it fell outside the powers granted to State authorities under, *inter alia*, the 1948 State Act and the 1970 BMC Rules which were promulgated pursuant to that statute. In addition, the Supreme Court held that the CHEJVA was invalid because it was opposed to public policy in terms of Section 23 of the Pakistani Contract Act, 1872. Similarly, the "*relaxations*" of the 1970 BMC Rules were not made in accordance with Pakistani law, which requires that such relaxations be granted only once "*hardship*" is established – which it had not been in the present circumstances. The Court found that, as a matter of Pakistani law, the CHEJVA did not confer any rights on BHP, Mincor, Claimant, TCCP, Antofagasta or Barrick. Further, each element of the contractual regime premised on the CHEJVA, including the 2000 Addendum, the 2000 Option Agreement, the 2000 Alliance Agreement and the 2006 Novation Agreement, was also void.[484]

V. POSITIONS OF THE PARTIES

555. The Parties are in disagreement regarding (i) whether Balochistan negotiated, authorized the conclusion of and became a party to the CHEJVA,[485] the 2000 Addendum[486] and the 2006 Novation Agreement;[487] (ii) whether the 1994 Relaxations of the 1970 BMC Rules confirmed that BHP was assured the right to mine;[488] (iii) whether TCCA remained a party to the CHEJVA after the Amalgamation in 2008;[489] (iv) whether the Governments encouraged, then thwarted, TCCA's attempts to negotiate a Mineral Agreement;[490] (v) whether Pakistan and Balochistan officials actively sought out investment from MCC[491] and (vi) whether the Governments assured TCC of their continued commitment to the project, even as they developed and executed a plan to oust TCC from Reko Diq.[492]

A. CLAIMANT'S CONTENTIONS AND RELIEF SOUGHT ON CLAIMANT'S CLAIMS

1. Summary of Claimant's Contentions

556. As stated at paragraph 5 above, Claimant claims that Pakistan violated the Australia-Pakistan Treaty by its denial of a mining lease to TCCP, TCCA's wholly-owned Pakistan subsidiary, and other actions attributable to Pakistan that deprived TCCA of the value of

[484] Counter-Memorial, ¶ 119. **Exhibit RE-18**.
[485] Reply, ¶¶ 32-61.
[486] Reply, ¶¶ 84-97.
[487] Reply, ¶¶ 98-100.
[488] Reply, ¶¶ 62-83.
[489] Reply, ¶¶ 101-121.
[490] Reply, ¶¶ 122-138.
[491] Reply, ¶¶ 139-155.
[492] Reply, ¶¶ 156-195.

its investments. Such alleged actions include, in particular, developing and executing a scheme to take over TCCA's Reko Diq project, denying the Mining Lease Application in pursuit of that scheme and using TCCA's exploration and feasibility work product in its own project, which allegedly amounted to a breach of the fair and equal treatment obligation under Article 3(2), an expropriation of TCCA's investment without compensation in violation of Article 7(1) and an impairment of TCCA's investment in violation of Article 3(3) of the Treaty.

2. Claimant's Request for Relief

557. In its Post-Hearing Brief, Claimant requests an award:[493]

(i) dismissing all of Pakistan's objections to jurisdiction and admissibility;

(ii) declaring that through the measures taken against TCCA's investments, including arbitrarily and unlawfully denying the Mining Lease Application, and developing and executing a plan to take over the Reko Diq project, Pakistan has breached Articles 3(2), 7(1) and 3(3) of the Australia-Pakistan Treaty;

(iii) dismissing all of Pakistan's counterclaims;

(iv) awarding TCCA full compensation for all damages and losses resulting from Pakistan's breaches of the Australia-Pakistan Treaty, including future lost profits, in an amount to be determined in a later phase of this proceeding;

(v) awarding TCCA interest on all sums awarded, in an amount to be determined in a later phase of this proceeding;

(vi) awarding TCCA its costs and expenses of this proceeding, including attorneys' fees, in an amount to be determined in a later phase of this proceeding by such means as the Tribunal may direct; and

(vii) ordering such other and further relief as may be just and appropriate in the circumstances

B. RESPONDENT'S CONTENTIONS AND RELIEF SOUGHT ON CLAIMANT'S CLAIMS AND RESPONDENT'S COUNTERCLAIMS

1. Summary of Respondent's Contentions

558. Apart from raising various jurisdictional and admissibility objections, Respondent submits that there were legitimate reasons for the Licensing Authority to reject the Mining

[493] Claimant's Post-Hearing Brief, ¶ 220, amending Memorial, ¶ 559, Reply, ¶ 505 and Rejoinder on Jurisdiction and Counterclaims, ¶ 72.

Lease Application. In addition, Respondent claims that neither Pakistan nor Balochistan had a plan to "*oust TCCA*" from Reko Diq in order to implement Balochistan's project. Further, Respondent claims that TCCA did not have property rights under Pakistani law. The Supreme Court held that the CHEJVA was illegal, void and *non est*, and furthermore, that even if it were valid, neither the CHEJVA nor the 2002 BM Rules conferred a guaranteed "*right to mine*" Reko Diq on Claimant. Finally, Respondent claims that the information and data arising from the exploration of the area covered by Exploration License EL-5 is Joint Venture Property which is not subject to an exclusivity requirement. Respondent denies that it has taken any actions which constitute a breach of Article 3(2), Article 7(1) and or Article 3(3) of the Treaty.

559. If and to the extent that the Tribunal finds that Claimant had a qualifying investment and upholds the relevant premises of jurisdiction for purposes of the Treaty, Respondent asserts the following counterclaims: (i) Claimant's alleged "*investment*" was not made "*in accordance with* [Pakistan's] *laws and investment policies*" as set out in Article 1(1)(a) of the Treaty; (ii) Claimant breached Clauses 11, 15 and 24.6 of the CHEJVA because it did not even attempt to comply with the contractual pre-conditions set out in the CHEJVA before filing its Mining Lease Application, and because it prepared a "*secret*" Expansion Pre-Feasibility Study; and (iii) Claimant violated rule 29(2)(c)(iii) of the 2002 BM Rules because it failed to complete "*a full feasibility study of the discovered deposits*" in the area covered by Exploration License EL-5, despite the fact that it had undertaken to do so in its application for a second renewal of EL-5.

2. Respondent's Request for Relief

560. In its Post Hearing Brief,[494] Respondent requests the Tribunal to:

(i) decline jurisdiction or declare Claimant's claims inadmissible;

(ii) alternatively, stay these proceedings pending resolution of the ICC arbitration;

(iii) alternatively, to the extent that the Tribunal proceeds to examine the merits of the case, declare that Respondent has not breached the BIT and dismiss Claimant's claims in their entirety;

(iv) alternatively, to the extent that the Tribunal finds that Respondent has breached the BIT, dismiss Claimant's claims for failure to establish causation;

(v) alternatively, uphold Respondent's counterclaims and award damages in a sum to be determined at a later stage in these proceedings; and

[494] Respondent's Post-Hearing Brief, ¶192, maintaining the request for relief stated in the Rejoinder, ¶ 574, amending Counter-Memorial, ¶ 668.

(vi) order Clamant to pay the totality of Respondent's costs and expenses relating to these arbitration proceedings.

561. In respect of its counterclaims, Respondent requests the Tribunal to order that:

(i) Claimant's investment was unlawful and not admitted subject to the laws of Respondent;

(ii) Claimant breached Articles 11, 15 and 24.6 of the CHEJVA;

(iii) Claimant violated Article 29(2)(c)(iii) of the 2002 BM Rules; and

(iv) Claimant must compensate Respondent for the loss suffered by the latter as a result of the former's breaches of Pakistani law, the CHEJVA and 2002 BM Rules on a basis and in a sum to be determined, together with interest, at a later phase of this arbitration.[495]

C. CLAIMANT'S CONTENTIONS AND RELIEF SOUGHT ON RESPONDENT'S COUNTERCLAIMS

1. Summary of Claimant's Contentions

562. Claimant submits that the Treaty does not authorize Respondent to raise counterclaims in ICSID proceedings. In any event, the Tribunal lacks jurisdiction to hear Respondent's non-Treaty counterclaims based on alleged violations of the CHEJVA and the 2002 BM Rules. Claimant notes that Balochistan has raised identical counterclaims in the ICC Proceedings, which Claimant considers to be proper forum for non-Treaty claims. As to Respondent's counterclaims based on the Treaty, Claimant argues that Article 1(1)(a) contains only a definition and does not give rise to any obligations of the investor. In Claimant's view, Respondent's counterclaims "*represent the flipside of* [its] *defences to* [TCCA's] *claims in this arbitration*"; therefore, Claimant will defeat the counterclaims if it succeeds in defeating those defenses.

2. Claimant's Relief Sought

563. In its Post-Hearing Brief, Claimant requests the Tribunal to dismiss all of Respondent's counterclaims.[496]

[495] Counter-Memorial, ¶ 666.
[496] Claimant's Post-Hearing Brief, ¶ 220.

VI. THE TRIBUNAL'S REASONING

564. By way of introduction, the Tribunal wishes to emphasize that it has carefully reviewed all of the arguments and evidence presented by the Parties during the course of these proceedings. Although the Tribunal may not address all such arguments and evidence in full detail in its reasoning below, the Tribunal has nevertheless considered and taken them into account in arriving at its decision.

565. The Tribunal's reasoning is structured as follows: As a first step, the Tribunal will assess whether the general jurisdictional requirements are met and decide on Respondent's further objections to jurisdiction and admissibility. In case the Tribunal's jurisdiction is established and Claimant's claims are admissible, the Tribunal will, as a second step, examine whether and to what extent the conduct that Claimant relies on is attributable to Respondent. As a third step, the Tribunal will analyze whether Respondent in fact breached Articles 3(2), 7(1) and 3(3) of the Treaty.

A. JURISDICTION AND ADMISSIBILITY

1. General Jurisdictional Requirements

566. It is undisputed between the Parties that the jurisdiction of the Tribunal is based on Article 13 of the Treaty and Article 25(1) of the ICSID Convention.[497]

567. Article 13 of the Treaty provides in relevant part:

> "*1. In the event of a dispute between a Party and an investor of the other Party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.*
>
> *2. If the dispute in question cannot be resolved through consultations and negotiations, either party to the dispute may:*
>
> . . .
>
> *(b) if both Parties are at that time party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ('the Convention'), refer the dispute to the International Centre for Settlement of Investment Disputes ('the Centre') for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention*."[498]

[497] Memorial, ¶ 377; Counter-Memorial, ¶ 286. *Cf.* Rejoinder, ¶ 354.
[498] **Exhibit CE-4**, Art. 13.

568. Article 25 of the ICSID Convention provides in relevant part:

> "*(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*
>
> *(2)* 'National of another Contracting State' *means:*
>
> > *(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and*
> >
> > *(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*"

569. Article 25(1) of the ICSID Convention sets out four requirements for the Tribunal to have jurisdiction: (a) the existence of a legal dispute; (b) a dispute arising directly out of an "*investment*;" (c) a dispute between a Contracting State and a national of another Contracting State; and (d) the existence of the written consent of both Parties.

a. Existence of a Legal Dispute

570. Claimant submits,[499] and Respondent does not contest, that there is a legal dispute between the Parties relating to Claimant's alleged investment in Pakistan. The existence of a legal dispute within the meaning of Article 25(1) of the ICSID Convention is thus common ground.

[499] Memorial, ¶ 382.

b. Dispute Arising Directly Out of an Investment

571. The Tribunal notes that Article 25 of the ICSID Convention does not define the term "*investment*"; however, it is undisputed between the Parties that the relevant definition can be found in Article 1(1) of the Treaty,[500] which reads in relevant part:

> *"1. For the purposes of this Agreement:*
>
> *(a)* 'investment' *means every kind of asset, owned or controlled by investors of one Party and admitted by the other Party subject to its law and investment policies applicable from time to time and includes:*
>
> *(i) tangible and intangible property, including rights such as mortgages, liens and other pledges,*
>
> *(ii) shares, stocks, bonds and debentures and any other form of participation in a company,*
>
> *(iii) a loan or other claim to money or a claim to performance having economic value,*
>
> *(iv) intellectual and industrial property rights, including rights with respect to copyright, patents, trademarks, trade names, industrial designs, trade secrets, knowhow and goodwill,*
>
> *(v) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to engage in agriculture, forestry, fisheries and animal husbandry, to search for, extract or exploit natural resources and to manufacture, use and sell products, and*
>
> (vi) *activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange."*[501]

572. Article 1(3) of the Treaty provides:

> "*For the purposes of this Agreement, a natural person or company shall be regarded as controlling a company or an investment if the person or company has a substantial interest in the company or the investment.*"

[500] Memorial, ¶ 379; Reply, ¶ 250; Counter-Memorial, ¶ 286.
[501] **Exhibit CE-4**, Art. 1(1)(a).

573. In addition, Article 2(3) of the Treaty provides:

> "*A company duly organised under the law of a Party shall not be treated as an investor of the other Party, but any investments in that company by investors of that other Party shall be protected by this Agreement.*"[502]

574. The Parties are in dispute as to whether TCCA had a qualifying investment under the Treaty, in particular: (i) whether TCCA had an "*asset*" in Pakistan; (ii) whether TCCA owned or controlled its investment; and (iii) whether the investment was "*admitted by* [Pakistan] *subject to its law and investment policies*."[503] Respondent further contests that the dispute "*relates to*" an investment within the meaning of Article 13 of the Treaty.[504]

i. Summary of Claimant's Position

575. Claimant claims that TCCA has made substantial "*investments*" within the meaning of Article 1(1)(a) of the Treaty, which include, *inter alia*, capital investments for exploration and feasibility activities in the Reko Diq project in an amount that exceeded US$ 240 million. Claimant further states that the Government of Balochistan expressly agreed in Clause 15.4.7 of the CHEJVA that "*the transactions to which this Agreement relates constitute an investment within the meaning of Article 25(1) of the ICSID Convention.*"[505]

(a) TCCA Had "*Assets*" and Related "*Activities*" in Pakistan

576. Claimant submits that the Treaty defines the term "*investment*" to mean "*every kind of asset,*" which is recognized as "*possibly the broadest*" phrase used in treaties and includes "*everything of economic value, virtually without limitation.*"[506] Claimant further argues that the term is not confined to the list of investments in Article 1(1)(a), which is "*merely*" illustrative of the kinds of investments that qualify for protection, as made clear by the Treaty's use of the word "*including.*"[507]

577. Claimant submits that TCCA's investment was "*the mining business it developed in Pakistan,*" which business was comprised of a "*bundle of other assets, including but by no means limited to TCCA's interest in the CHEJVA, TCCP, EL-5 and the right to convert EL-5 into a mining lease so as to mine Reko Diq.*"[508] Claimant claims that an investment

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[502] **Exhibit CE-4**, Art. 2(3).
[503] *Cf.* Reply, ¶ 248; Counter-Memorial, ¶ 294; Respondent's Rejoinder, ¶ 275.
[504] Rejoinder, ¶¶ 354, 355.
[505] Memorial, ¶ 381. **Exhibit CE-1**, Clause 15.4.7.
[506] Reply, ¶¶ 250, 252. *Cf.* Claimant's Rejoinder, ¶ 18.
[507] Reply, ¶ 250.
[508] Reply, ¶ 251.

in the development of a host State's natural resources is the "*quintessential example*" of an activity protected by the Treaty.[509] Claimant also notes that the Federal Board of Investment repeatedly acknowledged in official communications that TCCA's efforts and expenditures were investments.[510]

578. According to Claimant, TCCA's assets and activities in Pakistan included virtually all of the items enumerated on the list in Article 1(1)(a) of the Treaty, *inter alia*, "*shares*" in TCCP; a "*form of participation*" in the Chagai Hills Joint Venture; a "*claim to performance* [of the CHEJVA and other contracts] *having economic value*"; "*intellectual and industrial property rights*" in the Feasibility Study and other work; "*trade secrets, know-how and goodwill*" acquired in the course of the business; "*business concessions*" including rights "*to search for, extract or exploit natural resources*" such as Exploration License EL-5; and many varied "*activities associated with investments*," such as leasing office space, purchasing vehicles and equipment and hiring employees.[511]

579. Referring to Pakistan's argument that TCCA did not have any "*assets*" but only "*purported rights, which do not even exist*," Claimant argues that Pakistan conflates the analysis of the Tribunal's jurisdiction with the decision on the merits, while in fact the Tribunal should determine its jurisdiction to hear Claimant's claims "*assuming* pro tem *that they may be sustained on the facts*."[512] Claimant argues that Pakistan's merits arguments about the alleged invalidity of the CHEJVA, Exploration License EL-5 and other instruments are therefore irrelevant to the Tribunal's analysis of its jurisdiction.[513]

580. In any event, Claimant submits that its investment included, but was not limited to, its rights under the CHEJVA, its ownership of TCCP and its investment of approximately US$ 264,578,000 in the Reko Diq Project, but also numerous tangible and intangible assets which it had acquired in order to be able to run a business with over 500 employees and independent contractors in Pakistan.[514] In addition, Claimant argues that TCCP had a right to a mining lease even in the absence of the CHEJVA, *i.e.*, under the 2002 BM Rules.[515]

581. In addition, Claimant asserts that the CHEJVA and related agreements are valid and binding and refers to the ICC Rulings in which the ICC Tribunal held that "[t]*he CHEJVA,*

[509] Reply, ¶¶ 251, 253.
[510] Reply, ¶ 260 referring to **Exhibits CE-394**, **CE-327**, **CE-389**, **CE-346** and **CE-351**. *Cf.* Claimant's Post-Hearing Brief, ¶ 17.
[511] Reply, ¶ 255.
[512] Reply, ¶¶ 265, 266.
[513] Reply, ¶ 268.
[514] Claimant's Rejoinder, ¶¶ 4, 19-20.
[515] Claimant's Rejoinder, ¶ 4.

the 2000 Addendum and the 2006 Novation Agreement are valid" and binding on Balochistan.[516]

582. Claimant further contends that, regardless of its validity under Pakistani law, the CHEJVA is in any event part of Claimant's investment as Balochistan's conduct over the years led TCCA to believe, and thereby created a legitimate expectation, that the CHEJVA was valid and would be followed.[517] In Claimant's view, the fact that Balochistan and Pakistan subsequently reversed course and, following Balochistan's request, the Supreme Court ultimately declared the CHEJVA and related agreements void is relevant only insofar as this conduct in itself amounts to part of Pakistan's denial of fair and equitable treatment of Claimant's investment.[518]

583. Finally, Claimant argues that the Supreme Court's decision cannot deprive the Tribunal of its jurisdiction to determine the facts relevant to the Treaty claim, to interpret the Treaty provisions and to apply the Treaty to the facts found by the Tribunal, as the Constitutional questions before the Supreme Court were "*fundamentally distinct*" from the Treaty questions before this Tribunal and the Treaty was specifically designed to insulate investors from the jurisdiction of the courts of the host State.[519]

(b) TCCA Owned and Controlled Its Investment

584. Claimant argues that even if, as alleged by Respondent, all of TCCA's assets underlying its claims had been transferred to TCCP in the Amalgamation transaction in 2008, this would not have any effect on either TCCA's standing or this Tribunal's jurisdiction. Claimant asserts that it is immaterial whether the assets were held directly by TCCA or indirectly through its wholly-owned subsidiary TCCP, given that Article 2(3) of the Treaty extends the protection of investments to those held indirectly through ownership of a locally incorporated company.[520]

585. Claimant further contests Pakistan's assertion that TCCA "*transferred all rights, assets and obligations,*" including the CHEJVA, to TCCP by means of the Amalgamation. Claimant submits that the Amalgamation was merely a merger of TCCA's Pakistan branch into TCCP and notes that the order by which the Islamabad High Court endorsed the Amalgamation defines the petitioners as TCCP and the Pakistan branch of TCCA.[521] Claimant argues that, while the Amalgamation transferred all contracts "*entered into by*

[516] Claimant's Post-Hearing Brief, ¶ 12 referring to ICC Rulings, ¶ 429. **Exhibit RE-169**.
[517] Claimant's Rejoinder, ¶ 36.
[518] Claimant's Rejoinder, ¶¶ 37-38.
[519] Claimant's Rejoinder, ¶¶ 40, 42.
[520] Reply, ¶ 270.
[521] Reply, ¶¶ 271-274; **Exhibit RE-61**.

or subsisting in favour of" the Pakistan branch, this did not include the CHEJVA which was "*entered into by and subsisted in favour of*" TCCA.[522]

586. According to Claimant, at the time of the Amalgamation, TCCP and Balochistan intended that Balochistan would acquire 25% of TCCP's shares, with TCCA owning the remaining 75%. Claimant argues that it would not have made any sense for TCCA to transfer its rights under the CHEJVA to a company in which its CHEJVA counterparty held 25% of the shares.[523]

(c) TCCA's Investment Was Duly "*Admitted*" by Pakistan

587. Claimant submits that Article 1 of the Treaty does not require that investments be made "*in accordance with*" Pakistani law in general, but rather provides that to qualify for protection under the terms of the Treaty, an investment must have been "*admitted by* [Pakistan] *subject to its law and investment policies applicable from time to time*."[524]

588. Claimant submits that the term "*law*" in admission clauses refers to the host State's investment laws in particular, rather than its general laws. Claimant quotes the tribunal's explanation in *Saba Fakes v. Turkey*:

> *"*[I]*t would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation . . .* [U]*nless specifically stated in the investment treaty under consideration, a host State should not be in a position to rely on its domestic legislation beyond the sphere of investment regime to escape its international undertakings vis-à-vis investments made in its territory."*[525]

589. Claimant notes that the Supreme Court decision did not consider Pakistan's investment regime.[526]

590. Claimant further claims that "*the critical time period for determining an investment's legality*" for the purposes of an admission clause is "*the time the investment was made*" and argues that the Supreme Court judgment of May 2013 could not have had any relevance to the legality of TCCA's investments in Pakistan at the time they were "*admitted*," given that it was rendered 20 years after the CHEJVA was signed, 13 years

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[522] Reply, ¶ 275.
[523] Reply, ¶ 277.
[524] Reply, ¶ 281; Claimant's Rejoinder, ¶ 25.
[525] Reply, ¶ 284. *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award of 14 July 2010. ("*Saba Fakes v. Turkey*") [CA-122].
[526] Reply, ¶ 284.

after TCCA first began exploration work at Reko Diq, 7 years after TCCA became a party to the Joint Venture, and 3 years after the Feasibility Study was completed.[527] In Claimant's view, Pakistan cannot retroactively deprive investors of their rights by declaring their contracts void *ab initio*.[528]

591. Claimant further refers to the tribunal in *Desert Line Projects v. Yemen,* which observed that admission clauses are "*intended to ensure the legality of the investment by excluding investments made in breach of fundamental principles of the host State's law, e.g., by fraudulent misrepresentations or the dissimulation of true ownership*."[529] Claimant argues that the Supreme Court judgment does not establish a breach of any "*fundamental principles*," as its grounds for voiding the CHEJVA do not meet this standard.[530]

592. Claimant contends that there is no requirement that investments be formally "*admitted*," but even if this were the case, Claimant refers to numerous occasions on which the competent Pakistani officials "*repeatedly granted TCCA permission to operate and invest in Pakistan.*"[531] In Claimant's view, despite its finding as regards the CHEJVA and related agreements, the Supreme Court never invalidated such permission or the investment as a whole.[532] In particular, Claimant emphasizes that the Supreme Court did not find that the approvals were invalidated by fraud, corruption or other "*fundamental misconduct*."[533]

593. In Claimant's view, the Tribunal is in any event not bound to accept the Supreme Court's conclusions on the legality of the CHEJVA and subsequent agreements because such an approach would give the State unilateral power to redefine the scope and content of, and even to withdraw, its consent, once a dispute arises out of an investment.[534] Claimant emphasizes that it is not asking that the Tribunal act as a court of appeal, but rather to exercise its exclusive competence to rule on its own jurisdiction.[535]

594. Claimant further argues that the Supreme Court's judgment would not even have *res judicata* effect in relation to any alleged breaches of the CHEJVA, as the judgment did not resolve a bilateral contractual dispute between the parties to the CHEJVA, but rather public interest petitions brought by third parties, under the Pakistan Constitution, seeking relief for alleged misconduct by the Government. According to Claimant, the judgment

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[527] Reply, ¶ 282.
[528] Claimant's Rejoinder, ¶ 6; *cf.* Claimant's Post-Hearing Brief, ¶¶ 15, 16.
[529] Reply, ¶ 283. *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008. ("*Desert Line Projects v. Yemen*") [CA-115].
[530] Reply, ¶ 283.
[531] Claimant's Rejoinder, ¶¶ 5, 27.
[532] Claimant's Rejoinder, ¶ 5.
[533] Claimant's Rejoinder, ¶ 29.
[534] Reply, ¶ 285.
[535] Reply, ¶ 288.

would therefore not have *res judicata* effect even in a commercial dispute under Pakistani law. [536]

595. Claimant also refers to the ICC Rulings in which the ICC Tribunal ruled that any authority of the Supreme Court judgment would be limited to "*findings of law*," while "[t]*he application of the law to the facts is for the Tribunal*."[537] In Claimant's view, the judgment does not contain any rules of law that, when applied to the facts presented in this arbitration, establish the invalidity of the CHEJVA.[538]

596. In addition, Claimant submits that Pakistan cannot be allowed to rely on its own breaches of Pakistani law, in particular taking into account that they are "*technical missteps purportedly discovered twenty years later*."[539] Claimant refers to the tribunal in *Kardassopoulos v. Georgia,* which held that admission clauses do "*not allow a State to preclude an investor from seeking protection under the BIT on the ground that its* own actions *are illegal under its own laws.*"[540]

597. Claimant further contests Respondent's submission that Article 1(1)(a) of the Treaty provides for discretion of the State to admit investments, arguing that this interpretation is unsupported by the text of the Treaty provision and would exceed its scope.[541]

598. Finally, Claimant claims that Respondent cannot credibly argue that this dispute does not "*relate to*" an investment. Claimant refers in particular to its shareholding in TCCP and notes that TCCP was created specifically to carry out exploration and feasibility activities and, eventually, also mining operations at Reko Diq and it was TCCP's Mining Lease Application that was rejected by the Licensing Authority.[542]

ii. Summary of Respondent's Position

599. Respondent submits that Claimant is unable to show an "*investment*" that could meet the requirements of Article 1(1)(a) of the Treaty, namely (a) an asset owned or controlled by an Australian investor; and (b) an asset admitted subject to Pakistani law and policies applicable from time to time.[543] According to Respondent, it thus follows that the dispute

[536] Reply, ¶ 289.
[537] Claimant's Post-Hearing Brief, ¶ 14 referring to ICC Rulings, ¶ 181. **Exhibit RE-169**.
[538] Claimant's Post-Hearing Brief, ¶ 14.
[539] Reply, ¶ 290.
[540] Reply, ¶ 290; Claimant's Post-Hearing Brief, ¶ 18. *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction on Jurisdiction of 6 July 2007, ("*Kardassopoulos v. Georgia"*) [CA-134], ¶ 182 (emphasis in original).
[541] Reply, ¶¶ 293-294.
[542] Claimant's Post-Hearing Brief, ¶ 13.
[543] Counter-Memorial, ¶ 294; Respondent's Rejoinder, ¶ 275.

submitted by Claimant does not "*relate to*" an "*investment*," which also results in a lack of jurisdiction under Article 13 of the Treaty.[544]

600. Respondent contends that the question whether Claimant has an investment under the ICSID Convention therefore does not even arise, so Claimant's reliance on Article 15.4.7 of the CHEJVA, quoted at paragraph 575 above, is misplaced.[545]

(a) Claimant Does Not Have an "*Asset*" within the Meaning of Article 1(1)(a)

601. Respondent submits that the first limb of the definition of "*investment*" is that the purported rights must constitute an "*asset*"; in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties (the "**Vienna Convention**"), both terms must be given their ordinary meaning read in their context.[546]

602. Respondent refers to the Oxford English Dictionary definition of an "*asset*" as:

> *"A financial contract or physical object with value that is owned by an individual, company, or sovereign, which can be used to generate additional value or provide liquidity."*[547]

603. In Respondent's view, the correctness of this ordinary meaning is confirmed by reading the term "*asset*" in the context of Article 1(1)(a) as a whole, as each of the enumerated examples of assets in sub-paragraphs (i) to (iv) relates to rights, entitlements or claims having an economic value.[548] Respondent concludes that, by definition, rights that do not exist cannot have "*economic value.*"[549]

604. Respondent refers to the tribunal in *Nagel v. Czech Republic*, which held that the terms "*asset*" and "*investment*" refer to rights having a "*financial value*" to their holder and stated: "*This creates a link with domestic law, since it is to a large extent the rules of domestic law that determine whether or not there is a financial value.*" The tribunal therefore held that the terms under the treaty "*cannot be understood independently of the rights that may exist under Czech law.*"[550] Respondent also refers to the tribunal's

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[544] Respondent's Rejoinder, ¶ 276.
[545] Counter-Memorial, ¶ 354.
[546] Respondent's Rejoinder, ¶ 288. Vienna Convention [CA-141], Article 31(1).
[547] Respondent's Rejoinder, ¶ 289.
[548] Respondent's Rejoinder, ¶ 290.
[549] Respondent's Rejoinder, ¶ 291.
[550] Respondent's Rejoinder, ¶¶ 293-294. *William Nagel v. Czech Republic*, SCC Case No.049/2002, Award of 9 September 2003 ("*Nagel v. Czech Republic*") [RLA-104].

statement in *EnCana v. Ecuador* that "*the rights affected must exist under the law which creates them, in this case, the law of Ecuador*."[551]

605. In Respondent's view, the source of all the rights that Claimant purports to have – including those arising under the 2002 BM Rules, exploration licenses, the Surface Rights Lease and the comprehensive plan to mine Reko Diq – is the CHEJVA, and in particular its Article 11.8.2.[552]

606. Respondent argues that, regardless of whether the CHEJVA was valid, the right to a mining lease under Article 11.8.2 does not constitute an "*investment*" because this right was subject to the fulfilment of the conditions precedent set out in Articles 11.4.2 and 11.6, which Claimant failed to satisfy before Exploration License EL-5 expired on 19 February 2011. In Respondent's view, the right therefore never came into existence and thus cannot qualify as an investment under the Treaty.[553]

607. With regard to Claimant's purported rights under the 2002 BM Rules, Respondent asserts that Claimant was not the holder of Exploration License EL-5 (and neither was TCCP) and thus had no standing to apply for a mining lease pursuant to rule 48; rather, the 2002 BM Rules only recognize the unincorporated Joint Venture as exploration license holder, as was made clear by the Licensing Authority in its Notice of Intent to Reject.[554]

608. As regards Claimant's plan to mine Reko Diq and the related expenditures, Respondent asserts that TCCA did not perform any of the activities on its own and claims that they were undertaken by the Joint Venture pursuant to the terms of the CHEJVA. Respondent further argues that Claimant's expenditures cannot qualify as an "*asset*," as they were made on the express understanding that the BDA could withdraw from the Joint Venture; thus, they can only be categorized as pre-investment expenditure.[555] Respondent also refers to Article 1(1)(a)(v) of the Treaty pursuant to which the right to explore must be distinguished from the right to extract or exploit. Respondent argues that there was no interference with the right to explore and Claimant never had a right to extract or exploit, but only a right to apply for a license subject to the "*ordinary, regular and established procedures.*"[556]

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[551] Respondent's Rejoinder, ¶ 295. *EnCana Corporation v. Republic of Ecuador*, LCIA Case UN3481, Award of 3 February 2006 ("*EnCana v. Ecuador*") [RLA-71].
[552] Counter-Memorial, ¶ 299.
[553] Counter-Memorial, ¶ 320.
[554] Counter-Memorial, ¶¶ 321-331.
[555] Counter-Memorial, ¶¶ 333-345.
[556] Counter-Memorial, ¶¶ 348, 351.

609. Respondent claims that, in order to establish the economic value of its alleged contract-based rights, Claimant must therefore prove that they exist under Pakistani law as the governing law of both the 2006 Novation Agreement and the CHEJVA.[557] Respondent submits that, similarly, Exploration License EL-5 can only have been created by Pakistani law, as confirmed by Clause 9 of the 2006 Novation Agreement pursuant to which the transfer of EL-5 was governed by Pakistani law.[558] Respondent argues that Claimant disregards this fact when it claims that Pakistani law is irrelevant because "*this is not a contract case.*"[559]

610. Respondent contests Claimant's submission that the Tribunal should determine its jurisdiction "*assuming* pro tem *that* [Claimant's account of the facts] *may be sustained*," but argues that the Tribunal, now having the benefit of the Parties' full pleadings, must make a dispositive ruling on the facts that are relevant to its jurisdiction.[560]

611. According to Respondent, the Tribunal "*need look no further*" than the judgment of the Supreme Court of Pakistan, which was seized under Clause 11 of the 2006 Novation Agreement and concluded that the 2006 Novation Agreement is void *ab initio*, as a consequence of which Claimant never became a party to the CHEJVA. Respondent further refers to the Supreme Court's finding that the CHEJVA Agreements were void and claims that, as a result, the Joint Venture ceased to exist and could not be the holder of any rights in Exploration License EL-5.[561]

612. According to Respondent, the Supreme Court's judgment constitutes a binding statement of Pakistani law; Respondent refers to Article 198 of the Pakistani Constitution which provides:

> ***"Decisions of Supreme Court binding on other Courts***
>
> *Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan."*[562]

613. In Respondent's view, the Tribunal must defer to the conclusion of the Supreme Court that the CHEJVA Agreements and Exploration License EL-5 are invalid, void *ab initio* and illegal, as international arbitral tribunals lack competence to act as appellate bodies

[557] Respondent's Rejoinder, ¶¶ 296-298.
[558] Respondent's Rejoinder, ¶ 299.
[559] Respondent's Rejoinder, ¶ 301.
[560] Respondent's Rejoinder, ¶ 272.
[561] Respondent's Rejoinder, ¶ 305.
[562] Respondent's Rejoinder, ¶¶ 307, 309.

when it comes to the interpretation or application of domestic law.[563] Given that Claimant's purported contractual rights as well as its alleged right under Exploration License EL-5 thus did not exist, none of them can constitute an "*asset*" within the meaning of Article 1(1)(a).[564]

614. In relation to the ICC Rulings, Respondent submits that the Tribunal is required to determine for itself whether Claimant has satisfied all of the jurisdictional conditions under the Treaty and argues that the ICC Rulings do not detract from Claimant's failure to meet those requirements. In addition, Respondent submits that the ICC Rulings do not bind this Tribunal or Respondent, as the latter was not party to the ICC Proceedings.[565]

615. Respondent maintains that the relevant principles of Pakistani law are set out in the judgment of the Supreme Court as the final *arbiter* of Pakistani law and claims that, although the ICC Tribunal found that it must not second-guess the Supreme Court's findings of Pakistani law, it failed to adhere to its own statement of principle.[566] To the extent that, contrary to Respondent's position, this Tribunal considers the ICC Rulings relevant, it should bear in mind that the ICC Tribunal failed to apply the Supreme Court's first critical ruling under section 23 of the Contract Act 1872, namely that the conclusion of contracts such as the CHEJVA and the 2006 Novation Agreement must be transparent and competitive.[567] Respondent contends that it is common ground that such transparency and competition were not observed when the CHEJVA and the 2006 Novation Agreement were concluded; as the ICC Tribunal simply failed to address this issue, its conclusion that the contracts are valid is "*unsound*" and "*incorrect*" as a matter of Pakistani law.[568]

(b) The Alleged Assets Are Not Owned or Controlled by Claimant

616. Respondent claims that the alleged assets are not "*owned or controlled*" by Claimant, but rather belong to TCCP to whom Claimant transferred all of its rights, assets and obligations pursuant to the Amalgamation. Respondent asserts that in the order by which it approved the Scheme of Arrangement, the Islamabad High Court referred to TCCA and

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[563] Respondent's Rejoinder, ¶ 309, 311-312; *cf.* Counter-Memorial, ¶¶ 300-302.
[564] Respondent's Rejoinder, ¶ 308.
[565] Respondent's Post-Hearing Brief, ¶¶ 18-20.
[566] Respondent's Post-Hearing Brief, ¶¶ 19, 21, 23-24.The ICC Tribunal had found that: "*The real issue for this Tribunal to determine is what the applicable Pakistani law is. … **[I]f there is an issue of Pakistani law for determination in the arbitration, and there is a decision of the Supreme Court which is relevant, the Tribunal will treat that decision as an authoritative statement of the law**. But its authority only extends to findings which are necessary to the decision, and only to findings of law.*" ICC Rulings, ¶¶ 180-181, **Exhibit RE-169** (emphasis added by Respondent).
[567] Respondent's Post-Hearing Brief, ¶ 24.
[568] Respondent's Post-Hearing Brief, ¶¶ 25, 35.

TCCP as the participants in the Amalgamation. In addition, Respondent notes that it was TCCP who filed the Mining Lease Application.[569]

617. Respondent refers to Article 13(3)(c) of the Treaty which provides that:

> *"a company which is constituted or incorporated under the law in force in the territory of one Party and in which before the dispute arises the majority of the shares are owned by investors of the other Party shall, in accordance with Article 25(2)(b) of the Convention, be treated for the purposes of the Convention as a company of the other Party."*[570]

618. Respondent claims that the Treaty "*draws a bright line*" between investors and locally incorporated companies in which they hold the majority of the shares and argues that Claimant thus has no standing to bring a claim that belongs to TCCP.[571]

(c) The Alleged Assets Were Not Admitted "*Subject to* [the] *Laws and Investment Policies*" of Pakistan

619. Respondent submits that even if Claimant establishes the existence of an "*asset*," the second limb of the definition of "*investment*" under Article 1(1)(a) requires that the asset be ***"admitted by the other Party subject to its laws and investment policies*** *applicable from time to time."*[572]

620. Respondent submits that such clauses are commonly referred to as "*legality requirements*" and notes that, pursuant to Article 31 of the Vienna Convention, Article 1(1)(a) must be interpreted in good faith according to the ordinary meaning of the text in light of the BIT's object and purpose.[573]

621. According to Respondent, the legality requirement in Article 1(1)(a) of the BIT must be read as imposing an "*absolute requirement*" that Claimant's assets must have been legal at the time of their "*admission*" and must have been created or acquired in compliance with the entirety of the "*laws*" and the "*investment policies*" of Pakistan.[574]

622. Respondent submits that the ordinary meaning of the term "*laws*" is confirmed by the BIT's object and purpose, as recognized in its Preamble:

> "*RECOGNISING the importance of promoting the flow of capital for economic activity and development and aware of its role in expanding*

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[569] Counter-Memorial, ¶¶ 406-408.
[570] Counter-Memorial, ¶ 409. **Exhibit CE-4**, Art. 13(3)(c).
[571] Counter-Memorial, ¶ 410.
[572] Respondent's Rejoinder, ¶ 320 (emphasis added by Respondent).
[573] Respondent's Rejoinder, ¶¶ 321-323.
[574] Respondent's Rejoinder, ¶¶ 325, 327-328.

> *economic relations and technical co-operation between them, particularly with respect to investment by investors of one Party in the territory of the other Party.*
>
> . . .
>
> *ACKNOWLEDGING that investments of investors of one Party in the territory of the other Party would be made within the framework of the laws of that other Party.*"[575]

623. Respondent claims that the object and purpose of the Treaty is not the promotion and protection of investments *per se*, but only within the framework of the host State's laws and investment policies, in order to aid the development of the domestic economy.[576] Respondent argues that the contracting parties incorporated the legality requirement in the definition of "*investment*" in order to "*allay the important public policy concern that investments be made within the confines of the host State's domestic legal framework.*"[577]

624. Respondent argues that, in this case, the Supreme Court has already determined – binding as a matter of Pakistani law – that Claimant's alleged assets were illegal, void and *non est* from their inception and claims that the Tribunal must apply this judgment.[578] In Respondent's view, the judgment amounted to a declaration of what had always been the position under Pakistani law at all relevant times; therefore, the judgment did not "*retrospectively affect*" the admission of the alleged investment.[579]

625. With regard to Claimant's allegation that only "*investment laws*" are referred to in Article 1(1)(a) of the Treaty, Respondent claims that the tribunal in *Saba Fakes v. Turkey*, which Claimant relies on, was considering a different treaty which did not reflect the legality requirement in its preamble. According to Respondent, the tribunal also held in that case that there had been no investment at all, so the question of legality did not arise and the section quoted by Claimant was only an *obiter* remark.[580]

626. In relation to Claimant's position that only "*fundamental principles*" are relevant in the context of the admission requirement, Respondent refers to Claimant's reliance on the case of *Desert Line v. Yemen* and argues that the tribunal in that case had to consider a provision with different wording. In any event, Respondent submits that this limitation was explicitly rejected by the *Quiboras v. Bolivia* tribunal, stating: "*The interpretation of*

[575] Respondent's Rejoinder, ¶¶ 330-331.
[576] Respondent's Rejoinder, ¶ 332.
[577] Respondent's Rejoinder, ¶ 333.
[578] Respondent's Rejoinder, ¶ 335; Counter-Memorial, ¶ 305.
[579] Respondent's Post-Hearing Brief, ¶¶ 30-31.
[580] Respondent's Rejoinder, ¶ 341.

the Claimants [is] *too narrow* [and] *goes beyond the terms of the BIT, in an attempt to further the investor's protection without due regard for the State's interest.*"[581]

627. Respondent notes that, even if there was a "*fundamental principles*" qualification, the Supreme Court found that the CHEJVA Agreements were unlawful and void *ab initio* because they were contrary to public policy; in Respondent's view, sections 20 and 23 of the Contract Act 1872 embody "*fundamental principles*" of Pakistani law.[582]

628. With regard to Claimant's argument that a State may not rely upon its own wrongdoing, Respondent claims that there is no indication that the legality requirement applies only to the investor's own illegal conduct. Respondent notes that in the case of *Kardassopoulos v. Georgia* the clause that Claimant relies on in this regard expressly refers to the investor's conduct, while Article 1(1)(a) of the Australia-Pakistan Treaty does not.[583] Respondent argues that the tribunal in that case even stated that the ordinary meaning of the clause included a reference to Georgian contract law, but held that the particular object and purpose of the Greece-Georgia BIT, which the preamble set out to be broad protection for investors and investments,[584] would be frustrated if the State were allowed to rely on the illegality of its own actions under its own laws. Respondent emphasizes that that the object and purpose of the Treaty in the present case is very different and expressly refers to the legality requirement.[585]

629. According to Respondent, Claimant's attempt to narrow the scope of the legality requirement in Article 1(1)(a) is contrary to the ordinary meaning and the object and purpose of the Treaty; thus, Claimant has not satisfied the legality requirement, with the result that the Tribunal lacks jurisdiction.[586]

630. Finally, Respondent argues that, due to fact that none of Claimant's alleged assets meet the definition of "*investment*" in Article 1(1)(a), Claimant also failed to show that the dispute "*relates to*" an "*investment*." In addition, Respondent contends that, even if,

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[581] Respondent's Rejoinder, ¶¶ 343-344.
[582] Respondent's Rejoinder, ¶ 346.
[583] Respondent's Rejoinder, ¶¶ 347-349. Article 12 of the Greece-Georgia BIT that Respondent refers to provides: "*This Agreement shall also apply to investments made prior to its entry into force by investors of either Contracting Party in the territory of the other Contracting Party, consistent with the latter's legislation.*" *Kardassopoulos v. Georgia* [CA-134].
[584] The preamble of the Greece-Georgia BIT provides:
"*HAVING as their objective to create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party. RECOGNIZING that the promotion and protection of investments, on the basis of this Agreement, will stimulate the initiative in this field*." *Kardassopoulos v. Georgia* [CA-134].
[585] Respondent's Rejoinder, ¶ 352.
[586] Respondent's Rejoinder, ¶ 336.

contrary to the Respondent's case, Claimant did have an "*investment*," it has failed to prove the necessary link between such investment and the dispute it has submitted to this Tribunal.[587] Therefore, the Tribunal also lacks jurisdiction under Article 13 of the Treaty.[588]

iii. The Tribunal's Analysis

631. Article 25(1) of the ICSID Convention requires that the legal dispute "*aris*[es] *directly out of an investment*." The disagreement between the Parties as to whether Claimant had an "*investment*" within the meaning of Article 1(1)(a) of the Treaty is divided into three sub-questions: (i) whether Claimant had an "*asset*"; (ii) whether such asset was "*owned or controlled*" by TCCA; and (iii) whether the asset was "*admitted by* [Pakistan] *subject to its law and investment policies applicable from time to time*." In addition, Respondent contests that the dispute "*relates to*" an investment under Article 13 of the Treaty.

632. As to the first question whether Claimant had an "*asset*," the Tribunal is of the view that Claimant's activities in Pakistan were primarily based on two pillars: (i) TCCA's own direct 75% interest in the CHEJVA and the Joint Venture that was thereby established; and (ii) its 100% interest in its Pakistani subsidiary TCCP, which was established for the exclusive purpose of carrying out Claimant's activities in Pakistan. Through TCCP, Claimant indirectly held all further rights in the Reko Diq Project that were not held by the Joint Venture.

633. The Tribunal considers that both pillars constitute "*assets*" within the meaning of Article 1(1)(a) of the Treaty. While the enumeration in this provision is not exhaustive ("*includes*"), the Tribunal does not have to go beyond the list in the present case. Claimant's interest in the CHEJVA, the Joint Venture and its property qualifies as an asset because it includes, *inter alia*, "*tangible and intangible property*" (Article 1(1)(a)(i) of the Treaty); "*intellectual and industrial property rights*" (Article 1(1)(a)(iv) of the Treaty); "*business concessions and other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights … to search for, extract or exploit natural resources*" (Article 1(1)(a)(v) of the Treaty); and "*activities associated with investments, such as the organisation and operation of business facilities*" (Article 1(1)(a)(vi) of the Treaty).

634. The second pillar, *i.e.*, Claimant's interest in TCCP, likewise constitutes an asset, given that it qualifies as "*shares … and any other form of participation in a company*" (Article 1(1)(a)(ii) of the Treaty). In addition, Article 2(3) of the Treaty clarifies that, even though

[587] Respondent's Rejoinder, ¶ 355.
[588] Respondent's Rejoinder, ¶ 276.

companies established under the law of the host State are not themselves treated as investors under the Treaty, investments in such companies made by an investor of the Contracting Party are protected by the Treaty. As a result, the Tribunal considers that Claimant had an "*asset*" within the meaning of the "*investment*" definition contained in Article 1(1)(a) of the Treaty.

635. As to the second issue whether the assets were "*owned or controlled*" by TCCA, the Tribunal notes that Article 1(3) of the Treaty defines "*controlling a company or an investment*" for the purposes of the Treaty as having a "*substantial interest in the company or the investment.*"[589] In the present case, Claimant was and remained party to the CHEJVA after the Amalgamation in 2008 because it is clear from the record that only TCCA's "*PAKISTAN BRANCH*" was amalgamated with TCCP, which resulted in the "*consolidation of two wholly owned entities of TCCA,*" and Claimant thus continued to hold ("*owned*") a direct interest in the CHEJVA and its related agreements and the Joint Venture.[590] As to Claimant's interest in TCCP, it is undisputed that Claimant always held, and still holds, 100% of the shares and thus a "*substantial interest*" in TCCP. Consequently, it "*controls*" TCCP and its investment in that company within the meaning of Article 1(3) of the Treaty.

636. Finally, the Tribunal will address the third issue, *i.e.*, whether the assets that Claimant owned or controlled were "*admitted by* [Pakistan] *subject to its law and investment policies applicable from time to time.*" In accordance with Article 31(1) of the Vienna Convention, this phrase has to be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"[591]

637. In the Tribunal's view, the ordinary meaning of the phrase does not impose a strict legality or a formal admission requirement upon the asset but rather implies that, at the time the investment is made, it must be accepted by the relevant authorities or officials representing the host State. If such an acceptance could later be revoked retroactively, the host State could unilaterally deprive an initially "*admitted*" investment of its protection under the Treaty.

638. This interpretation is also in conformity with the context as well as the object and purpose of the Treaty. While the Tribunal agrees with Respondent that the Preamble to the Treaty is relevant in this regard, it cannot follow Respondent's argument that the recital "*ACKNOWLEDGING that investments of investors of one Party in the territory of the*

[589] **Exhibit CE-4**, Article 1(3).
[590] **Exhibit CE-21**, pp. 1 and 5; **Exhibit RE-61**.
[591] Vienna Convention on the Law of Treaties ("Vienna Convention") [CA-141], Article 31(1).

other Party would be made within the framework of the laws of that other Party" implies the intent of the Contracting Parties to make the protection of investments subject to their strict compliance with all applicable laws of the host State. In the view of the Tribunal, it rather appears from the Preamble, which contains an aggregate of four recitals, that the Contracting Parties recognized the importance of foreign investments for the economic activity of the States and of providing a clear set of principles to protect such investments in order to promote them. In this context, the Contracting States then acknowledge that investments would be made "*within the framework of the laws*" of the host State.

639. The recital that Respondent relies on therefore underlines the requirements contained in various provisions of the Treaty, such as Article 1(1)(a) and Article 3(1), but it was not intended to raise the threshold for the recognition of investments that are protected under the Treaty. A different interpretation would be contrary to the Contracting Parties' intent – on which they put repeated emphasis – to foster such foreign investments in order to promote the economic development in their territory. Therefore, the Tribunal considers that the admission requirement is met if the investment was accepted by the host State at the time it was made.

640. In the present case, the Tribunal considers that the relevant point in time when TCCA made its investment was the conclusion of the Novation Agreement in 2006 because TCCA thereby became party to the CHEJVA and took over BHP's rights and obligations *vis-à-vis* its Joint Venture partner. At that time, the record clearly establishes that TCCA's activities in Pakistan were not only accepted, but highly welcomed and encouraged on every level of the GOB and the GOP. Even if there was an internal issue within the GOB regarding the proper authorization for signing the CHEJVA, there is no evidence that any Government representative suggested at the time that the CHEJVA and its related agreements were null and void. To the contrary, it appears that such issues were first raised in the proceedings before the Balochistan High Court and then the Supreme Court, in which the GOB defended the validity of the CHEJVA until early 2011.

641. In addition, the Tribunal notes that the reasons for which the Supreme Court ultimately declared the CHEJVA invalid – seven years after TCCA had replaced BHP as a party – did not concern any illegal conduct on the part of Claimant, but rather failures on the part of the GOB and the BDA to comply with their internal laws. Even though the Treaty does not link the admission requirement exclusively to the conduct of the investor, it is a general principle that the State cannot rely on its own failure to escape its liabilities under international law. Reasons that are not within the investor's sphere of responsibility therefore cannot deprive an investment of its protection under the Treaty.

642. Consequently, the Tribunal considers that Claimant's investment was also "*admitted by* [Pakistan] *subject to its law and investment policies*" applicable at the time the investment

was made. In conclusion, the Tribunal therefore finds that Claimant had an "*investment*" within the meaning of Article 1(1)(a) of the Treaty.

643. Finally, the dispute between the Parties also "*relates to*" Claimant's investment within the meaning of Article 13 of the Treaty, given that Claimant's claims, which are based on the denial of the Mining Lease Application and the alleged takeover of the Reko Diq Project by the GOB, specifically relate to Claimant's interest in the CHEJVA and the Joint Venture as well as to TCCP, which was created exclusively to carry out the exploration, feasibility and eventual mining operations at Reko Diq.

c. Dispute between a Contracting State and a National of Another Contracting State

644. It is common ground between the Parties that the dispute is between a Contracting State to the ICSID Convention and a national of another Contracting State. Pakistan is a Contracting State for the purposes of Article 25(1) because Pakistan ratified the ICSID Convention on 15 September 1966 and the Convention entered into force for Pakistan on 15 October 1966. Australia ratified the ICSID Convention on 2 May 1991, and it came into force for Australia on 1 June 1991.

645. The Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investment was signed on 7 February 1998 and entered into force on 14 October 1998. TCCA is a "*national of another Contracting State*" within the meaning of Article 25(1) of the ICSID Convention, and is an "*investor*" pursuant to Article 1(1)(c) and (d) of the Australia-Pakistan Treaty because it is a company constituted under the laws of Australia.[592]

d. Existence of Written Consent of Both Parties

646. In Article 13(2)(b) of the Treaty, Pakistan has given its consent to submit disputes relating to an investment to the jurisdiction of the Centre.[593] As stated above, the present dispute relates to Claimant's alleged investment in Pakistan; thus, it is covered by Respondent's consent given in Article 13(2)(b).

647. Claimant expressly consented to submit this dispute to the jurisdiction of the Centre in its Request for Arbitration.[594]

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[592] Memorial, ¶ 379. **Exhibit CE-4**, Art. 1(1)(c), (d).
[593] **Exhibit CE-4**, Art. 13.
[594] RfA, ¶ 16.

e. Conclusion on General Jurisdictional Requirements

648. In conclusion, the Tribunal finds that the general jurisdictional requirements of Article 25(1) of the ICSID Convention are fulfilled.

2. Respondent's Further Objections to Jurisdiction and Admissibility

a. Are Claimant's Claims Contractual in Nature and Is Claimant Barred from Re-Litigating Contractual Issues?

i. Summary of Respondent's Position

649. Respondent claims that "*Claimant's vague articulation of its investment boils down to its alleged contract-based rights*" under the CHEJVA Agreements and refers in particular to the purported *"right to mine."* In Respondent's view, the Treaty breaches that Claimant alleges are based on a purported breach of contract, namely the rejection of the Mining Lease Application by the Licensing Authority; thus, Claimant's Treaty case in fact rests on a contractual foundation.[595]

650. Respondent further submits that Exploration License EL-5 was granted to the Joint Venture "*under the auspices of the CHEJVA agreements*" and, in general, all of Claimant's purported rights have their source in the CHEJVA, via the gateway of the 2006 Novation Agreement.[596] According to Respondent, Claimant's core claim is therefore a "*claim to performance*" of the CHEJVA and related agreements.[597]

651. Respondent claims that this is a "*classic*" joint venture contract dispute between two joint venture partners, which is before the ICC Tribunal and is not subject to the jurisdiction of this Tribunal. Respondent requests that the choice-of-forum clause in the CHEJVA be given effect and that the scope of Pakistan's consent to jurisdiction under the Treaty be respected.[598] Respondent argues that, in the absence of a specific treaty provision, a State should not be presumed to have consented to submit purely contractual disputes to international jurisdiction.[599]

652. According to Respondent, a treaty claim must be "*self-standing*"; Respondent refers to Judge Georges Abi-Saab's Concurring Opinion in *TSA Spectrum v. Argentina* in which

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[595] Respondent's Rejoinder, ¶¶ 273, 274.
[596] Respondent's Rejoinder, ¶¶ 279, 281.
[597] Respondent's Rejoinder, ¶ 283.
[598] Counter-Memorial, ¶¶ 356-357.
[599] Counter-Memorial, ¶ 358.

he held that this was not a case where alleged treaty breaches "*necessarily pass by or posit a contract violation as a fundamental element of or premise of its cause of action*."[600] Respondent argues that the entirety of Claimant's claims are premised on violations of the CHEJVA; thus, those claims are "*no more than a contractual claim . . . dressed up as a Treaty case*."[601]

653. Respondent submits that in a case where the basis of a claim is contractual, an exclusive choice-of-law clause in that contract must be honored in order to respect the original bargain between the parties and the principle of *pacta sunt servanda*.[602] Respondent asserts that in light of the dispute resolution mechanism provided in Article 15.4, the Tribunal does not have jurisdiction over Claimant's claims arising out of the CHEJVA, as Claimant has initiated the ICC arbitration prior to these ICSID proceedings.[603]

654. In Respondent's view, it is clear that in the context of Claimant's Treaty claims, the Tribunal is required to rule on the same contractual issues as the ICC Tribunal, including (a) whether the alleged "*assets*" exist and are lawful under Pakistani law; (b) whether any rights under the CHEJVA Agreements can be invoked against Respondent; and (c) whether Claimant has a right to a mining lease pursuant to the terms of the CHEJVA. Respondent argues that Claimant itself has elected to submit those issues to the ICC Tribunal and must be held to its choice.[604]

655. Respondent further submits that the well-established general principle of issue estoppel (also known as "*collateral estoppel*") precludes Claimant from re-litigating the contractual issues, which have already been determined by the Supreme Court of Pakistan.[605]

656. Respondent relies on the holding of the tribunal in *RSM v Grenada*:

> "*The disputing parties . . . agree that a finding concerning a right, question or fact may not be relitigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the*

[600] Counter-Memorial, ¶¶ 364-365. *TSA Spectrum de Argentina v. Argentine Republic*, ICSID Case No. ARB/05/5, Concurring Opinion of Arbitrator Georges Abi-Saab of 19 December 2008 ("*TSA Spectrum v. Argentina* Concurring Opinion") [RLA-55].
[601] Counter-Memorial, ¶ 366, quoting *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Award of 10 December 2010 ("*RSM v. Grenada*") [RLA-56].
[602] Counter-Memorial, ¶¶ 369, 371.
[603] Counter-Memorial, ¶¶ 374-376.
[604] Respondent's Rejoinder, ¶¶ 356-357.
[605] Respondent's Rejoinder, ¶¶ 358-359.

> *resolution of the question was necessary to resolving the claims before that court or tribunal.*
>
> *It is also not disputed that the doctrine of collateral estoppel is now well established as a general principle of law applicable in international courts and tribunals such as this one.*"[606]

657. Respondent argues that the test for estoppel under international law is clearly met in this case, as Claimant voluntarily submitted to the jurisdiction of the Supreme Court, which determined the very same contractual issues that are now before this Tribunal.[607]

ii. Summary of Claimant's Position

658. Claimant recognizes that this Tribunal does not have jurisdiction to decide on contractual claims arising from the CHEJVA, emphasizing however that "*this is not a contract case*" and that TCCA's claims relate to breaches of the Treaty and general international law.[608]

659. Claimant argues that treaty claims are distinct from contractual claims and submits that in assessing Claimant's Treaty claims, the Tribunal will not determine whether under Pakistani law "*the contractual rights or entitlements asserted by Claimant have been breached under the contract*," but it may rather consider, *inter alia*, the conduct of the organs and officials of both the GOP and the GOB in relation to the CHEJVA.[609]

660. Claimant refers to the tribunal in *Vivendi v. Argentina II,* which held:

> "*A state may breach a treaty without breaching a contract; it may also breach a treaty at the same time it breaches a contract. And, in the latter case it is permissible for the Tribunal to consider such alleged contractual breaches, not for the purpose of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyse and determine whether there has been a breach of the Treaty. In doing so, the Tribunal would in no way be exercising jurisdiction over the contract, it would simply be taking into account the parties behavior under and in relation to the terms of the contract in determining whether there has been a breach of a distinct standard of international law.*"[610]

661. Claimant submits that Respondent attempts to conflate the Treaty claims to be decided by this Tribunal with the contract claims that are at issue before the ICC Tribunal.

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[606] Respondent's Rejoinder, ¶ 360. *RSM v Grenada* [RLA-56].
[607] Respondent's Rejoinder, ¶ 361.
[608] Reply, ¶ 232.
[609] Reply, ¶¶ 233, 235
[610] Reply, ¶ 235. *Compañia de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007 ("*Vivendi v. Argentina II*") [CA-52], ¶ 7.3.10.

Claimant recognizes that its Treaty claims derive in part from its rights under the CHEJVA, but submits that this cannot prevent this Tribunal from hearing those claims. Claimant again refers to the *ad hoc* Committee in *Vivendi v. Argentina* I which stated that:

> "*it is one thing to exercise contractual jurisdiction . . . and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law*."[611]

662. Claimant asserts that it is irrelevant that the dispute against Balochistan arising under the CHEJVA will be decided before a different forum.[612] In Claimant's view, the fact that some of the acts to be assessed by this Tribunal may also be considered a breach of the CHEJVA by Balochistan does not deprive TCCA of its rights and remedies under the Treaty.[613]

663. Claimant also emphasizes that apart from the fact that both arbitrations were filed simultaneously and only registered on different dates, TCCA tried to register the Balochistan arbitration with ICSID but was forced to resort to the ICC fallback mechanism because Pakistan failed to authorize the Province of Balochistan to participate in ICSID arbitration (despite a commitment to do so in the 2006 Novation Agreement).[614]

iii. The Tribunal's Analysis

664. There is common ground between the Parties that the Tribunal does not have jurisdiction to decide on claims that are based on breaches of contract, but only on claims that are based on violations of the Treaty.[615] However, this does not mean that the Tribunal may not take into account the terms of the CHEJVA in its analysis of whether Respondent in fact breached any of its obligations under the Treaty.

665. In this regard, the Tribunal agrees with the *ad hoc* Committee in *Vivendi v. Argentina* that "*it is one thing to exercise contractual jurisdiction … and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law*."[616]

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[611] Reply, ¶¶ 240-241. *Compañia de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002 ("*Vivendi v. Argentina I Annulment Decision"*) [CA-9], ¶ 105.
[612] Reply, 242.
[613] Claimant's Rejoinder, ¶ 13.
[614] Claimant's Rejoinder, ¶¶ 14-15.
[615] The separate question of whether the Tribunal has jurisdiction to hear Respondent's counterclaims insofar as they are not based on alleged Treaty violations but rather on alleged breaches of the CHEJVA and the 2002 BM Rules, will be addressed at paragraph 1420 below.
[616] *Vivendi v. Argentina I Annulment Decision* [CA-9], ¶ 105.

666. It has to be emphasized that the Tribunal does not wish to interfere with the exclusive jurisdiction of the ICC Tribunal to decide on claims arising out of the CHEJVA and, therefore, it will not express an opinion on whether any provisions of the CHEJVA have been breached – which in any event would be something that Claimant has not asked this Tribunal to do. In the present proceedings, Claimant has not raised any such claims based on breaches of contract, but it has rather claimed that Respondent violated certain standards of protection under the Treaty. Given that Claimant's investment includes its interest in the Joint Venture that was established under the CHEJVA, the Tribunal necessarily has to look at the CHEJVA and its related agreements in order to be in a position to assess whether Respondent violated its obligations under the Treaty.

667. The question whether Respondent's conduct amounted to a violation of the Treaty has not, and will not, be decided by either the Supreme Court or the ICC Tribunal; therefore, there can be no "*collateral estoppel*" with regard to the Treaty claims that Claimant has raised in the present proceedings.

b. Are Claimant's Claims Inadmissible?

i. Summary of Respondent's Position

(a) Claimant's Claims Are Inadmissible *Ratione Materiae*

668. Respondent submits that Claimant's claims are inadmissible due to the fact that its purported right to mine Reko Diq pursuant to Article 11.8.2 of the CHEJVA never arose. It is Respondent's position that Article 11.8.2 did not bestow on Claimant any rights to mine, but only entitled it to convert a prospecting license into a mining lease "*subject to routine Government requirements.*" In addition, Respondent asserts that Articles 11.4.2 and 11.6 constitute conditions precedent to be fulfilled before any entitlement to undertake mine development could arise and claims that these conditions were never satisfied.[617]

669. Respondent argues that it is clearly set out in the CHEJVA that the transfer of the Non-participating Party's interest in the Joint Venture Property, such as the Exploration License EL-5 and the Feasibility Study, necessarily had to occur before the Participating Party could assert a right over such Property.[618] Respondent further claims that the procedure set out in the CHEJVA, which was to be followed for the acquisition of the interest, was "*flagrant*[ly] *disregard*[ed]" by Claimant when it denied the BDA an

[617] Counter-Memorial, ¶¶ 377-379, 391.
[618] Counter-Memorial, ¶ 394.

opportunity to decide whether it wished to develop the (at least) fourteen mineral deposits over which Claimant sought a lease in its Mining Lease Application.[619]

670. Respondent argues that a right that had not yet arisen at the date of the Mining Lease Application cannot be interfered with; thus, Claimant's claim is inadmissible.

(b) Claimant's Claims Are Inadmissible *Ratione Personae*

671. Respondent further submits that Claimant's claims are inadmissible because Claimant comes to this Tribunal with "*unclean hands*," referring to the doctrine of "*clean hands*" as a general principle regarding claims tainted by corruption.[620]

672. Respondent contends that Claimant's role in procuring the illegality of its investment is evident from the record.[621] According to Respondent, the Supreme Court judgment reveals "*very serious irregularities committed by TCC's predecessor*" and further illustrates the role of Claimant, given that it was incorporated by Mincor, the company which "*orchestrated*" the 2000 Addendum and thus must have been aware that BHP's and BDA's counsel had considered the CHEJVA void for uncertainty.[622]

673. Respondent further asserts that Claimant was aware of the CHEJVA's illegality and knew that it would only be a matter of time before it became public, given that Mincor and BHP agreed in the Option Agreement that the existence of a binding Addendum to the CHEJVA would be one of the conditions precedent for the Mincor Option to become binding. In Respondent's view, Claimant was therefore not an unsuspecting or innocent party, but rather used the 2000 Addendum to "*bolster*" its case.[623]

674. In addition, Respondent alleges that Claimant "*sponsored numerous all-expenses-paid trips for various BDA and Government of Balochistan officials*."[624] Respondent also refers to the Supreme Court's finding that officials involved in the conclusion of the CHEJVA violated their public duties under Pakistani law by offering advantages and benefits to Claimant's predecessor. Respondent refers to international law and policy on anti-corruption pursuant to which the prohibition of corruption forms part of public policy and submits that investments in violation of public policy are not accorded treaty protection.[625]

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[619] Counter-Memorial, ¶¶ 397-398.
[620] Counter-Memorial, ¶¶ 402, 405.
[621] Counter-Memorial, ¶ 402.
[622] Counter-Memorial, ¶ 307.
[623] Counter-Memorial, ¶¶ 308-309.
[624] Counter-Memorial, ¶ 307.
[625] Counter-Memorial, ¶¶ 310, 312.

ii. Summary of Claimant's Position

(a) Respondent's *Ratione Materiae* Objection

675. In the context of jurisdiction, Claimant submits that Respondent conflates the Tribunal's jurisdiction, which should be determined "*assuming* pro tem *that* [the claims] *may be sustained on the facts*," with the decision on the merits.[626]

676. On the merits, Claimant contends that the CHEJVA did not require the sole Participating Party to acquire the interest of the Non-participating Party before it could apply for a Mining Lease. Claimant notes that pursuant to rule 47(1), the unincorporated Joint Venture would not even have qualified to file the application; therefore, only TCCP could do so.[627] In addition, Claimant submits that TCCP "*repeatedly encouraged*" Balochistan to join the mining venture in order to file a joint application and, when Balochistan failed to do so, it sought to buy out Balochistan's share pursuant to Clause 11.5 of the CHEJVA, but Balochistan refused to negotiate with TCCP.[628]

(b) Respondent's *Ratione Personae* Objection

677. Claimant claims that Pakistan's contention that the Tribunal should dismiss TCCA's claims because "*it comes to this Tribunal with* 'unclean hands'," due to an alleged "*role in procuring* [the] *illegality*" of its investments, or because its claims are "*tainted by corruption*" is a "*scandalous and false accusation*" for which Pakistan does not offer any proof. Claimant asserts that Respondent's allegations are rather based on alleged "*technical defects*" in relation to the conclusion of the CHEJVA, or on "*pure speculation*."[629]

678. Claimant emphasizes that, as the ICC Tribunal has observed in its decision on Respondent's document production requests,[630] the Supreme Court does not make any findings of corruption in its judgment and did not invalidate the CHEJVA on that basis. Claimant submits that the Supreme Court only repeated, *verbatim*, Balochistan's submission that there were "*shocking disclosures of extensive irregularities and corruption*" in the record that the Provincial Government provided, but did not give any examples of such disclosures and did not draw any conclusions from this observation with regard to the validity or effectiveness of the CHEJVA and related agreements.[631]

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[626] Reply, ¶ 266. See ¶ 579 above.
[627] Reply, ¶ 418.
[628] Claimant's Post-Hearing Brief, ¶ 87.
[629] Reply, ¶¶ 296-297.
[630] **Exhibit CE-386**, p. 18.
[631] Reply, ¶ 299.

679. Claimant further submits that, contrary to Respondent's allegation, the Supreme Court does not state in its judgment that any "*officials involved in* [the] *conclusion*" of the CHEJVA "*violated their public duties under Pakistani law by offering advantages and benefits to the Claimant's predecessor related to the CHEJVA.*" Claimant states that the paragraphs cited by Pakistan rather relate to (i) the validity of the 1994 Relaxations that Balochistan granted in 1994, and (ii) the fact that the Chairman of the BDA (at the time the CHEJVA was concluded) was convicted several years later of a corruption-related offence, which was, however, not related to the CHEJVA or the Joint Venture.[632]

680. Claimant concludes that Respondent did not present any evidence either in the Supreme Court proceeding or in this or the ICC arbitration that the CHEJVA was procured by corruption and that there is thus no factual support for Respondent's allegation.[633]

iii. The Tribunal's Analysis

681. As to Respondent's *ratione materiae* objection, the Tribunal agrees with Claimant that the arguments raised by Respondent in this regard relate to the merits of the claim. Even if the Tribunal were to find that the right that is claimed to have been violated does not exist, this would not, in itself, lead to the inadmissibility of the claim. While there may be an exception for a right that evidently, *i.e.*, without the need for any analysis of the merits, does not exist and therefore cannot form the basis for the claim, the Tribunal considers that no such exception is applicable in the present case.

682. Further, contrary to Respondent's allegation, Claimant does not base its claims exclusively on Clause 11.8.2 of the CHEJVA but also on rule 48 of the 2002 BM Rules and the assurances that it claims to have received from Government officials. In addition, the Tribunal does not agree with Respondent that Claimant "*flagrant*[ly] *disregard*[ed]" the procedure set out in Clause 11 of the CHEJVA, given that Claimant attempted to acquire the 25% interest of its Joint Venture partner. The question whether such acquisition had to be completed before TCCP would be eligible to apply for a mining lease on its own, despite the fact that the Joint Venture itself was not eligible to do so under the 2002 BM Rules and the Expiration License EL-5 was about to expire in February 2011, does not yield the obvious result that Respondent alleges and therefore remains a question for the merits.

683. Respondent's *ratione materiae* objection is therefore dismissed.

684. With regard to Respondent's *ratione personae* objection, the Tribunal notes that there is no evidence in the record that would support Respondent's allegations of corruption in

[632] Reply, ¶ 300.
[633] Reply, ¶ 301.

connection with Claimant's investment at Reko Diq. This applies both to the conduct of TCCA or TCCP itself and to any conduct of BHP of which Claimant should have been aware.

685. In particular, the Supreme Court judgment on which Respondent relies does not include any finding on corruption; it further does not indicate that there is any evidence for the existence of corruption in connection with Claimant's investment. While the Supreme Court notes that the dual office held by Mr. Jaffar, Chairman of the BDA and Additional Chief Secretary at the time the CHEJVA was signed, presented a "*clear conflict of interest*,"[634] it does not make a finding that Mr. Jaffar's conduct in connection with the CHEJVA constituted an act of corruption and it does not mention any corresponding conduct of the investor (then BHP). The Supreme Court further adopts the GOB's formulation that, in the course of reviewing the record to the CHEJVA, "[i]*t made shocking disclosures of extensive irregularities and corruption*."[635] However, the Supreme Court does not give any examples of such disclosures, nor does it specify what kind of disclosures were made. Therefore, the Tribunal does not have any evidence before it that would establish or even indicate any acts of corruption on the part of TCCA/TCCP or its predecessor BHP.

686. Finally, the Tribunal considers that Mincor/TCCA's insistence on the conclusion of the 2000 Addendum as a condition to taking over BHP's role as a party to the CHEJVA does not constitute evidence of Claimant's awareness of corruption, or in fact any illegal conduct, when the CHEJVA was concluded. This condition is rather a reaction to the uncertainties that had come up in 1999 as to whether the GOB had validly become a party to the CHEJVA pursuant to the applicable internal laws in 1993.

687. As a result, Respondent's *ratione personae* objection is likewise dismissed. As noted in the Tribunal's Draft Decision on Jurisdiction and Liability dated 3 February 2016, the findings above on Respondent's *ratione personae* objection are based upon the evidence as it stood before Respondent's Application and do not account for any of the developments set out in paragraphs 177 through 212 above. Before filing its Application, Respondent submitted, *inter alia*, that Claimant's claims were inadmissible because it had participated in administrative irregularities and acts of corruption in consequence of which it came to the Tribunal with 'unclean hands'. Claimant denied the allegation. At the time of the original hearing, there was nothing which could be described as evidence of any act of corruption. However, as the Tribunal has stated, it subsequently gave leave to Respondent to introduce new evidence of alleged acts of corruption in support of an

[634] **Exhibit RE-18**, ¶ 50.
[635] **Exhibit RE-18**, ¶ 63.

application to dismiss the claims. The Tribunal has dismissed this application and deals with the allegations of corruption in its Decision on Respondent's Application to Dismiss the Claims (with reasons), which is issued together with the present Decision on Jurisdiction and Liability (see paragraph 215 above).

3. The Tribunal's Conclusion on Jurisdiction and Admissibility

688. In conclusion, the Tribunal finds that it has jurisdiction to hear Claimant's claims and that the claims are admissible.

B. ATTRIBUTION

1. Summary of Claimant's Position

689. Claimant submits that Respondent is liable for the alleged breaches of the Treaty not only on account of its own conduct, but also on account of the conduct of Balochistan and its organs, including the BDA, whose acts, Claimant claims, are fully attributable to Respondent.[636]

a. The Conduct of the GOB Is Attributable to Respondent

690. Claimant refers to Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission (the "**ILC Articles**") which provides that:

> "[t]*he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*"[637]

691. Claimant submits that it is recognized that, in Federal States like Pakistan, this rule applies to all organs "*at provincial or even local level*," irrespective of whether the organ is under the control of the central government pursuant to the State's domestic laws.[638] Claimant refers to the ILC Commentary to Article 4, which states that "*the principle in article 4 applies equally to organs of the central government and to those of regional or local units*" and further that "*it does not matter for this purpose whether the territorial unit in question is a component unit of a Federal State or a specific autonomous area*."[639]

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[636] Memorial, ¶ 385; Reply, ¶ 322.
[637] Memorial, ¶ 386.
[638] Memorial, ¶ 387.
[639] Reply, ¶ 307. ILC Articles [CA-1].

692. Claimant also refers to the tribunal in *Vivendi v. Argentina I*, which observed that the "*internal constitutional structure of a country*" cannot be used to deny responsibility, nor can a federal state *"rely on the federal or decentralized character of its constitution to limit the scope of its international responsibilities*."[640]

693. In Claimant's view, Pakistan is therefore fully liable for the conduct of the Licensing Authority, the Secretary of the MMDD and any other organ or official of the GOB.[641]

694. In relation to Respondent's argument that the conduct on which TCCA bases its claims exceeded the authority of the State organ, Claimant refers to Article 7 of the ILC Articles which provides that:

> *"*[t]*he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."*[642]

695. Claimant further submits that the State also bears responsibility for the conduct of its judiciary and claims that ICSID tribunals have recognized that an investor's treaty-protected rights can also be impaired or deprived by a judicial act.[643]

696. As to Respondent's argument that the conduct of the Government of Balochistan is not attributable to Pakistan because Annex B of the Treaty provides for the application of domestic law, Claimant notes that Annex B applies only to an "*Arbitral Tribunal referred to in paragraph 2(c) of Article 13*" of the Treaty, *i.e.*, an *ad hoc* tribunal constituted in the event that Australia and Pakistan are not both ICSID Member States at the time an investor-state dispute is submitted to arbitration. Claimant argues that this dispute has been filed in accordance with paragraph 2(b) of Article 13 of the Treaty as both Australia and Pakistan were ICSID Member States at the time the Request for Arbitration was filed; thus, Annex B of the Treaty is inapplicable in this arbitration.[644]

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[640] Reply, ¶ 308. *Compañia de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 21 November 2000 ("*Vivendi v. Argentina I*") [CA-8].
[641] Memorial, ¶ 388; Reply, ¶ 309.
[642] Memorial, ¶ 389 referring to *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008 ("*Rumeli v. Kazakhstan*") [CA-40] and *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award of 30 June 2009 ("*Saipem v. Bangladesh*") [CA-39].
[643] Memorial, ¶ 390.
[644] Reply, ¶¶ 305, 229.

697. Claimant argues that, in the absence of a provision in the Treaty dealing with the question whether the acts of federal provinces can be attributed to the State, the rules of international law as reflected in Article 4 of the ILC Articles have to be applied.[645]

698. Regarding Respondent's further argument that Pakistan was not a party to the CHEJVA, Claimant emphasizes that TCCA's claims are not based on "*a contractual breach of the CHEJVA*," but rather on violations of the Treaty by the conduct of high-ranking organs and officials of both the GOP and the GOB over a period of more than 20 years. Claimant refers to, *inter alia*, (i) their repeated representations and assurances that TCCA is entitled to a mining lease subject only to routine requirements; (ii) their ousting of TCCA from the project in order to replace it with the "*Balochistan Copper Gold Project*"; and (iii) the Supreme Court proceedings and judgment.[646]

699. Claimant asserts that the 1929 Harvard Draft Convention on State Responsibility (the "**Harvard Articles**") relied on by Respondent does not reflect international law because those Articles "*contravene the international consensus that the conduct of even minor organs can be regarded as an act of State*."[647] Claimant further argues that in any event, even under the Harvard Articles, Pakistan would be liable for the Supreme Court's judgment as it constitutes "*a violation by the State of a treaty*" pursuant to Article 12(4)(c) of the Harvard Articles.[648]

700. With respect to Respondent's argument that Balochistan acted in its commercial capacity, Claimant submits that, under international law, a State is responsible for the conduct of its organs, irrespective of whether they act in a governmental or a commercial function. Claimant again relies on the ILC Commentary to Article 4, which states that "*it is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as* 'commercial' *or as* acta iure gestionis*,*" and further that "*the entry into or breach of a contract by a State organ is . . . an act of a State for the purposes of article 4.*"[649]

701. In addition, Claimant argues that the record clearly establishes that Balochistan acted in its official capacity when it engaged in the conduct described above.[650]

[645] Reply, ¶ 305.
[646] Reply, ¶ 311.
[647] Reply, ¶ 312.
[648] Reply, ¶ 313.
[649] Reply, ¶ 315.
[650] Reply, ¶ 316.

b. The Conduct of the BDA Is Attributable to Respondent

702. In relation to the attribution of the conduct of the BDA, Claimant first submits that the record shows that (i) the GOB was the original party to the CHEJVA and consistently represented itself as such – to TCCA, to the Pakistani courts and in internal communications; and (ii) the BDA acted under the instructions of the GOB until it was replaced by the MMDD in December 2009.[651]

703. Claimant further argues that in any event, the BDA is a State organ for purposes of State responsibility and cites the ILC Commentary to Article 4 pursuant to which the term "*state organ*" under international law encompasses "*all the individual or collective entities which make up the organization of the State and act on its behalf.*"[652] In relation to Respondent's reliance on Article 4(2), Claimant again refers to the ILC Commentary stating that "*it is not sufficient to refer to internal law for the status of State organs*" and that "*internal law will not itself perform the task of classification.*" [653]

704. Claimant also claims that, as the BDA Act clearly shows, the BDA exercises public authority and acts on behalf of the GOB, given that (i) the BDA's function is the "*promotion of the economic and industrial development of Baluchistan*"; (ii) almost all of its functions depend on previous approval or directions by the Government; (iii) all of its employees are deemed to be public servants; (iv) its Board members are appointed by the Government and may be removed for failure to comply with any direction received from the Government; and (v) its annual budget requires Government approval.[654]

705. Finally, Claimant argues that, even if the BDA did not qualify as an organ under ILC Article 4, its conduct would still be attributable to Respondent under ILC Articles 5 and 8, given that Pakistani law "*empowered*" the BDA "*to exercise elements of the governmental authority*" and the BDA was acting "*on the instructions of*" and "*under the direction or control of*" the GOB.[655] Claimant asserts that: (i) the Chief Minister authorized the BDA to sign the CHEJVA on behalf of Balochistan;[656] (ii) during the negotiations of the CHEJVA and its related agreements, the BDA regularly sought and received guidance from the Chief Minister, the Chief Secretary, the Secretary Industries, Commerce and Mining, the Law Department and the Finance Department; and (iii) the

[651] Reply, ¶ 318.
[652] Reply, ¶ 319.
[653] Reply, ¶ 319.
[654] Reply, ¶ 320.
[655] Reply, ¶ 321.
[656] **Exhibit RE-39**, pp. 5, 10.

GOB repeatedly represented that the BDA was acting on its behalf and, in December 2009, replaced the BDA with the MMDD as the responsible entity for Joint Venture operations, thus acknowledging that the Government was TCCA's true joint venture partner.[657]

2. Summary of Respondent's Position

706. Respondent asserts that there are two types of actions that form the basis of Claimant's claims: (a) a contractual breach of the CHEJVA, and (b) a breach of the 2002 BM Rules by the Licensing Authority. Respondent claims that it is not liable for either of them, noting that Claimant does not specify which Federal organ committed those actions.[658]

a. The ILC Articles Do Not Apply to Claimant's Alleged Contract-Based Claims

707. Respondent contends that it is Claimant's case that the conduct of the GOB, or alternatively the BDA, in entering into the CHEJVA is attributable to Pakistan, which in turn creates contractual rights against Pakistan. Respondent argues that Claimant thereby seeks to inappropriately extend the scope of the ILC Articles to purely contractual issues.[659] Respondent refers to the tribunal in *Impregilo v. Pakistan*, which stated:

> "*Much of Impregilo's argument on this issue rested upon international law principles of state responsibility and attribution. However, a clear distinction exists between the responsibility of a State for the conduct of an entity that violates international law (e.g. a breach of the BIT) and the responsibility of a State for the conduct of an entity that breaches a municipal law contract (i.e. Impregilo's Contract Claims).*"[660]

708. Respondent notes that the tribunal in that case also referred to the following statement of the *ad hoc* Committee in the case of *Vivendi v. Argentina I Annulment Decision*:

> "[I]*n the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.*"[661]

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[657] Reply, ¶ 321.
[658] Counter-Memorial, ¶¶ 429-431.
[659] Respondent's Rejoinder, ¶¶ 375, 376.
[660] Respondent's Rejoinder, ¶ 377. *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 April 2005 ("*Impregilo v. Pakistan*") [RLA-54], 210.
[661] Respondent's Rejoinder, ¶ 378. *Vivendi v. Argentina I Annulment Decision* [RLA-57], ¶ 96.

709. Respondent argues that, for the same reasons, the ILC Articles do not apply to contractual issues arising in the context of treaty claims; in particular, they cannot be invoked to join a third party State to a contract. Respondent refers to the following statement of Professor Crawford:

> "*It is often assumed that because a State organ has entered into a contract, the State is therefore responsible for compliance with the contract. This depends, however, on what is specified in the proper law of the contract. In most cases, it is the individual legal entity that has entered into the contract that is responsible for breach. The rules of attribution have nothing to do with questions of contractual responsibility*."[662]

710. Respondent asserts that Claimant's investment relates to its alleged contract-based rights under the CHEJVA Agreements to which neither Pakistan nor Balochistan is a party; according to Respondent, Claimant cannot invoke such contract-based rights against Respondent as part of its Treaty claim.[663]

b. Even Under the ILC Articles, the Alleged Violations of the CHEJVA Are Not Attributable to the GOP

711. Respondent submits that the CHEJVA was concluded with the BDA, a statutory entity that is legally distinct from the GOB and the GOP and not a State organ of Balochistan under Pakistani law. Respondent claims that the BDA is not empowered to act, or to enter into agreements, on behalf of the GOB.[664] Thus, according to Respondent, the question whether its acts are attributable to Pakistan does not arise.[665]

712. Respondent claims that the BDA is not a State organ under the law of Pakistan and argues that its acts therefore fall outside the scope of Article 4 of the ILC Articles.[666] Respondent refers to the tribunal in *Noble Ventures, Inc. v. Romania*, which stated that Article 4 applies to acts of "*de jure organs which have been expressly entitled to act for the State*

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[662] Respondent's Rejoinder, ¶ 379. J. Crawford, "Investment Arbitration and the ILC Articles on State Responsibility", (2010) 25(1) *ICSID Review* 127 ("*Crawford*") [RLA-176], p. 134.
[663] Repondent's Rejoinder, ¶¶ 381, 383.
[664] Respondent submits that under Article 173 of the Pakistani Constitution, contracts on behalf of Balochistan shall be made in the name of the Governor by those expressly and properly authorized by him to execute them. Counter-Memorial, ¶ 44.
[665] Counter-Memorial, ¶ 432.
[666] Counter-Memorial, ¶ 435.

within the limits of their competence" and held that for "*legal entities separate from the Respondent, it is not possible to regard them as de jure organs*."[667]

713. Respondent submits that the BDA does not have legal capacity to act for the State of Pakistan, and refers to the Supreme Court judgment stating:

> *"It is clear that CHEJVA was made between BDA and BHP alone for all practical purposes, and not between GOB through BDA and BHP."*[668]

714. Respondent submits that, rather than Article 4, Article 5 of the ILC Articles is relevant in the present case as it sets out the circumstances in which the acts of State entities which are not State organs can be attributed to the State.[669] Article 5 provides:

> *"The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acing in that capacity in the particular instance."*[670]

715. Respondent submits that the following two requirements have to be met in order for the BDA's acts to be attributable to the State of Pakistan: (i) the BDA must be empowered by Pakistani law to exercise elements of governmental authority; and (ii) the BDA must be acting in that capacity in the particular instance.[671]

716. Respondent argues that those requirements are not met because the BDA does not exercise governmental authority on behalf of either Pakistan or Balochistan as a matter of Pakistani law. In addition, Respondent claims that in this particular case, the BDA was a partner in a joint venture agreement, *i.e.*, a commercial transaction.[672]

717. Respondent further contends that, even if the GOB was a party to the CHEJVA, the GOP was not and Claimant has not shown how the acts of the GOP have interfered with the CHEJVA.[673] Respondent quotes Professor Mayer, who states:

> "*As regards contracts concluded by the sovereign State as such (State contracts in the strict sense) the applicable principles are those of*

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[667] Counter-Memorial, ¶ 433. *Noble Ventures, Inc. v Romania*, Case No ARB/01/11, Award of 12 October 2005 ("*Noble Ventures v. Romania*") [RLA-75].
[668] Counter-Memorial, ¶ 434.
[669] Counter-Memorial, ¶ 436.
[670] Counter-Memorial, ¶ 437.
[671] Counter-Memorial, ¶ 438.
[672] Counter-Memorial. ¶ 440.
[673] Counter-Memorial, ¶¶ 441, 442.

> *contract or procedural law . . .; when the contract is concluded by a separate entity, the applicable principles are those for extra-contractual liability*."[674]

718. Respondent submits that Article 12 of the Harvard Articles, which it claims to be "*the most comprehensive attempt at codifying this issue*," draws the same distinction and, in case of a contract with a State entity, provides for one of the following additional requirements: (i) "*a clear and discriminatory departure from the proper law of the contract*"; (ii) "*an unreasonable departure from the principles recognized by the principal legal systems of the world as applicable to such contracts*"; or (iii) "*a violation by the State of a treaty*."[675]

719. Respondent claims that, in order for Pakistan to incur international responsibility in the present case where the contract was concluded with the BDA as a separate entity, the "*traditional test*" for internationally wrongful conduct set out in Article 12 must be applied.[676]

720. Finally, Respondent argues that even if it were assumed that the GOB was a party to the CHEJVA, it would not have acted as a governmental authority but only in its commercial capacity; thus, any breach of contract could not amount to a Treaty violation.[677]

c. The Alleged Breaches of the 2002 BM Rules Are Not Attributable to the GOP

721. In relation to the acts of the Licensing Authority and the Secretary of the MMDD, Respondent submits that, pursuant to Annex B of the Treaty, the attribution of acts to the GOP is governed by the provisions of the Treaty, the provisions of any agreement between the parties and Pakistani law. Respondent argues that, while the Treaty itself does not contain any provision on this issue, Pakistani law clearly provides that the GOP is not responsible for the conduct of its provinces, as Balochistan can sue and be sued in its own name.[678]

722. In Respondent's view, Claimant cannot escape the risk allocation provided for in the CHEJVA by laying blame on the Licensing Authority for "*acts attributable to the Respondent State as a sovereign*"; rather, it must establish that the conduct of its contracting partner and the Licensing Authority was in violation of both the CHEJVA

[674] Counter-Memorial, ¶ 442 [without citation].
[675] Counter-Memorial, ¶ 443.
[676] Counter-Memorial, ¶ 446.
[677] Counter-Memorial, ¶ 447.
[678] Counter-Memorial, ¶¶ 449-450.

and the 2002 BM Rules and, in addition, that this amounted to a violation of Respondent's obligations under the Treaty.[679]

3. The Tribunal's Analysis

723. At the outset, the Tribunal recalls its finding above that it is not for this Tribunal to make a determination on whether Claimant has any contractual claims against Respondent, but the Tribunal's jurisdiction is rather limited to the assessment of whether the conduct of Respondent (or any conduct that is attributable to Respondent) amounts to a violation of its obligation under the Treaty and thus under international law. Even though some of these actions may well be relevant to both Claimant's contractual claims and its claims arising under the Treaty, this does not mean that, irrespective of the context in which the actions are analyzed, there is a uniform answer as to the applicable rules of attribution.

724. In the Tribunal's view, because this Tribunal will assess whether any conduct of Respondent gives rise to liability under the Treaty and thus under international law, it is the customary international law of attribution, as reflected in the ILC Articles, that applies in determining which conduct is attributable to Respondent.

a. The Conduct of Government Officials

725. First of all, it is undisputed that the conduct of Federal officials and of the Supreme Court is attributable to Respondent under Article 4 of the ILC Articles.

726. The Tribunal considers that the same must apply to the conduct of the GOB and its provincial officials because a Federal State may not use its internal organization to escape liability under international law. The Tribunal notes that this corresponds to what is expressed in the final part of Article 4(1) ("*whatever its character as an organ of the central Government or of a territorial unit of the State*") and in the Commentary to Article 4:

> "[T]*he principle in article 4 applies equally to organs of the central government and those of regional or local units. This principle has long been recognized. … It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power*

[679] Counter-Memorial, ¶ 451.

> *to compel the component unit to abide by the State's international obligations. … That rule has since been consistently applied.*"[680]

727. The Tribunal agrees with the ILC Commentary that this principle is justified because, even if the component units, *i.e.*, in this case the provinces, have a separate legal personality under domestic law, they do not have a separate international legal personality and they do not have the power to enter into international treaties.[681] If this principle were not applied, it would be impossible to make the conduct of provincial units subject to international obligations, which would in turn discourage investments in areas that are governed by provincial law and/or in which investors have to deal with provincial authorities. It is clear that this cannot have been the intent of either the Contracting Parties in concluding the Treaty or the authors of the ILC Articles.

728. As a result, the Tribunal considers that the conduct of the GOB and its officials is attributable to Respondent despite the fact that under Pakistani law, Balochistan can sue and be sued in its own name. As to Respondent's reference to Annex B of the Treaty, pursuant to which a tribunal shall apply the domestic law of the host State, the Tribunal agrees with Claimant that this Annex applies only in case neither Contracting Party is party to the ICSID Convention at the time the dispute is submitted to arbitration (Article 13(2)(c) of the Treaty) and therefore does not support Respondent's position in the present case.[682]

729. In light of the fact that the Licensing Authority, the Secretary of the MMDD and further Government officials of the GOB on whose assurances Claimant relies in these proceedings thus qualify as State organs within the meaning of Article 4 of the ILC Articles, their conduct is to be considered an act of Respondent. Pursuant to Article 7, this applies regardless of whether any of those State organs exceeded their authority or contravened instructions.[683] Pursuant to the Commentary on Article 4, it is further "*irrelevant for the purposes of attribution that the conduct of a State organ may be classified as* 'commercial' *or as* acta iure gestionis."[684] Therefore, acts of the GOB and its officials are attributable to Respondent even if they were carried out in performance of the CHEJVA rather than in an executive function.

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[680] International Law Commission, Articles on Responsibility of States for InternationallyWrongful Acts, Y.B. INT'L L. COMM'N (2001), VOL. II, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2); annex to General Assembly resolution 56/83 of 12 December 2001, as corrected by document A/56/49(Vol. I)/Corr.4, Article 4 ("ILC Articles") [CA-1], Commentary to Article 4, ¶¶ 8-9.
[681] ILC Articles [CA-1], Commentary to Article 4, ¶ 10.
[682] **Exhibit CE-4**, Article 13 and Annex B.
[683] ILC Articles [CA-1], Article 7.
[684] ILC Articles [CA-1], Commentary to Article 4, ¶ 6.

b. The Conduct of the BDA

730. Finally, the Tribunal has to determine whether the conduct of the BDA can be attributed to Respondent as well. In the Tribunal's view, there is no need to decide whether the BDA as an autonomous legal entity is a State organ under Article 4, if its conduct is in any event attributable to Respondent under Article 5 or Article 8.

731. According to Article 5 of the ILC Articles, the conduct of an entity that does not qualify as a State organ under Article 4 is nevertheless considered an act of the State, if (i) it is empowered by the law of that State to exercise elements of governmental authority; and (ii) it is acting in that capacity in the particular instance. At this stage, the Tribunal considers it relevant whether the GOB was party to the CHEJVA because, if that were indeed the case, it would be clear that the BDA was empowered to exercise governmental authority and acted in that capacity in representing the GOB, in particular on the Joint Venture's Operating Committee, until December 2009.

732. The Tribunal is aware that the question whether the GOB or the BDA itself was party to the CHEJVA was analyzed by both the Supreme Court and the ICC Tribunal. In its 2013 judgment, the Supreme Court considered it "*clear that CHEJVA was made between BDA and BHP alone for all practical purposes, and not between GOB through BDA and BHP*" and stated that the BDA Act 1974 does not authorize the BDA to act as an agent of the GOB.[685] The ICC Tribunal disagreed in its 2014 Preliminary Rulings with the view of the Supreme Court and, after having analyzed the relevant provisions of the Pakistani Constitution, the 1976 Rules of Business and the BDA Act 1974 as well as the language used in the CHEJVA, the 2000 Addendum and the 2006 Novation Agreement, concluded that the BDA was authorized to enter into the CHEJVA on behalf of the GOB, *i.e.*, with the result that the GOB became a party to the CHEJVA in 1993, as confirmed by the 2000 Addendum.[686]

733. While this Tribunal will of course give due consideration to the findings of the Supreme Court, the Tribunal does not consider itself bound by them in the context of its analysis of whether the actions of the BDA can be attributed to Respondent under international law. The Tribunal will therefore give the same due consideration to the findings of the ICC Tribunal and will form its own judgment as to whether the GOB became a party to the CHEJVA in 1993 or by means of the 2000 Addendum.

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[685] **Exhibit RE-18**, ¶¶ 69, 73.
[686] ICC Rulings, ¶¶ 344-369.

734. Both the Supreme Court and the ICC Tribunal referred to Articles 173(3) and 139(2) of the Pakistani Constitution.[687] Article 173(3) of the Constitution provides:

> "*All contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made in the name of the President or, as the case may be, the Governor of the Province, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the President or Governor by such persons and in such manner as he may direct or authorize.*"[688]

735. Article 139(2) of the Constitution reads:

> "*The* [Provincial Government] *shall by rules specify the manner in which orders and instruments made and executive actions* [in the name of the Governor] *shall be authenticated, and the validity of any order or instrument so authenticated shall not be questioned in any court on the ground that it was not made or executed by the Governor*."[689]

736. The ICC Tribunal further agreed with the Supreme Court that Balochistan implemented Article 139(2) of the Constitution by enacting the 1976 Rules of Business, of which rule 7 is of particular relevance in the present case. However, while the Supreme Court referred to the requirements of both rules 7(2) and 7(3),[690] the ICC Tribunal distinguished between the requirements for orders and instruments in rule 7(2) and those for contracts in rule 7(3) and considered that only the latter had to be satisfied in the present case.[691] Rule 7 is entitled "*Orders and instruments, agreements and contracts*" and provides:

> "*(1) As provided for in the Constitution, all executive action of Government shall be expressed in the name of the Governor.*
>
> *(2) Save in cases where an officer has been specifically empowered to sign an order or instrument of Government, every such order or instrument shall be signed by the Secretary*[,] *the Additional Secretary, the Joint Secretary, the Deputy Secretary or the Section Officer to the*

[687] Exhibit RE-18, ¶ 69; ICC Preliminary Rulings, ¶¶ 347-349.
[688] **Exhibit RE-16**, Article 173(3).
[689] **Exhibit RE-16**, Article 139(2). As of 2010, the words in brackets replaced the former words "*Governor*" and "*in his name*." As of 2010, Article 139 further contains a third paragraph pursuant to which "[t]*he Provincial Government shall also make rules for the allocation and transaction of its business.*" *See* **Exhibit RE-16**, Article 139(3) notes 1, 2 and 3 on p. 73.
[690] **Exhibit RE-18**, ¶ 69.
[691] ICC Preliminary Rulings, ¶¶ 354-357. However, the ICC Tribunal further held that even if the requirements of rule 7(2) were applicable, they would be satisfied as well. ICC Preliminary Rulings, ¶ 363.

> *Government in the department concerned and such signature shall be deemed to be the proper authentication of such order or instrument.*
>
> *(3) Instructions for the making of contracts on behalf of the Governor and the execution of such contracts and all assurances of property shall be issued by the Law Department.*"[692]

737. The Tribunal notes that the Supreme Court's judgment does not contain any reasoning as to the applicability of rules 7(2) and/or (3) of the 1976 Business Rules to the conclusion of the CHEJVA; the ICC Tribunal on the other hand held that rule 7(2) of the 1976 Business Rules applies only to instruments and orders and considered that, in the context of Article 139 of the Constitution, these terms refer to legislative and quasi legislative acts but not to contracts. As to rule 7(3), the ICC Tribunal noted that no specific instructions had been issued for the execution for the CHEJVA but considered it sufficient that it had been "*vetted*" by the Law Department.[693]

738. With regard to the CHEJVA itself, the Supreme Court relied on the wording of the title page[694] and in particular the reference to approvals from the GOP and/or GOB to be sought under Clause 2.1 of the CHEJVA,[695] which, in its view, made clear that the GOB was an "*entit*[y] *outside the ambit of* 'Part[y]'" under the CHEJVA.[696] The ICC Tribunal on the other hand referred to the wording on the opening page of the CHEJVA[697] and the authorization of the Chairman by the Additional Chief Secretary, the Chief Secretary and the Chief Minister.[698] In addition, the ICC Tribunal noted that the Law Department had vetted the CHEJVA before its execution and had further considered it unnecessary in 1999 to clarify the role of the BDA as agent of the GOB by an addendum.[699]

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[692] **Exhibit RE-20**, rule 7.
[693] ICC Preliminary Rulings, ¶¶ 354-358.
[694] "*AGREEMENT FOR CHAGAI HILLS EXPLORATION JOINT VENTURE BETWEEN THE BALOCHISTAN DEVELOPMENT AUTHORITY AND BHP MINERALS INTERNATIONAL EXPLORATION INC.*" **Exhibit CE-1**, p. 1..
[695] "*This Agreement shall be conditional upon the Parties receiving from the Federal Government and/or the Provincial Government (as the case may be) within six (6) months of the date of this Agreement or such other period as the parties may agree: (i) all consents and approvals necessary under Pakistani law; and (ii) all assurances as to fiscal parameters for investments in any future Mining Venture which either of the Parties may have need for.*" **Exhibit CE-1**, Clause 2.1.
[696] **Exhibit RE-18**, ¶ 69.
[697] "*THIS AGREEMENT is made the 29th day of July, 1993 between the GOVERNOR OF BALOCHISTAN, THROUGH THE CHAIRMAN, BALOCHISTAN DEVELOPMENT AUTHORITY a statutory corporation of Balochistan Province … AND BHP MINERALS INTERNATIONAL CORPORATION INC. … .*" **Exhibit CE-1**, p. 4.
[698] *Cf.* **Exhibits CE-308** and **RE-39**.
[699] ICC Preliminary Rulings, ¶¶ 364-366. *Cf.* **Exhibits CE-309** and **RE-58(VI)(an)**, p. 33.

739. As to the 2000 Addendum, the Supreme Court reasoned that the assumption of the parties involved that the GOB was made party to the CHEJVA was a mistake of fact because this would have required "*an affirming signature under the hand of a duly authorized representative or agent of GOB in terms of Rule 7*."[700] According to the Supreme Court, the signature of the Chairman of the BDA under the 2000 Addendum did not fulfill this requirement because the authorization letter from the Governor was "*not printed on the Governor's letterhead, carrie*[d] *no date, notification number, nor* [was] *it addressed to any office or authority or even stamped. Neither* [was] *there any supporting documentation, nor* [did] *the letter provide a reference to a decision of the Cabinet on the matter*."[701] The ICC Tribunal held that the 2000 Addendum confirmed that the GOB was party to the CHEJVA and referred to the authorization letter as having been sent by the Principal Secretary to the Chairman on 27 December 1999; in addition, the ICC Tribunal emphasized that the Law Department had returned the 2000 Addendum "*duly vetted*."[702]

740. The Supreme Court further held that that GOB could not have validly appointed the BDA or its Chairman as its agent because rule 7 required that the agreement would be executed through the respective department and signed by the Secretary, Additional Secretary, etc. of that department, whereas the BDA was not a department but a separate legal entity.[703] By contrast, the ICC Tribunal noted that the BDA was authorized under the BDA Act 1974 to enter into joint venture contracts (as recognized by the Supreme Court) and further that, while it was not expressly authorized to act as agent of the GOB, the BDA Act gave the BDA broad powers to carry out the purposes of the Act.[704] Therefore, the ICC Tribunal considered that there was no legal basis for Balochistan's argument that the GOB could not authorize a legal person such as the BDA to act on its behalf. Finally, the ICC Tribunal held that even if rule 7(2) were to be applied, the Chairman of the BDA also qualified as an "*officer*" under the 1976 Business Rules.[705]

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[700] **Exhibit RE-18**, ¶¶ 69-70.
[701] **Exhibit RE-18**, ¶ 71.
[702] ICC Preliminary Rulings, ¶ 367. *Cf.* **Exhibit RE-58(VI)(an)**, pp. 52-55.
[703] **Exhibit RE-18**, ¶ 88.
[704] ICC Preliminary Rulings, ¶¶ 360-361. The ICC Tribunal referred to section 17(6) of the BDA Act 1974 pursuant to which the BDA "*may participate in joint ventures with the private sector in regard to* [projects for mineral exploitation and development including establishment of mineral-based industries]" and further to section 18(1) according to which the BDA "*may take such measures and exercise such powers as may be necessary for carrying out the purposes of this Act*" and section 16(2) providing that the BDA "*shall perform such other duties and functions as Government may, from time to time, assign to it.*" **Exhibit RE-42**, sections 17(6), 18(1) and 16(2).
[705] ICC Preliminary Rulings, ¶ 363. In this regard, the ICC Tribunal relied on Schedule IV of the 1976 Business Rules, which refers in item (iv) to "*officers shown in Schedule III*," which in turn refers in item 14(i) to "[a]*ll appointments under statutory bodies which are required to be made or approved by Government*," and section 5(3) of the BDA Act 1974 pursuant to which "*Government shall appoint one of the Directors to be the Chairman*

741. This Tribunal agrees with the ICC Tribunal that there is no support in the BDA Act 1974 or the 1976 Business Rules for Respondent's argument that the GOB could not have validly authorized the BDA, *i.e.*, a separate legal entity rather than a department of the GOB itself, as its agent. In addition, the Tribunal considers it established that the GOB did in fact authorize the Chairman of the BDA in July 1993 to enter into the CHEJVA on its behalf.[706] Given that the Law Department further vetted the CHEJVA before it was executed on 29 July 1993,[707] the requirements under both rules 7(2) and (3) were fulfilled so that it is not necessary to decide on whether they both apply to the execution of contracts. In conclusion, this Tribunal therefore agrees with the conclusion of the ICC Tribunal that the BDA was authorized to sign the CHEJVA on behalf of the GOB and that, as a result, the GOB was a party to the CHEJVA as of 1993.

742. In addition, the Tribunal considers that, even if there had been an authorization issue that prevented the GOB from becoming a party in 1993, it would have become a party in any event by means of the 2000 Addendum, which was concluded to "*clarify the role of the BDA under the JVA as agent of the GOB and the scope of its authority to act on behalf of the GOB.*" In addition, the GOB confirmed and ratified "*all past actions, matters and things done by the BDA in connection with the JVA.*"[708] Even though the 2000 Addendum was again signed by the Chairman of the BDA on behalf of the GOB, this time the Chairman was expressly authorized by the Governor to sign the Addendum on behalf of the GOB.[709]

743. While Respondent initially maintained the position of the Supreme Court that the authorization letter from the Governor was improper because it was unsigned and was not prepared on the Governor's letterhead, it was clarified during the Hearing that the letter was attached to an official communication, which has also been submitted to the Tribunal in the present proceedings.[710] During the Hearing, Respondent rather argued that the Governor did not have the power to bind the GOB under the 1976 Rules of Business and

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of the Board, who shall be the chief executive of the Authority." **Exhibits RE-20**, Schedules IV and III, and **RE-42**, section 5(3).

[706] *Cf.* **Exhibits CE-308** and **RE-39**.

[707] **Exhibit CE-309**.

[708] **Exhibit CE-2**, Recital B.

[709] **Exhibit RE-58(VI)(an)**, p. 53 (numbered as p. 38).

[710] The accompanying communication, dated 23 December 1999, is prepared on the letterhead "*GOVERNOR'S SECRETARIAT BALOCHISTAN*" and references the Subject "*ADDENDUM NO. 1 TO THE THE JOINT VENTURE AGREEMENT BETWEEN BDA AND BHP*." It is signed by the Principal Secretary and states: "*The Governor Balochistan has been pleased to approve and sign the authorization letter allowing the Chairman, Balochistan Development Authority to sign the subject addendum on behalf of the Government of Balochistan. The original authorization letter along with the summary is returned for taking further necessary action please*." **Exhibit RE-58(VI)(an)**, p. 52 (numbered as p. 37). *See* Transcript (Day 8), p. 2098.

claimed that "[t]*hat's something which is in the hands of the Cabinet and the Chief Minister and authorized officials*."[711] The Tribunal is not convinced by this argument because rule 7(1) expressly states that contracts shall be executed in the name of the Governor and there is no indication that the Governor himself did not have the power to authorize a third party to act on his behalf.

744. In addition, the Tribunal notes that Respondent stated during the Hearing that from October 1999 through November 2002, the Governor of Balochistan ruled under martial law so that during the relevant time period in which the authorization letter and the 2000 Addendum were signed, "*there was no Chief Minister and no Parliament. There was only a Governor.*"[712] Thus, if one were to follow Respondent's argument, there would have been no official at the time who could have validly bound the GOB.[713] In light of these particular circumstances, the Tribunal considers it sufficient for the purposes of rule 7 of the 1976 Business Rules that the Governor himself signed the authorization letter and, apparently, authorized his Principal Secretary to deliver it to the Chairman of the BDA on his behalf.[714]

745. Finally, the Tribunal notes that contemporaneous documents establish that at the time the GOB itself considered that it was a party to the CHEJVA. In particular, the GOB decided to replace the BDA as representative on the Operating Committee by the MMDD on 12 December 2009.[715] If the BDA itself had been party to the CHEJVA, the GOB would not have had any authority to replace it with the MMDD; therefore, this decision clearly demonstrates that the GOB considered the BDA to be an agent that could be replaced. The 24 December 2009 Working Paper prepared by the MMDD further expressly states that BHP entered into the CHEJVA with the GOB "*through B.D.A.*" and repeatedly refers to the GOB's 25% equity share in the Joint Venture.[716] These documents strongly indicates that the GOB itself was of the view at the time that the BDA had acted as its representative under the CHEJVA until December 2009 when the BDA was replaced by the MMDD.

746. In light of the fact that the BDA acted as agent of the GOB in connection with the CHEJVA, it was clearly empowered to exercise governmental authority and also acted in

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[711] Transcript (Day 9), p 2419 lines 18-20.
[712] Transcript (Day 2), p. 272 lines 6-14.
[713] *Cf.* Respondent's further statement during the Hearing: "*Now, there was a procedure under which the Governor can act, but it wasn't followed in this case, and he can only act where there has been a decision of the Cabinet or the Chief Minister and he's implementing that decision. And there was no Cabinet or Chief Minister for him to implement their decision.*" Transcript (Day 2), p. 274 lines 14-19.
[714] *Cf.* **Exhibit RE-58(VI)(an)**, pp. 52-53 (numbered as pp. 37-38).
[715] **Exhibit CE-163**.
[716] **Exhibit RE-62**, pp. 2-3.

that capacity, in particular when it represented the GOB on the Operating Committee. The conduct of the BDA is thus attributable to Respondent under Article 5 of the ILC Articles.

747. In conclusion, the Tribunal finds that the actions of all provincial agencies and departments and in particular of the BDA can be attributed to Balochistan and in turn to Respondent. The Tribunal will rely on this finding in its further analysis and consider all of these actions as acts of Respondent.

C. DID PAKISTAN BREACH ARTICLE 3(2) OF THE TREATY?

748. Claimant claims that the following conduct constitutes a violation of the fair and equitable treatment (sometimes referred to as "**FET**") obligation under Article 3(2) of the Treaty: (i) the denial of the Mining Lease Application; (ii) the development and implementation of the plan to take over the Reko Diq project; and (iii) together with the foregoing breaches, other Government conduct, including the conduct during the Mineral Agreement negotiations and/or in the Pakistan Supreme Court proceedings which, according to Claimant, constitutes an overall course of action that is a composite breach of Article 3(2).[717]

749. In its analysis, the Tribunal will first determine the precise scope of the FET standard under Article 3(2) of the Treaty. As a second step, the Tribunal will assess whether this particular standard has been breached by Respondent's actions, insofar as they are established by the record.

1. The Standard of Fair and Equitable Treatment Protection under Article 3(2) of the Treaty

750. Article 3(2) of the Treaty provides as follows:

> "*Each Party shall ensure fair and equitable treatment in its own territory to investments*."[718]

a. Summary of Claimant's Position

751. Claimant submits that the obligation under Article 3(2) of the Treaty to provide fair and equitable treatment constitutes an autonomous requirement, which, contrary to Respondent's allegation, is not confined to the minimum standard of treatment under customary international law as embodied in the 1926 case of *Neer v. Mexico*.[719]

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[717] Claimant's letter dated 18 November 2014. *See* ¶ 174 above.
[718] **Exhibit CE-4**. Art. 3(2).
[719] Claimant's Post-Hearing Brief, ¶ 20.

i. The Scope of the Autonomous FET Standard Under Article 3(2)

752. Claimant submits that there are several inter-related principles embodied within an FET obligation, which set a standard for the host State's conduct towards the investor. According to Claimant, these principles include: (a) protection of the reasonable legitimate expectations of foreign investors; (b) conduct in good faith; (c) procedural propriety and due process; (d) non-discrimination; and (e) no arbitrariness in decision-making.[720] Claimant claims that a host State's failure to conform to *any* of these principles may result in a breach of the FET standard.[721]

(a) Protection of Reasonable Legitimate Expectations

753. In Claimant's view, the "*dominant*" element of these principles is the protection of an investor's legitimate expectations.[722] Claimant refers to what it claims is "*a widely-accepted formulation*" of the standard in the case of *Tecmed v. Mexico*:

> "[The fair and equitable treatment obligation] *requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations*."[723]

754. In relation to Respondent's criticism of the *Tecmed* standard, Claimant notes that the tribunal in *Saluka v. Czech Republic*, which Respondent relies on in this regard, agreed with the *Tecmed* tribunal that the protection of an investor's legitimate expectations is the "*dominant element*" of FET.[724] Claimant further notes that the article from Professor Muchlinski, which Respondent also relies on, refers to the standard set out in *Tecmed* as a "*now reasonably well settled*" proposition, without citing any other authority.[725]

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[720] Memorial, ¶ 394.
[721] Memorial, ¶ 394; Reply, ¶ 337.
[722] Memorial, ¶ 395; Claimant's Post-Hearing Brief, ¶ 25.
[723] Claimant's Post-Hearing Brief, ¶ 25. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003 ("*Tecmed v. Mexico*") [CA-45], ¶ 154. *Cf*. Memorial, ¶ 395.
[724] Claimant's Post-Hearing Brief, ¶ 26. *Saluka Investments BV (The Netherlands) v. Czech Republic* (UNCITRAL), Partial Award of 17 March 2006 ("*Saluka v. Czech Republic*") [CA-44], ¶¶ 302, 304.
[725] Claimant's Post-Hearing Brief, ¶ 26. Peter Muchlinski, 'Caveat Investor?' The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard, *ICLQ* vol 55, July 2006 ("*Muchlinski*") [RLA-183].

Claimant also asserts that Respondent adopted the application of the legitimate expectations standard in its Closing.[726]

755. Claimant further refers to the tribunal in *Kardassopoulos v. Georgia*, which stated that an investor may reasonably hold the legitimate expectation that the host State would "*conduct itself vis-à-vis* [the] *investment in a manner that was reasonably justifiable and did not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination.*"[727]

756. In addition, Claimant relies on the tribunal's observation in *Frontier Petroleum v. Czech Republic* that "[w]*hile the host state is entitled to determine its legal and economic order, the investor also has a legitimate expectation in the system's stability to facilitate rational planning and decision making.*" Claimant notes that the tribunal further stated that "*an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment.*"[728]

757. Claimant acknowledges that the expectations of the investor have to be reasonable and submits that they must be based "*on assurances explicit or implicit, or on representations, made by the state which the investor took into account in making the investment*."[729] Claimant again refers to the tribunal in *Frontier Petroleum v. Czech Republic*, which stated that an investor is entitled to "*rely on* [the State's] *legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses and contracts.*"[730]

758. Claimant emphasizes that contractual commitments may form part of the investor's legitimate expectations and relies on the case of *Bayindir v. Pakistan* in which the tribunal stated that, even in a case where the tribunal does not have jurisdiction to decide on breaches of the contract itself, "*the Tribunal must nevertheless take into account the terms of the* [c]*ontract as a factual element reflecting the expectations of Claimant*."[731]

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[726] Claimant's Post-Hearing Brief, ¶ 26, referring to Transcript (Day 9), pp. 2459, 2555-2556.
[727] Memorial, ¶ 396. *Kardassopoulos & Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award of 3 March 2010 ("*Kardassopoulos and Fuchs v. Republic of Georgia*") [CA-50], ¶ 441.
[728] Memorial, ¶ 397. *Frontier Petroleum Services Ltd. v. Czech Republic* (UNCITRAL), Final Award of 12 November 2010 ("*Frontier Petroleum v. Czech Republic*") [CA-41], ¶ 285.
[729] Memorial, ¶ 398 quoting *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006 ("*Azurix*") [CA-6], ¶ 398.
[730] Memorial, ¶ 399. *Frontier Petroleum v. Czech Republic* [CA-41], ¶ 285.
[731] Memorial, ¶ 399. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 August 2009 ("*Bayindir v. Pakistan*") [CA-55], ¶ 197.

(b) Conduct in Good Faith

759. Claimant further submits that the FET standard is breached in case the State fails to act in good faith and thereby affects the investment.[732] Claimant again relies on the case of *Frontier Petroleum v. Czech Republic* in which the tribunal stated that the obligation to act in good faith may be breached by "*the use of legal instruments for purposes other than those for which they created*" as well as by "*a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and expulsion of an investment based on local favouritism*" and by "[r]*eliance by a government on its internal structures to excuse non-compliance with contractual obligations*."[733]

760. Claimant emphasizes that, while a violation of the good faith principle results in a breach of the FET obligation, the former is not a necessary element of the latter; according to Claimant, even if the minimum standard of treatment were to be applied, the FET standard may also be violated without the State acting in subjective bad faith,.[734]

(c) Procedural Propriety and Due Process

761. Claimant further states that a denial of fair and equitable treatment may result from "*an absence of fair procedure or a finding of serious procedural shortcomings*," such as defects in an administrative process (*e.g.*, absence of transparency and candor) and defects in judicial proceedings (*e.g.*, undue influence of State political initiatives, unreasoned and arbitrary judicial decision).[735]

762. Claimant argues that due process requires "*an actual and substantive legal procedure*," which provides the investor with "*basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute*" and grants the investor "*a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard*."[736]

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[732] Memorial, ¶ 400.
[733] Memorial, ¶¶ 402-403. *Frontier Petroleum v. Czech Republic* [CA-41], ¶ 300.
[734] Memorial, ¶ 404; Reply, ¶ 338; Claimant's Post-Hearing Brief, ¶ 23.
[735] Memorial, ¶ 405 referring to *Frontier Petroleum v. Czech Republic* [CA-41], ¶¶ 289-292.
[736] Memorial, ¶ 406 quoting from *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006 ("*ADC v. Hungary*") [CA-61], ¶ 435.

(d) Non-Discrimination

763. Claimant submits that a State further breaches its FET obligation if it engages in discriminatory treatment.[737] Claimant refers to the tribunal in *Saluka v. Czech Republic,* which held that "*differential treatment of a foreign investor . . . must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.*"[738]

764. Claimant also notes that pursuant to the Preamble of the Treaty, Pakistan and Australia concluded the Treaty to promote investment relations in accordance with "*internationally accepted principles";* according to Claimant, this includes the principle of "*non-discrimination*."[739]

(e) No Arbitrariness in Decision-Making

765. Finally, Claimant states that the host State breaches the FET standard if it treats the foreign investment in an arbitrary manner, which has been found to be the case when a measure is "*not founded on reason or fact, nor on the law, . . . but on mere fear reflecting national preference*"[740] or when there is "*a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.*"[741]

ii. The Standard under Article 3(2) Is Not Limited to the Minimum Standard of Treatment under Customary International Law

766. Claimant rejects Respondent's contention that fair and equitable treatment is "*generally understood to impose* [an] 'international minimum standard'" of treatment under customary international law and Respondent's conclusion that its treatment of TCCA's investment may violate Article 3(2) of the Treaty only if it "*amount*[ed] *to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*"[742]

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[737] Memorial, ¶ 407.
[738] Memorial, ¶ 407. *Saluka v. Czech Republic* [CA- 44], ¶ 307.
[739] Memorial, ¶ 409. **Exhibit CE-4**, Preamble.
[740] *Lauder v. Czech Republic* (UNCITRAL), Final Award of 3 September 2001 ("*Lauder v. Czech Republic*") [CA-62], ¶ 232.
[741] Memorial, ¶¶ 410-411. *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006 ("*LG&E v. Argentina*") [CA- 60], ¶ 128.
[742] Reply, ¶¶ 327, 328.

767. In Claimant's view, Respondent's contention that the Treaty imposes the minimum standard of treatment is contrary to Article 31(1) of the Vienna Convention pursuant to which a treaty must be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*"[743]

768. Claimant argues that Respondent's argument is not supported by the text of Article 3(2) and notes that, unlike the North American Free Trade Agreement ("**NAFTA**"), which is at issue in the cases of *Glamis Gold* and *Waste Management* that Respondent relies on, the Australia-Pakistan Treaty does not link the FET standard to the minimum standard under customary international law.[744]

769. Claimant submits that the tribunal in *Inmaris v. Ukraine* had to interpret a provision similar to Article 3(2) and concluded that, in the absence of any language "*in the BIT that limits* [the FET provision] *to the standard required by customary international law, . . . the Tribunal interprets the language as written*," so that "[a]*ny government act that is unfair or inequitable with respect to a covered investment breaches that obligation*."[745]

770. Claimant further asserts that Respondent's argument is not supported by the context of Article 3(2) or the object and purpose of the Treaty. In particular, Claimant claims that the "*internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence*" that Respondent refers to in the Preamble to the Treaty cannot be read as indicating an intent to limit the FET obligation to the minimum standard of treatment.[746] Claimant refers to the tribunal in *Vivendi v. Argentina II*, which held that "*the reference to principles of international law supports a* ***broader reading*** *that invites consideration of a* ***wider range*** *of international law principles than the minimum standard alone*."[747]

771. Claimant maintains that the FET standard has "*an autonomous meaning*" that "*is not to be assimilated to the lesser minimum standard of treatment under customary*

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[743] Reply, ¶ 329. Vienna Convention [CA-141].
[744] Reply, ¶ 329; Claimant's Post-Hearing Brief, ¶ 21.
[745] Reply, ¶ 329. *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award of 1 March 2012 ("*Inmaris v. Ukraine*") [CA-144], ¶¶ 238, 265. The respective treaty provision states: "*Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and admit such investments in accordance with its respective laws.* ***It shall in any case accord investments fair and equitable treatment.***" Reply, note 99 (emphasis added by Claimant).
[746] Reply, ¶¶ 330, 331; Claimant's Post-Hearing Brief, ¶ 22.
[747] Reply, ¶ 331.*Vivendi v. Argentina II* [CA-52], ¶ 7.4.7 (emphasis added by Claimant). The tribunal in that case had to construe a provision requiring "*fair and equitable treatment according to the principles of international law.*"

international law."[748] Claimant again refers to the tribunal in *Vivendi v. Argentina II*, which quoted a statement from Dr. F.A. Mann:

> "[T]*he terms* 'fair and equitable treatment' *envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A Tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by any other words is likely to be material. The terms are to be understood and implied independently and autonomously.*"[749]

772. Claimant further argues that the UNCTAD survey on practice regarding the fair and equitable treatment obligation, which Respondent relies on, distinguishes between "*formulations of the FET standard*" that are "*linked to the minimum standard of treatment of aliens under customary international law*," such as NAFTA, and those treaties which impose an FET obligation "*without any reference to international law or any further criteria*," such as the Treaty in this case. Claimant submits that the survey describes the latter as imposing an "*unqualified, autonomous or self-standing FET standard*."[750]

773. Finally, in relation to Respondent's reliance on the 1926 case of *Neer v. Mexico*, Claimant claims that the minimum standard of treatment has evolved significantly since that decision and argues that, even if the minimum standard were to be applied, it would not be the standard of 1926 but rather the one existing under customary law today.[751]

b. Summary of Respondent's Position

i. The Standard of Article 3(2) Is Equivalent to the Minimum Standard of Treatment under Customary International Law

774. Respondent submits that Article 3(2) of the Treaty is "*no ordinary* 'fair and equitable treatment' *provision*," as it has to be read with the preceding Article 3(1), which together provide:

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[748] Reply, ¶ 333 citing *OKO Pankki Oyi and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award of 19 November 2007 ("*OKO v. Estonia* Award") [CA-145].
[749] Reply, ¶ 334. *Vivendi v. Argentina II* [CA-52], ¶ 7.4.9.
[750] Reply, ¶ 335. *UNCTAD Series on Issues in International Investment Agreements. Fair and Equitable Treatment* (United Nations 2012) ("UNCTAD Series FET"), [RLA-85], pp. 17-18, 23.
[751] Claimant's Post-Hearing Brief, ¶ 24.

> *"1. Each Party shall encourage and promote investments in its territory by investors of the other Party and shall,* ***in accordance with its laws and investment policies*** *applicable from time to time, admit investments.*
>
> *2. Each Party shall ensure fair and equitable treatment in its own territory to Investments."*[752]

775. According to Respondent, Article 3(2) of the Treaty is equivalent to the minimum standard for the treatment of aliens under customary international law.[753]

776. Respondent submits that the requirement to treat investments in a fair and equitable manner as set out in Article 3(2) is generally understood to impose an "*international minimum standard.*" According to Respondent, this standard is breached only if "*based on the totality of the circumstances of the case, the Government would have acted in such a manner that every reasonable and impartial man or woman would recognise its insufficiency.*"[754]

777. Respondent argues that Claimant's interpretation of Article 3(2) would "*inappropriately limit*[] *the exercise of sovereign regulatory authority and discretion,*" as illustrated by Claimant's allegation of a "*myriad of violations*" of "*stability,*" "*transparency,*" *legitimate expectations*," "*procedural propriety,*" "*consistency*" and "*good faith.*"[755]

778. Respondent submits that in accordance with Article 31(1) of the Vienna Convention, the FET obligation of the Treaty has to be interpreted "*in light of* [the Treaty's] *object and purpose.*"[756] According to Respondent, the object and purpose of the Treaty are contained in the Preamble, which states that "*investment relations should be promoted and economic co-operation strengthened in accordance with* ***internationally accepted principles*** *of mutual respect for sovereignty.*"[757] Respondent argues that, unlike other treaties, the Australia-Pakistan Treaty does not solely aim at promoting and protecting investment, but rather at "*promoting the flow of capital for economic activity and development.*"[758]

779. Respondent argues that, in light of the contextual guidance provided by the Preamble, the provisions of the Treaty, including the FET obligation under Article 3(2), should be

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[752] Counter-Memorial, ¶¶ 455-456 (emphasis added by Respondent).
[753] Respondent's Post-Hearing Brief, ¶ 41.
[754] Counter-Memorial, ¶ 533.
[755] Counter-Memorial, ¶¶ 534, 535.
[756] Counter-Memorial, ¶ 537.
[757] Counter-Memorial, ¶ 537; Respondent's Post-Hearing Brief, ¶ 41 (emphasis added by Respondent).
[758] Respondent's Post-Hearing Brief, ¶ 42.

interpreted in accordance with standards set by international law.[759] Respondent refers to the Notes and Comments to Article 1 of the OECD Draft Convention in which the Committee responsible for the Draft stated:

> "*The phrase* 'fair and equitable treatment', *customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. . . .* ***The standard required conforms in effect to the* 'minimum standard'** ***which forms part of customary international law***."[760]

780. In Respondent's view, the "*authoritative articulation*" of the FET standard as "*the functional equivalent*" of the minimum standard of treatment under customary international law has been provided by the tribunal in *Neer v. Mexico*:

> "[T]*he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*."[761]

781. Respondent contends that the *Neer* tribunal set forth a very high threshold that has been adopted by subsequent tribunals and still remains applicable today; according to Respondent, it is the appropriate standard for compliance with Article 3(2).[762]

782. Respondent refers to the tribunal in *Glamis Gold v. USA*, which held that in order to constitute a breach of the FET obligation:

> "[a]*n act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach.*"[763]

783. Respondent further refers to the tribunal's description of the requirements under customary international law in *Genin v. Estonia*:

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[759] Counter-Memorial, ¶ 538. Respondent's Post-Hearing Brief, ¶ 42.
[760] Counter-Memorial, ¶ 539. OECD Draft Convention on the Protection of Foreign Property (1967) ("OECD Draft Convention") [RLA-90], p. 333 (emphasis added by Respondent).
[761] Counter-Memorial, ¶ 540. *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, General Claims Commission United States and Mexico, Docket No. 136, Opinion dated 15 October 1926, 21 American Journal of International Law 555 (1927) ("*Neer v. Mexico*") [RLA-91], p. 556.
[762] Counter-Memorial, ¶¶ 541, 545; Respondent's Post-Hearing Brief, ¶ 43.
[763] Counter-Memorial, ¶ 541. *Glamis Gold, Ltd. v. United States of America*, NAFTA (UNCITRAL), Award dated 8 June 2009 ("*Glamis Gold v. USA*") [RLA-92], ¶ 22.

> "*Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.*"[764]

784. Respondent claims that the circumstances in *Genin v. Estonia* were similar to the present case. The tribunal stated that the Estonian Central Bank's decision to revoke a license "*invites criticism,*" in particular, the reasoning in the notice was "*formalistic*" and did not fully express all the "*not unsound*" reasons underlying its decision. The tribunal found that "*ample grounds existed for the action taken*" by the Bank and, despite the poor form of and non-exhaustive reasons in the revocation decision, such matters "*do*[] *not rise to the level of a violation of any provision of the BIT.*"[765]

785. Respondent also cites the interpretation given by the tribunal in *Lauder v. Czech Republic*:

> "*Fair and equitable treatment is related to the traditional standard of due diligence and provides a* 'minimum international standard which forms part of customary international law'."[766]

786. Finally, Respondent refers to the case of *El Paso v Argentina* in which the tribunal was of the view that:

> "*the position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law and with the identical role assigned to FET and to the international minimum standard.*"[767]

ii. Even If Considered a Self-Standing Standard, the Threshold for Breach of the FET Obligation Would Be Higher Than Alleged by Claimant

787. Respondent contends that even if the Tribunal were to follow Claimant's interpretation of Article 3(2) as a self-standing FET standard that is not connected to the international minimum standard, the standard would be stricter than alleged by Claimant.[768]

788. In relation to Claimant's reliance on the articulation of the FET standard in *Tecmed v. Mexico*, Respondent submits that this articulation has been criticized in scholarship and has also been "*heavily qualified*" by subsequent case law. Respondent cites the tribunal

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[764] Counter-Memorial, ¶ 542. *Alex Genin et al. v. Republic of Estonia*, ICSID CaseNo. ARB/99/2, Award of 25 June 2001 ("*Genin v. Estonia*") [RLA-93], ¶ 367.
[765] Respondent's Post-Hearing Brief, ¶ 44. *Genin v. Estonia* [RLA-93], ¶ 367.
[766] Counter-Memorial, ¶ 543. *Lauder v. Czech Republic* [CA-62], Respondent notes that the tribunal in that case quoted from the United Nations Conference on Trade and Development [RLA-94], ¶ 292..
[767] Counter-Memorial, ¶ 544. *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15 Award of 31 October 2011 ("*El Paso v Argentina*") [RLA-115], ¶ 336.¶
[768] Respondent's Post-Hearing Brief, ¶ 45.

in *Saluka v. Czech Republic*, which stated in relation to the *Tecmed v. Mexico* standard: "[I]*f their terms were to be taken too literally, they would impose upon host States obligations which would be inappropriate and unrealistic.*"[769]

789. Respondent further contends that other tribunals have imposed limitations on the standard focusing on the extent to which the frustration of an investor's expectations may constitute a breach of the FET obligation.[770] Respondent submits that there are five relevant limitations:[771] (a) the reasonableness and legitimacy of an investor's expectations must not be assessed in isolation, but rather in the context of all the surrounding circumstances; (b) the expectations must be based on a representation made by the State specifically to the investor regarding specific commitments, or a representation or rule that is not specifically addressed to a particular investor but which was made with a specific aim to induce foreign investments and on which the foreign investor relied; (c) the representation must be "*crucial for the investment decision*"; (d) the expectations must be balanced against legitimate regulatory goals of the host State; and (e) the investor's conduct must be taken into account.

(a) Reasonableness and Legitimacy of the Expectations

790. With regard to the first limitation, Respondent contends that, as the general factor, reasonableness is a key aspect both in terms of the investor's expectations and the host State's conduct.[772]

791. According to Respondent, the extent to which the expectations of the investor are reasonable and legitimate must be considered in the context of all the surrounding circumstances. Respondent refers to the tribunal in *Duke Energy v. Ecuador,* which stated that:

> "*the* ***assessment of the reasonableness or legitimacy must take into account all circumstances****, including not only the facts surrounding the investment, but also the* ***political, socioeconomic, cultural and historical conditions prevailing in the host State****.*"[773]

792. Respondent further asserts that if the relevant conduct of the host State is reasonable in all the circumstances (and thus to be expected), no liability under the FET standard can

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[769] Respondent's Rejoinder, ¶¶ 391-393. *Saluka v. Czech Republic* [CA-44], ¶ 304.
[770] Respondent's Rejoinder, ¶ 394.
[771] Respondent's Rejoinder, ¶¶ 395, 399-402.
[772] Respondent's Post-Hearing Brief, ¶ 52.
[773] Respondent's Rejoinder, ¶ 395. *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008 ("*Duke Energy v. Ecuador*") [CA-49], ¶ 340 (emphasis added by Respondent).

arise. Respondent argues that there can thus be no breach of Article 3(2) if the rejection of the Mining Lease Application by the Licensing Authority was not unreasonable.[774]

793. Respondent submits that investors must also take into consideration the level of development and administrative standards in the host State; they have to conduct their own due diligence and may not rely on the terms of an investment treaty if they failed to do so.[775]

794. Respondent further contends that Claimant's focus on "*whether its own (subjective) expectations were frustrated*" is misconceived and refers to the statement of the tribunal in *EDF v. Romania*:

> *"Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State's power to regulate its economic life in the public interest.*"[776]

795. Respondent argues that the hopes and wishes of an investor do not form the basis of the State's liability under Article 3(2); to the contrary, Respondent considers the concept of "*legitimate expectations*" to be a "*jurisprudential construct*" designed to assist in deciding whether the FET obligation was breached. Respondent asserts that there is no freestanding obligation to respect such expectations and also emphasizes that not all expectations can be considered "*legitimate*."[777]

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[774] Respondent's Post-Hearing Brief, ¶¶ 50, 52.
[775] Respondent's Rejoinder, ¶ 396. Respondent relies on the case of *Generation Ukraine v. Ukraine* in which the tribunal considered it natural that prospects of greater profit come along with greater risks, including risks in the regulatory sphere. *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003 ("*Generation Ukraine v. Ukraine*") [RLA-105], ¶ 20.37. Respondent also refers to the tribunal in *Parkerings v. Lithuania*, which held that in case of a State in political transition, an investor may not legitimately expect that the legislative regime would remain unchanged. *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007 ("*Parkerings v. Lithuania*") [RLA-180], ¶¶ 335-336. Respondent further relies on the case of *Genin v. Estonia* in which the tribunal took into account the fact that the claimants had knowingly chosen to invest in "*a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown*" and held that such a State cannot be expected to regulate perfectly or consistently. Respondent's Rejoinder, ¶ 397; Respondent's Post-Hearing Brief, ¶ 51. *Genin v. Estonia* [RLA-93], ¶ 348.
[776] Respondent's Post-Hearing Brief, ¶ 46; Respondent's Rejoinder, ¶ 398. *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009 ("*EDF v. Romania*") [CA-136].
[777] Respondent's Post-Hearing Brief, ¶¶ 46-47.

(b) Specific Representation Made by the State

796. As to the second limitation, Respondent contends that a legitimate expectation must be based either on a representation made by the State specifically to the investor regarding specific commitments or on a representation or rule which was not specifically addressed to a particular investor but which was made with a specific aim to induce foreign investments and on which the investor relied.[778]

797. Respondent acknowledges that assurances or representations from the Government can form the basis of legitimate expectations, but argues that they must have "*a certain grade of precision.*" Respondent refers to the tribunal in *Frontier Petroleum v. Czech Republic*, which rejected an FET claim that was based on assurances and representations from the host Government because they did "*not exhibit the level of specificity to generate legitimate expectations.*"[779]

798. Respondent further acknowledges that the legal and regulatory framework may form the basis of legitimate expectations, but argues that this is subject to the following qualifications: (i) investors take the law of the host State as they find it; and (ii) the framework must contain some specific basis for a legitimate expectation. Respondent refers to the *EDF v. Romania* tribunal, which stated:

> "*Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.*"[780]

(c) "*Crucial for the Investment Decision*"

799. In relation to the third limitation, *i.e.*, that the representation must be "*crucial for the investment decision*," Respondent refers in particular to the frequent allegation of investors that they legitimately expected that their contract would be properly performed by the State and relies on the tribunal's finding in *Parkerings v. Lithuania* that "*not every*

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[778] Respondent's Rejoinder, ¶ 399. Respondent refers to the tribunal in *Methanex v. United States,* which held that Methanex had not been given any representations by the United States that it could reasonably have relied on in its expectation that the impugned regulatory changes would not occur. *Methanex Corporation v. United States of America* NAFTA Arbitral Tribunal, Final Award of 3 August 2005 ("*Methanex v. USA*") [RLA-107], ¶ IV.D.5.7.
[779] Respondent's Post-Hearing Brief, ¶ 48 lit. b. *Frontier Petroleum Services Ltd. v. Czech Republic* [CA-41], ¶ 468.
[780] Respondent's Post-Hearing Brief, ¶ 48 lit.c. *EDF v. Romania* [CA-136], ¶ 217.

hope amounts to an expectation under international law. . . . [C]*ontracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law.*"[781] Respondent further refers to the case of *Hamester v. Ghana* in which the tribunal stated that "*it is not sufficient for a claimant to invoke contractual rights that have allegedly been infringed to sustain a claim for a violation of the FET standard.*"[782]

(d) Balance of Interests

800. According to Respondent, the fourth limitation, *i.e.*, a balance between the expectations of the investor and the legitimate regulatory goals of the host State, ensures that a State is not prevented from acting in the public interest, even if such conduct adversely affects the operations of an investor.[783] Respondent cites the tribunal in *Saluka v. Czech Republic:*

> "*In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. . . . The determination of a breach of* [the FET standard] *by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other.*"[784]

(e) The Investor's Conduct

801. Finally, with regard to the last limitation, Respondent submits that the Tribunal must take into consideration whether Claimant has satisfied the following three duties set out by Professor Muchlinski:

> "[A] *duty to refrain from unconscionable conduct, a duty to engage in the investment in light of an adequate knowledge of its risks, and a duty to conduct its investment in a reasonable manner.*"[785]

[781] Respondent's Rejoinder, ¶ 400. *Parkerings v. Lithuania* [RLA-180].
[782] Respondent's Rejoinder, ¶ 400. *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010 ("*Gustav Hamester v Ghana*") [CA-7].
[783] Respondent's Rejoinder, ¶ 401.
[784] Respondent's Rejoinder, ¶ 401. *Saluka v Czech Republic* [CA-44], ¶¶ 304-308.
[785] Respondent's Rejoinder, ¶ 402. Muchlinski [RLA-183], p. 530.

802. Respondent emphasizes that bilateral investment treaties "*are not insurance policies against bad business judgments.*"[786]

c. The Tribunal's Analysis

803. Article 3(2) of the Treaty provides that "[e]*ach Party shall ensure fair and equitable treatment in its own territory to investments.*"[787] The dispute between the Parties as to the applicable FET standard relates primarily to the question whether this provision refers to the minimum standard under customary international law or whether it rather contains an autonomous standard, as it has been developed by case law on similar provisions.

i. The Minimum Standard under Customary International Law

804. The Tribunal will interpret the FET obligation of Respondent pursuant to Article 31(1) of the Vienna Convention, *i.e.*, "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."[788] First of all, the Tribunal notes that Article 3(2) of the Treaty does not contain any (express) reference to the minimum standard or even to principles of international law. Therefore, Respondent's interpretation would reflect the ordinary meaning of this provision only if it can be established that the Contracting Parties considered that the words "*fair and equitable treatment*" in themselves imply a reference to the minimum standard.

805. In the Tribunal's view, there is no indication that this was indeed the case, in particular taking into account that there are examples of FET provisions in which the Contracting States expressly included a reference to the minimum standard. For example, Article 1105(1) of the NAFTA provides that "[e]*ach party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security*."[789]

806. The UNCTAD Report of 2007 on trends in investment rulemaking from 1995-2006, *i.e.*, covering the time period in which the Australia-Pakistan BIT was concluded in 1998, confirms that the level of protection agreed on by the various contracting States differed during that time. The Report distinguishes between seven groups of FET standards: (i) standards that do not make any reference to international law or any other criteria to determine their content; (ii) standards that link fair and equitable treatment to a treatment

[786] Respondent's Rejoinder, ¶ 402, quoting *Emilio Agustin Maffezini v. The Kingdom of Spain,* ICSID Case No. ARB/97/7, Procedural Order No. 2 of 28 October 1999 ("*Maffezini v. Spain*") [RLA-130], ¶ 64.
[787] **Exhibit CE-4**, Article 3(2).
[788] Vienna Convention [CA-141], Article 31(1).
[789] North American Free Trade Agreement [CA-142], Article 1105(1).

no less favorable than that accorded to the host State's own investors or investors of third States; (iii) standards that combine FET with a duty to abstain from impairing the investment through unreasonable or discriminatory measures; (iv) standards that link FET to the principles of international law; (v) standards that likewise link FET to the principles of international law but additionally include broad examples of which conduct qualifies as a violation of the FET standard; (vi) standards that make FET contingent on the domestic legislation of the host State; and (vii) standards that explicitly refer to the minimum standard of customary international law.[790]

807. The Tribunal notes that Article 3(2) of the Treaty forms part of the first group of standards that do not make any reference to international law or any criteria pursuant to which their content shall be determined. While the UNCTAD Report states that the specific content of these provisions remains open and has to be determined on a case-by-case basis, the Tribunal is of the view that the comparison to the other groups of standards set out by the Report demonstrates that contracting States that intended to limit the FET standard in their treaty to the minimum standard had means to express such intent through clarifying language. As a result, the Tribunal considers the absence of any reference to international law in Article 3(2) as a strong indication that the Contracting Parties did not intend to limit the FET standard contained therein to the minimum standard.

808. In the Tribunal's view, this indication is not rebutted by the context and/or the object and purpose of the Treaty as expressed in its Preamble. Respondent relies in particular on the second recital pursuant to which "*investment relations should be promoted and economic co-operation strengthened in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence*."[791] However, the Tribunal does not agree with Respondent that this reference to "*internationally accepted principles*" indicates an intent of the Contracting Parties to limit the FET standard to the minimum standard.

809. First, most of the international principles referred to in the recital ("*sovereignty, equality, mutual benefit, non-discrimination and mutual confidence*") do not concern what is understood as the minimum standard under customary international law. Second, the immediate context of Article 3(2) shows that, where the Contracting Parties indeed intended to qualify an obligation, they did so through express language. Article 3(1), which contains an obligation to encourage and promote investments, includes the qualifier "*in accordance with its laws and investment policies*."[792] Similarly, Article 3(3),

[790] UNCTAD Report 2007 [RLA-94], pp. 28-33.
[791] **Exhibit CE-4**, Preamble.
[792] **Exhibit CE-4**, Article 3(1).

which sets out an obligation to accord protection and security, is qualified by the words "*subject to its laws*."[793]

810. The Tribunal therefore considers that the context and the object and purpose of the Treaty in fact confirm that, in the absence of any qualifier in Article 3(2), there is no indication that the Contracting Parties intended to limit the FET standard to the minimum standard under customary international law, but it rather appears that they intended to agree on an autonomous standard, as it has been developed in case law.

ii. The Autonomous FET Standard as Developed by Case Law

811. What, then, is the content of this autonomous FET standard? In the Tribunal's view, a dominant principle of the FET standard is the protection of the investor's legitimate, investment-backed expectations. The Parties both accept this obligation, although Respondent emphasizes that the concept of legitimate expectations does not simply correspond to any subjective hopes of the investor, but is rather qualified by objective requirements, such as reasonableness, existence of specific representations made by the State, causality for the investment decision, balance of interests and the investor's conduct. Claimant agrees that expectations deserve protection only if they are reasonable and does not expressly dispute the other qualifiers.

812. The Tribunal agrees with the Parties and the case law they rely on that the protection of legitimate expectations is an important element of the FET standard. In the Tribunal's view, the term "*legitimate*" further embodies the concept that the expectations must be reasonable, *i.e.*, based on assurances that are attributable to Respondent and that an investor acting reasonably would have relied on in making its investment decision. The Tribunal further considers that the concept of "*legitimate expectations*" includes an assessment of all circumstances of the individual case. As part of this analysis, the Tribunal will take into account these further criteria set out by the Parties, such as (i) whether Respondent's conduct was justified by a legitimate purpose or whether it was rather arbitrary and/or discriminatory; (ii) whether Respondent accorded Claimant procedural propriety and due process in the course of its decision-making process; and (iii) whether Claimant conducted its investment in a reasonable manner.

813. In the following analysis of whether Article 3(2) has been breached, the Tribunal will first determine whether and to what extent Respondent's actions created a legitimate expectation on the part of Claimant that it would be entitled to mine Reko Diq. As a

[793] **Exhibit CE-4**, Article 3(3).

second step, the Tribunal will assess whether the actions referred to in Claimant's 18 November 2014 letter breached such legitimate expectations.[794]

2. Did Respondent Create a Legitimate Expectation That Claimant Would Be Entitled to Mine Reko Diq?

a. Summary of Claimant's Position

814. Claimant submits that over a period of more than fifteen years, both Pakistan and Balochistan repeatedly affirmed in contracts, laws, communications, official statements, meetings, court submissions and court rulings that TCC – BHP's successor as of 2006 – would receive a mining lease for Reko Diq, once TCC had successfully completed its exploration and feasibility work and submitted an application and feasibility study meeting "*routine Government requirements*."[795] Claimant contends that these affirmations that TCCA reasonably relied on when it invested more than US$ 240 million in exploration and feasibility activities in the Reko Diq area created a legitimate expectation that, after having successfully completed the work, it would be granted a Mining Lease over Reko Diq.[796]

815. Claimant refers to two "*basic expectations*" that it considers to be legitimate under the circumstances:

(i) TCCA would have "*security of tenure,*" meaning that if it did its work and succeeded in proving a viable mine, it would be entitled to convert its exploration license into a mining lease; and

(ii) both the GOB and the GOP would support and facilitate TCCA's investment.[797]

816. Claimant claims that TCCA's expectations were fostered by three categories of Government assurances: (i) Balochistan's specific representations in the CHEJVA and related agreements; (ii) representations made through the federal and the provincial regulatory framework; and (iii) specific assurances made by both Governments at "*critical junctures*."[798] Claimant claims that in its Closing Respondent did not dispute, *as a matter of law*, that these three categories of assurances could give rise to legitimate expectations.[799]

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[794] *See* ¶ 174 above.
[795] Memorial, ¶ 412; Reply, ¶¶ 339, 348.
[796] Memorial, ¶ 413.
[797] Claimant's Post-Hearing Brief, ¶ 28.
[798] Claimant's Post-Hearing Brief, ¶ 29.
[799] Claimant's Post-Hearing Brief, ¶ 30.

i. Assurances Under the CHEJVA and Related Agreements

817. Claimant submits that Balochistan assured TCC under the CHEJVA, specifically its Clause 11.8.2, that it had the "*right to mine Reko Diq*," once TCC had successfully completed its exploration and development activities. Article 11.8.2 provides that TCC "shall be entitled *to convert the relevant* [Exploration] *Licence(s) held by it into Mining* [Leases] *so as to give secure title over the required Mining Area*," subject only to "*compliance with routine Government requirements*."[800] According to Claimant, this provision specifically provided for security of tenure.[801]

818. Claimant further submits that pursuant to Clauses 7.2(a), 10.3 and 24.6.3 of the CHEJVA, Balochistan undertook to assist TCC by providing "*appropriate administrative support*" in obtaining all requisite licenses and permits, including the mining lease, and performing "*all such acts as shall be reasonably required to give effect to the purposes of* [the CHEJVA]."[802]

819. According to Claimant, Balochistan repeatedly affirmed the validity of the CHEJVA and the "*finders-keepers*" principle embodied in Clause 11.8.2. Claimant refers in particular to:[803]

(i) the 2000 Addendum to the CHEJVA by which Balochistan "*acknowledge*[d] *and agree*[d] *that the Agreement is in full force and effect*";[804]

(ii) the 23 June 2000 Deed of Waiver in which Balochistan agreed that "*all the provisions of the* [CHEJVA] *remain in full force and effect*";[805]

(iii) the 2006 Novation Agreement in which Balochistan agreed that TCCA "*shall enjoy all rights and benefits accorded to BHP*[] *under the* [CHE]*JVA*," and assured that it would "*observe the terms and conditions of the* [CHE]*JVA which are on its part required to be observed*";[806]

(iv) Balochistan's 2007 submissions to the Balochistan High Court in which it "*specifically denied that the CHE*[JVA] w*as in any manner illegal*," and the statement of Balochistan's Advocate General at the hearing before the Court that "*the Government of Balochistan has rightly entered into CHEJVA and it is in the*

[800] Memorial, ¶ 414. **Exhibit CE-1**, Clause 11.8.2 (emphasis added by Claimant). Reply, ¶ 343.
[801] Claimant's Post-Hearing Brief, ¶ 31.
[802] Memorial, ¶ 415. **Exhibit CE-1**, Clauses 7.2(a), 10.3 and 24.6.3. *See also* Claimant's Post-Hearing Brief, ¶ 31 referring to Clauses 24.6.1 and 24.6.2.
[803] Memorial, ¶ 416.
[804] **Exhibit CE-2**, Clause 4.1. *See also* Reply, ¶ 344.
[805] **Exhibit CE-194**, Clause 6.
[806] **Exhibit CE-3**, Clauses 2(b) and 4(f). *See also* Reply, ¶ 344.

best interest of the people of Balochistan that [the Joint Venture's] *project should continue*";[807]

(v) the 26 June 2007 judgment of the Balochistan High Court, which states that "*it can be safely held that CHEJVA has been executed legally and the interest of the people of Balochistan has been very well taken care of*";[808] and

(vi) Balochistan's 11 December 2010 submission to the Pakistan Supreme Court in which it stated that the CHEJVA was "*made in accordance with the existing laws / rules*" and "*is not illegal*."[809]

820. In Claimant's view, Balochistan thereby created the legitimate expectation that it would "*comply with its contractual obligation to grant TCC the Mining Lease*" once TCC had successfully completed the exploration program at Reko Diq.[810]

821. In reference to Respondent's argument that TCCA never received an "*express assurance*" from the Government in relation to "*the specific* [mining area of] *. . . over 99,453 square kilometres containing at least 14 mineral deposits*" that it applied for, Claimant emphasizes that it never claimed an "*automatic right*" to mine a specific, predetermined area; rather, it claims the right to receive a mining lease upon the submission of an application meeting all applicable requirements, which includes the identification of the area to be covered by the Mining Lease.[811]

822. Claimant also refers to Respondent's argument that the Mining Area identified in TCCP's Mining Lease Application "[did] *not match the scope of* [the] [F]*easibility* [S]*tudy*" and that under Clause 11.8.1 of the CHEJVA, a Participating Party does not have a right to apply for a mining lease in respect of "*a greater land area than is necessary to encompass all ore resources which may be properly mined as a single mining enterprise*." Claimant notes that Clause 11.8.1 of the CHEJVA expressly includes "*any necessary plan or facilities for the milling and treatment of ore and other appropriate infrastructure*" in the definition of the "*Mining Area*."[812] In Claimant's view, the Mining Area identified in the Feasibility Study and the Mining Lease Application was in full compliance with Clause 11.8.1, as it was large enough for TCCA to efficiently mine several deposits while using the same infrastructure and processing facilities and yet even smaller than contemplated by the CHEJVA.[813]

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[807] **Exhibit CE-212**, pp. 11, 13; **Exhibit CE-61**, p. 24.
[808] **Exhibit CE-61**, pp. 29-30.
[809] **Exhibit CE-107**, p. 8 lit. d, ¶ 14.
[810] Memorial, ¶ 417.
[811] Reply, ¶¶ 361, 362.
[812] Reply, ¶ 365. **Exhibit CE-1**, Clause 11.8.1.
[813] Reply, ¶¶ 365-366.

823. In relation to Respondent's argument that TCCA failed to "*fulfil the condition precedent of acquiring the BDA's interest*" before TCCP filed its Mining Lease Application, Claimant submits that the language of the CHEJVA and the parties' intent confirm that the acquisition of the non-participating party's interest (pursuant to the process set out in Clause 11.6) is not a condition for the grant of a mining lease, but has to be completed only before the start of any mining project. Claimant notes that Clause 11.4.2 of the CHEJVA provides that "[w]*here the BDA is a Non-participating Party, then subject both to* [TCCA] *obtaining all routine Government approvals required and to compliance with Clause 11.6,* [TCCA] *shall be entitled to undertake sole risk investment . . . in a mining development within any of the relevant Prospecting Licences*."[814]

824. Claimant also refers to Respondent's argument that the CHEJVA and related agreements were invalid under Pakistani law and claims that the question is not whether TCCA now has a valid contractual right to mine, but rather whether TCCA had a legitimate expectation of a right to mine; therefore, even if, contrary to Claimant's position, the Supreme Court's judgment were authoritative as regards the contractual validity of the CHEJVA, it would nevertheless be irrelevant to the analysis whether Respondent has breached Article 3(2) of the Treaty. [815]

825. Claimant contends that acts or representations will give rise to liability under international law even if they are "*considered legally nonexistent or null and void or susceptible to invalidation*" as a matter of domestic law.[816] Claimant refers to the tribunal in *Kardassopoulos v. Georgia* which found that, even though the joint venture agreement of the claimant with a state-owned corporation was void *ab initio* (due to the fact that the latter had exceeded its authority when it concluded the agreement), the respondent "*created a legitimate expectation for Claimant that his investment was, indeed, made in accordance with Georgian law and, in the event of breach, would be entitled to treaty protection,*" based on "[t]*he assurances given to Claimant regarding the validity of the JVA* [that] *were endorsed by the Government itself, and some of the most senior officials of Georgia*."[817]

826. In reference to Pakistan's argument that "*the mere frustration of contractual expectations without something further will not automatically become a legitimate expectation protected under fair and equitable treatment,*" Claimant acknowledges that a breach of

[814] Reply, ¶¶ 367-369.
[815] Claimant's Post-Hearing Brief, ¶ 32; Reply, ¶¶ 370-371.
[816] Reply, ¶ 372 quoting *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992 ("*Southern Pacific Properties v. Egypt*") [CA-150], ¶¶ 82-83. Claimant's Post-Hearing Brief, ¶ 32.
[817] Reply, ¶ 372. *Kardassopoulos v. Georgia* [CA-134], ¶¶ 191-192.

contract does not always give rise to an FET breach but emphasizes that this is due to the fact that a Treaty breach requires sovereign conduct; it does not preclude a contract from being the foundation of legitimate expectations.[818]

827. Claimant also refers to Pakistan's allegation that "*the first time that the contractual right to a mining lease emerged*" was in TCCs response to Balochistan's Notice of Intent to Reject, filed on 19 October 2011, and submits that: This right was expressly provided for in the CHEJVA; it had been confirmed by Balochistan when it relaxed the 1970 BM Rules to provide the contractor the "*absolute right*" to a Mining Lease, subject only to routine Government requirements (Clause 11.8.2); it was expressly reaffirmed when TCCA first began investing in Pakistan in 2000; it formed a part of the due diligence when Barrick and Antofagasta purchased TCCA in 2006; and TCCA again invoked its security of tenure when the Steering Committee considered an alternative proposal from MCC.[819] According to Claimant, TCCA's right to security of tenure was recognized by the Governments given that they declined to consider MCC's proposal in order to avoid "*legal implications.*"[820] Claimant also submits that the MMDD acknowledged in the 24 December 2009 Working Paper for the Balochistan Cabinet that pursuant to the CHEJVA, "*if a suitable discovery* [was] *made*[,] *the area was to be converted into a Mining Lease,*"[821] and claims that the Planning Commission also recognized that the "*Government of Balochistan* [was] *legally bound to convert* [TCC's] *Exploration License into long term renewable mining lease*."[822]

ii. Assurances in Provincial and Federal Law

828. Claimant submits that further assurances of Balochistan were contained in the 1994 Relaxations decision and the 2002 BM Rules.[823]

(a) The 1994 Relaxations

829. Claimant asserts that by granting the 1994 Relaxations, specifically the relaxation of the "*preferential right*" provided for in rule 23 of the 1970 BMC Rules, Balochistan undertook to grant TCC a mining lease. Claimant refers to BHP's request that "*the*

[818] Claimant's Post-Hearing Brief, ¶ 33.
[819] Claimant's Post-Hearing Brief, ¶ 34 referring to **Exhibits CE-1, CE-187, CE-189, CE-2, CE-70** and **CE-235**.
[820] Claimant's Post-Hearing Brief, ¶ 35. **Exhibit RE-78**.
[821] Claimant's Post-Hearing Brief, ¶ 35. **Exhibit RE-62**.
[822] Claimant's Post-Hearing Brief, ¶ 35. The 17 November 2009 Working Paper for the Planning Commission actually states that "[t]*he sponsors may clarify whether Government of Balochistan is legally bound to convert Exploration License into long term renewable mining lease for thirty (30) years under Balochistan Mining Concession Rules 2002 or not.*" **Exhibit RE-240**, p. 4.
[823] Memorial, ¶ 418.

subjective discretion of the licensing authority . . . must be waived in favour of an absolute right" of the license holder "*to a M*[ining] *L*[ease]*, provided they comply with routine administrative requirements*."[824] Claimant notes that BHP emphasized that "[i]*nternational mining companies will view this aspect of a country's mining regulations as one of the most important.*"[825] Given that Balochistan granted the relaxations as requested to enable BHP "*to carry out its exploration work without any complication,*" Claimant claims that Balochistan also granted BHP the requested "*absolute right*" to a Mining Lease subject only to "*routine administrative requirements.*"[826] Claimant further notes that in the context of its consent to the transfer of BHP's interest in the Joint Venture to TCC in 2000, Balochistan expressly reaffirmed that the 1994 Relaxations "*still h*[e]*ld good.*"[827]

830. Claimant refers to Respondent's argument that the assurances provided to BHP in the 1994 Relaxations "*were of no effect*" after the 2002 BM Rules entered into force and that the 1994 Relaxations could not have given rise to any legitimate expectations of TCCA because, in particular, TCCA had provided "*an express Undertaking to comply with the regular procedures under the 2002 BM Rules.*"[828] Claimant argues that, in the context of the assessing Pakistan's liability under Article 3(2) of the Treaty, it is irrelevant whether the 2002 BM Rules replaced the 1994 Relaxations as a matter of Pakistani law. In Claimant's view, the assurance provided in the 1994 Relaxations, *i.e.*, that BHP would receive a mining lease subject only to "*routine administrative requirements,*" created legitimate expectations on the part of BHP and later TCCA that it would be granted the right to mine Reko Diq once it had successfully completed its exploration and feasibility work.[829]

831. In any event, Claimant claims that, even under Pakistani law, the 1994 Relaxations were not affected by the entry into force of the 2002 BM Rules. Claimant asserts that Pakistani courts have repeatedly held that rights that were obtained under rules that were later repealed are protected from impairment through the enactment of new rules.[830]

832. As regards the 2006 Undertaking that Respondent relies on, Claimant notes that it merely states that TCCA "*shall abide by all other conditions of* [the] *National Mineral Policy read with* [the] *Balochistan Mineral Rules, 2002 as approved / amended from time to*

[824] Memorial, ¶ 419. **Exhibit CE-187**, p. 7.
[825] Reply, ¶ 346. **Exhibit CE-187**, p. 7.
[826] Memorial, ¶¶ 72, 420. **Exhibit CE-189**. Reply, ¶¶ 345, 347.
[827] Memorial, ¶ 420. **Exhibit CE-195**. Reply, ¶ 345.
[828] Reply, ¶ 373.
[829] Reply, ¶ 374.
[830] Reply, ¶ 375.

time," but does not refer to the 1994 Relaxations. According to Claimant, the 2006 Undertaking therefore does not constitute a waiver of the assurances provided in the 1994 Relaxations.[831]

(b) The 2002 BM Rules (Implementing the 1995 NMP)

833. Claimant submits that under the 2002 BM Rules, specifically its rule 48(1), Balochistan further undertook that "*where the holder of an exploration license . . . makes an application for a mining lease . . . the licensing authority* ***shall*** *grant the mining lease*" subject only to certain requirements set out in rule 48 of the 2002 BM Rules that Claimant claims to be "*routine*."[832]

834. In Claimant's view, this language, together with rule 45(1) which provides that a mining lease grants the holder a right to mine, contradicts Respondent's contention that the 2002 BM Rules provided TCCA only with a "*right to apply for a mining lease*," but not with a right to mine[833]

835. Claimant submits that the 2002 BM Rules reflected international standards and refers to the foreword pursuant to which Balochistan intended to provide a "*set of rules internationally competitive*" that would "*attract the interest of investors on such matters as transparency, criteria for dealing with applications and the grant of Licenses and Leases, expeditious decision making process, security of tenure, provision of adequate information on mineral titles, independent resolution mechanism etc.*"[834]

836. Claimant further emphasizes that the 2002 BM Rules implemented the 1995 NMP, which provided in Article 8.6.2 that "[t]*he Licensing Authority shall not unreasonably refuse an application for the grant of an ML. Where the Licensing Authority considers that the applicant has satisfied the specified criteria for assessment and grant of an ML, the ML* ***will be*** *granted.*"[835]

837. Claimant refers to rules 9(1) and 9(3)(a) of the 2002 BM Rules pursuant to which Balochistan could conclude agreements which "*make provision with respect to the grant, renewal, cancellation or transfer of a mineral title*" to a mining company.[836] Claimant states that these provisions implemented the policy directive of the 1995 NMP that

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[831] Reply, ¶ 376. **Exhibit CE-206**.
[832] Memorial, ¶ 421. **Exhibit CE-5**, Rule 48(1). Reply, ¶ 341 (emphasis added by Claimant).
[833] Reply, ¶¶ 340-341.
[834] Memorial, ¶ 422. **Exhibit RE-1**, p. 7. Claimant notes that this language mirrors the language used in the 1995 NMP. **Exhibit CE-190**, ¶ 8.1. Reply, ¶ 349.
[835] Memorial, ¶ 422. **Exhibit CE-190**, ¶ 8.6.2 (emphasis added by Claimant).
[836] Memorial, ¶ 423. **Exhibit RE-1**. Rules 9(1) and 9(3)(a). Rule 7(2) defines "*mineral title*" to include mining leases.

Provincial Governments could "*enter into an agreement with an investor, within the framework of the law*," that covered "*the right of the licensee to obtain a mining lease*."[837] In Claimant's view, the 2002 BM Rules therefore "*expressly affirmed*" that Balochistan's contractual promise under Clause 11.8.2 of the CHEJVA was valid.[838]

838. Claimant claims that Pakistan conceded in its Closing that the 1995 NMP and the 2002 BM Rules were "*key factual elements in assessing* [TCCA's] *legitimate expectations*"[839] and notes that Respondent's witness Mr. Khokhar testified during the Hearing that the 1995 NMP was specifically intended to "*attract private investment in the mineral sector of Pakistan.*"[840]

839. Claimant contends that, while Pakistan attempts to "*manufacture an inconsistency*" between the CHEJVA and the 2002 BM Rules in terms of the Licensing Authority's discretion and the resulting (lack of) security of tenure, the 2002 BM Rules and the 1995 NMP were, in fact, specifically intended to provide investors with security of tenure as an improvement over the wide discretion in the 1970 BMC Rules.[841] Claimant argues that it was therefore legitimate for TCC to expect that Balochistan would not undermine the goal of the regulatory reform, which made security of tenure "*the premise for all future investments*," by exercising whatever discretion it retained under the 2002 BM Rules to subvert security of tenure.[842] Claimant quotes its witness Ms. Boggs, who stated during the Hearing that "[TCC] *believed, to the extent the Government had that discretion,* [that it was] *constrained by terms that are known in the mining business*" and that the requirements of rule 48 could all "*be demonstrated objectively.*"[843]

840. Referring to Respondent's argument that TCCA's conduct in the negotiation of the Mineral Agreement demonstrates its awareness of the fact that it did not have a right to a mining lease under the CHEJVA or the 2002 BM Rules, Claimant contends that, in these negotiations, TCCA was not concerned with the scope of the Licensing Authority's discretion to grant or deny a Mining Lease Application. It had already received assurances that the Mining Lease Application would be approved subject to routine Government requirements.[844] According to Claimant, its principal concern in the negotiation of the Mineral Agreement was rather the impact that future amendments to the 2002 BM Rules

[837] Memorial, ¶ 423. Exhibit CE-190, ¶¶ 8.12.1, 8.12.2.
[838] Memorial, ¶ 423.
[839] Claimant's Post-Hearing Brief, ¶ 37; Transcript (Day 9), pp. 2556-2558.
[840] Claimant's Post-Hearing Brief, ¶ 38; Transcript (Day 7), p. 1737.
[841] Claimant's Post-Hearing Brief, ¶¶ 39, 40.
[842] Claimant's Post-Hearing Brief, ¶¶ 40, 41.
[843] Claimant's Post-Hearing Brief, ¶ 42. Transcript (Day 4), pp. 978-979.
[844] Reply, ¶¶ 377, 378.

could have on "*the certainty and security of tenure required for investment and financing on the scale of Reko Diq*," given that rule 9 of the 2002 BM Rules provided for the precedence of the 2002 BM Rules over the terms of any mineral agreement.[845]

841. Claimant emphasizes that it did not attempt to exempt itself from the requirements of rule 48, as it believed that Balochistan would apply this rule "*objectively, fairly and consistent with its security-of-tenure assurances.*" It intended rather to ensure that the Mineral Agreement could not be "*negated by any changes to the BM Rules in the future*."[846] Claimant submits that TCCP therefore proposed to assure legal certainty either by including a statement in the Mineral Agreement that the agreement would prevail in case of inconsistency, or by amending certain provisions of the 2002 BM Rules "*to further strengthen security of tenure.*"[847]

842. Contrary to Respondent's arguments, Claimant stresses that its 2006 Undertaking did not alter its expectations, as it was part of the novation of the CHEJVA, which Claimant considers to be a single transaction in which the parties affirmed both the validity of the CHEJVA and the applicability of the 2002 BM Rules. According to Claimant, this demonstrates that the parties did not believe there was any inconsistency between the two.[848]

843. Claimant contests Respondent's allegation that TCC's proposed amendments to the 2002 BM Rules violated the 2006 Undertaking and argues that while the 2002 BM Rules expressly allowed mineral agreements, they made such agreements pointless given that the Province could unilaterally override the agreement by amending the Rules. According to Claimant, the proposed amendments were intended to "*bring the Rules more closely in line with their express purpose.*"[849]

844. Claimant also refers to Respondent's reliance on the 1995 NMP requirement that mineral agreements be "*within the framework of the law*"[850] and notes that, while the 2013 NMP still provides that "[t]*he Provincial Governments may enter into an agreement with an investor, within the framework of the law*," the new policy also states that "[t]*he mineral*

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[845] Reply, ¶ 379 quoting **Exhibit RE-227**, p. 4. Claimant refers to a letter dated 27 October 2008 from its witness Ms. Boggs to the GOB in which she stated: "*Our interpretation of the BM Rules leads us to conclude that some of the BM Rules are not fully compatible with the stability provisions of the Mineral Agreement, and that any future amendment of the BM Rules would be mandatory and applicable to TCC notwithstanding any stability provisions of the Mineral Agreement.*" Claimant's Post-Hearing Brief, ¶ 44 (emphasis added by Claimant). **Exhibit RE-64**, p. 2.
[846] Claimant's Post-Hearing Brief, ¶ 45 quoting **Exhibit CE-227**, p. 4.
[847] Reply, ¶ 379.
[848] Claimant's Post-Hearing Brief, ¶¶ 46, 47.
[849] Claimant's Post-Hearing Brief, ¶ 48.
[850] **Exhibit CE-190**, ¶ 8.12.1.

agreement would have an overriding effect in case anything contained therein is inconsistent with any law or rules subsequently amended."[851] Claimant concludes that a mineral agreement can therefore override certain aspects of the 2002 BM Rules and still be "*within the framework of the law*." [852]

845. Claimant further refers to Respondent's argument that "*the 2002 BM Rules confer a broad discretion upon the Licensing Authority*" and asserts that this argument is based on rule 48(3)(a)(vi) of the 2002 BM Rules, which provides that "[s]*ubject to sub-rules (4) and (5), a mining lease shall not be granted . . . unless . . . it is in the interest of the development of the mineral resources of Balochistan to grant the lease*."[853]

846. Claimant argues that, by entering into the CHEJVA and the 2006 Novation Agreement and by agreeing that TCCA would receive a mining lease "*subject only to routine Government requirements*," Balochistan already exercised any discretion it may have had pursuant to the 2002 BM Rules. Claimant notes that rule 9(1) specifically authorizes the GOB to "*enter into an agreement . . . relating to a mineral title*" with a party proposing to carry on mineral operations "*if the Government is satisfied that . . . the carrying on of the undertaking in question is desirable in the interest of the development of the mineral resources of Balochistan.*"[854] In Claimant's view, Balochistan determined that any project would be "*in the interest of the development of the mineral resources of Balochistan"* when it entered into the 2006 Novation Agreement with TCCA.[855]

847. In addition, Claimant asserts that Pakistan and Balochistan repeatedly assured TCCA that the project was indeed "*in the interest of the development of mineral resources of Balochistan*" and refers to the following occasions:[856]

    (i) January 2006: Pakistan's Prime Minister stated that Pakistan needs foreign investment in order to develop the mining sector, which would boost economic growth and exports of the country;[857]

    (ii) 10 July 2007: Balochistan's Chief Minister stated that the Reko Diq project would play an important role in the development of the Province;[858]

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[851] **Exhibit CE-416**, ¶ 7.8.
[852] Claimant's Post-Hearing Brief, ¶ 50.
[853] Reply, ¶ 380. **Exhibit R-1**. Rule 48(3)(a)(vi).
[854] Reply, ¶ 381. **Exhibit R-1**. Rule 9(1).
[855] Reply, ¶ 381. *See also* Memorial, ¶ 483.
[856] Reply, ¶ 382.
[857] Luksic, ¶ 7; **Exhibit CE-318**.
[858] **Exhibit CE-326**.

(iii) 14 July 2007: The Board of Investment stated in a letter to TCC's CEO that it "*appreciates your endeavours and feels indebted to you for your contribution in the development of Pakistan through your investment in* 'Copper Mining'";[859]

(iv) 2007: Balochistan stated before the Balochistan High Court that the constitutional petitions "*undermin*[ed] *the interest of the Province by* [j]*eopardizing such a profitable project of national importance*";[860]

(v) 14 July 2010: The Chairman of the Board of Investment stated that he "*appreciated the work of* [TCC] *on producing employment to the locals and also . . . attract*[ing] *more investment in mining of other natural resources in the remote province of Pakistan*";[861] and

(vi) 25 October 2010: The Chairman of the Board of Investment stated that "*foreign investors and companies are encouraged to invest in exploiting the riches of the Balochistan province.*"[862]

848. Claimant also refers to the 31 December 2009 note to the Chief Secretary in which the MMDD reported that TCC was providing "*health, education, sanitation and drinking water facilities to the residents of the nearby villages and communities*" as well as "*training to their employees using latest scientific knowledge, technology, equipments and computer softwares to build / enhance the capacity of their employees*" and that its project would provide "*8000+ employment opportunities during construction phase while during operation phase it will provide 3000+ direct and about 30,000 indirect employment opportunities.*"[863]

849. Finally, Claimant claims that international law and Pakistani law did not permit the Licensing Authority to exercise any remaining discretion in bad faith, in an arbitrary and discriminatory manner, or without providing adequate reasoning. Nevertheless, Claimant asserts that the Licensing Authority did not deny the Mining Lease Application because it thought that TCCA's mining project would not be "*in the interest of the development of the mineral resources of Balochistan,*" but because it was implementing the decision of the GOB to *"oust*" TCCA from Reko Diq.[864]

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[859] **Exhibit CE-327**.
[860] **Exhibit CE-212**, pp. 11, 12, 14. *See also* Memorial, ¶ 484.
[861] **Exhibit CE-346**.
[862] **Exhibit CE-351**.
[863] Memorial, ¶ 486 quoting **Exhibit CE-31**, pp. 19, 20.
[864] Reply, ¶ 383.

iii. Direct Affirmations by the Government

850. Claimant submits that Pakistan and Balochistan affirmed the undertakings they had given in the CHEJVA, the 1995 NMP and the 2002 BM Rules on various occasions during the time period in which TCC performed its exploration and feasibility work.[865] Claimant cites the following examples as "*express affirmations*":[866]

(i) 2007: In its submissions to the Balochistan High Court, Balochistan argued that TCC "*is entitled to retain the benefit*" of its mineral discovery, because "*if this was not so* [,] *then no one would come forward to invest millions of dollars in exploration/prospecting;*"[867]

(ii) 26 June 2007: The judgment of the Balochistan High Court upheld the validity of the CHEJVA, stating that mining "*is a risky business and after exploration by a party when the area is proved, then it becomes his vested right to do mining;*"[868]

(iii) 23 January 2009: Pakistan and Balochistan stated in a Working Paper of the Steering Committee that "[u]*nder the Balochistan Mineral Rules (BMR) 2002, the license holder is* ***legally entitled*** **[to the]** ***conversion of prospecting license into mining lease****, once the area is proved and certain laid down requirements under the rules are fulfilled by the licensee. The project area of Reko Diq Copper Project has been granted to TCC (Pvt) Ltd by GOB who carried out intensive exploration work and has spent about US$ 46 million on the establishment of over 4.0 billion tons of copper ore reserves*";[869]

(iv) 23 November 2010: In its submission to the Supreme Court, Pakistan asserted that "*the* 'finders – keepers' *principle … is fundamental for the development of the mining industry and is recognized by the National Mineral Policy and by the 2002 BMC Rules.*"[870]

851. Claimant submits that in addition, the conduct of Pakistan and Balochistan implied that they intended TCC to mine Reko Diq. Claimant refers, *inter alia*, to:[871]

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[865] Memorial, ¶ 424.
[866] Memorial, ¶¶ 424, 425.
[867] **Exhibit CE-212**, p. 14. *See also* Reply, ¶ 352.
[868] **Exhibit CE-61**, p. 52. *See also* Reply, ¶ 352.
[869] **Exhibit CE-69**, p. 5 (emphasis added by Claimant).
[870] Memorial, ¶ 424. **Exhibit CE-264**, p. 2.
[871] Memorial, ¶ 425; Reply, ¶¶ 350-352.

(i) Balochistan's consistent encouragement of its joint venture partner TCC to carry on with its exploration activities and the preparation of a feasibility study, e.g., at the 26 October 2007 OC meeting in which Balochistan agreed that TCC "*should move immediately to commence and complete* [a] *feasibility study*";[872]

(ii) Balochistan's renewal of Exploration License EL-5 in 2005, and again in 2008;[873]

(iii) Balochistan's granting of all permits that TCC required for its exploration activities;[874]

(iv) the active engagement by both Pakistan and Balochistan in the Mineral Agreement negotiations, which included fiscal incentives and stabilization provisions; and

(v) Balochistan's engagement in the Project Agreement negotiations regarding the future joint mining venture with TCC.

852. Claimant further contends that there were "*numerous assurances provided directly to representatives of TCC and its corporate parents by Federal and Provincial officials at the highest levels.*" Claimant cites as examples:[875]

(i) January 2006: Pakistan's Prime Minister assured Mr. Luksic, Antofagasta's Chairman, that the GOP would work to facilitate TCCA's investment, and recommended that TCCA enter into a Mineral Agreement with the Governments.[876]

(ii) April 2006: Pakistan's President assured Mr. Luksic that TCCA's investment in the Reko Diq project would have "*the full protection of the Government*."[877]

(iii) 13 July 2010: Balochistan's Chief Minister and Chief Secretary assured a delegation of TCCA and Barrick executives, including Claimant's witness Ms. Boggs, that the Government wanted *"to develop the Reko diq project exclusively with TCC, and not with any third parties.*"[878]

(iv) 14 July 2010: According to a Government press release, Pakistan's Prime Minister assured the same delegation "*that the Federal Government has discussed and decided in principle to fully support the consortium and expects the project would be launched at the earliest.*"[879] According to the newspaper *Daily Times*, Pakistan's

[872] **Exhibit CE-64**, p. 3.
[873] **Exhibit CE-5**.
[874] Livesey IV, ¶¶ 34-45.
[875] Reply, ¶¶ 353, 354.
[876] Luksic, ¶¶ 8-9.
[877] Luksic, ¶ 13. *See also* **Exhibits CE-317** and **CE-318**.
[878] Boggs I, ¶ 87. *See also* Memorial, ¶ 237.
[879] **Exhibit CE-95**, p. 1. *See also* Memorial, ¶ 238; Boggs I, ¶ 88.

> Finance Secretary stated after the meeting, that he would extend "*full assurance of cooperation to the* [TCC and Barrick delegation] *for their success in* [the] *Reko Diq Project.*"[880]

853. In relation to Respondent's argument that the officials of the GOP exceeded their powers when they provided assurances regarding Balochistan's disposal of mineral titles to TCC, Claimant claims that Pakistan is liable for the conduct of all its organs and officials under international law; thus, it is irrelevant for the purposes of determining Pakistan's liability under Article 3(2) of the Treaty whether these officials were authorized to provide such assurances under domestic law.[881]

854. Claimant emphasizes that, contrary to Respondent's allegations, TCC did not rely on general statements, but rather on "*specific representations made by high-level officials of both Governments in face-to-face meetings with leaders of major international companies on the verge of investing hundreds of millions of dollars*." Claimant argues that such meetings were not intended to discuss details, but rather an opportunity to receive assurance directly from the Governments that they would provide the required support for TCCA's project. Claimant further states that these representations were made at "*critical moments*," *i.e.*, prior to the initial investment decision and each further infusion of capital, following rumors of a takeover and proposals of other investors like MCC and, similarly, before the Feasibility Study was delivered and the Mining Lease Application was filed.[882]

855. Claimant claims that it was deliberately led to believe that the Governments were supporting the proposed mining venture and refers to Chief Minister Raisani's assurance that the press reports about the takeover decision were inaccurate even though he had presided over the meeting of the Balochistan Cabinet in which this decision was taken.[883]

856. In addition to these specific representations, Claimant argues that the fact that Balochistan supported and facilitated the Joint Venture for many years gave rise to a legitimate expectation that it would continue to do so and fulfill its contractual obligations. Claimant refers in particular to Balochistan's approval of the shift in focus to the Western Porphyries, which gave rise to a legitimate expectation that the Government would not later deny the Mining Lease on the grounds that TCCA had done precisely what had been approved.[884]

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[880] **Exhibit CE-246**. *See also* Memorial, ¶ 239.
[881] Reply, ¶¶ 359-360.
[882] Claimant's Post-Hearing Brief, ¶¶ 53-54, 56.
[883] Claimant's Post-Hearing Brief, ¶ 55.
[884] Claimant's Post-Hearing Brief, ¶ 57.

iv. TCCA Relied on These Assurances

857. Finally, Claimant submits that, in reliance on the assurances given by Pakistan and Balochistan, TCCA spent more than US$ 240 million on the Reko Diq project and thereby "*transformed a barren strip of land into one of the world's largest copper-gold deposits.*"[885] Claimant claims that it relied on the Governments' assurances specifically when making the following decisions:[886]

(i) 2000 to 2005: investment of over US$ 23 million in the exploration of Reko Diq and the preparation of a scoping and draft feasibility study on the Tanjeel deposit;[887]

(ii) October 2002: entry into the Alliance Agreement with BHP in order to assume BHP's obligations under the CHEJVA and to step into the Joint Venture;[888]

(iii) mid-2006 to end of 2007: investment of over US$ 45 million in expanded drilling and work on the Scoping Study;[889]

(iv) 2008 and 2009: investment of an additional US$ 150 million in work on the Pre-Feasibility Study and the Feasibility Study for initial mine development at the Western Porphyries and the Expansion Study for Tanjeel and further satellite deposits;[890] and

(v) 2010: investment of an additional US$ 22 million in work to finalize the Feasibility Study and the Expansion Study.[891]

b. Summary of Respondent's Position

858. Respondent submits that no legitimate expectation of a "*right to mine*" Reko Diq could arise from the so-called "*assurances*" and, in fact, any conduct of the Governments because (i) Respondent cannot be bound by any alleged representations arising out of the CHEJVA and related agreements; (ii) the CHEJVA does not confer a right to a mining lease on Claimant; (iii) there were no representations reducing the "*routine Government requirements*" referred to in the CHEJVA to "*mere administrative niceties*"; and (iv) none of the alleged "*assurances*" could be construed as "*trumping*" the 2002 BM Rules.[892]

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[885] Memorial, ¶ 426; Reply, ¶ 356.
[886] Memorial, ¶ 427.
[887] **Exhibit CE-56**, p. 2.
[888] **Exhibit CE-198**.
[889] **Exhibit CE-65**, p. 2.
[890] **Exhibit CE-65**, p. 2; **Exhibit CE-82**, p. 2.
[891] **Exhibit CE-110**, p. 2.
[892] Respondent's Rejoinder, ¶ 405; Counter-Memorial, ¶ 131.

i. Respondent Cannot Be Bound by Expectations Arising Out of the CHEJVA and Related Agreements

859. Respondent submits that it was not a party to the CHEJVA, the 2000 Addendum or the 2006 Novation Agreement and refers to the Supreme Court's finding that the GOB was also not a party to the CHEJVA, which was rather "*made between BDA and BHP alone for all practical purposes, and not between GO*[B] *through BDA and BHP*."[893] In Respondent's view, it cannot be bound by an expectation that arises from an agreement to which it was not a party; therefore, the CHEJVA and related agreements could not have given rise to any legitimate expectations.[894]

860. Respondent further contends that pursuant to the Supreme Court judgment, the CHEJVA, and consequently also the 2000 Addendum and the 2006 Novation Agreement, were illegal and void *ab initio*, with the result that the Joint Venture ceased to exist and could not be the holder of any rights under Exploration License EL-5. Respondent asserts that the same applies to the 1994 Relaxations, which the Supreme Court held were illegal under rule 98 of the 1970 BMC Rules.[895]

861. Respondent refers to Claimant's argument that the Supreme Court's holding is irrelevant in the context of the assessment whether the Governments' assurances gave rise to legitimate expectations. Respondent contests Claimant's submission that liability under international law *will* arise even if the acts or representations are considered illegal as a matter of domestic law, but acknowledges that in such cases liability *may* nevertheless arise. Respondent notes that in the present case, it was the Supreme Court (and not a court of first instance) which made the finding of voidness and illegality, and Claimant has not raised a claim for denial of justice with regard to the substance of the decision.[896]

ii. The CHEJVA Does Not Confer a Right to Mine on Claimant

862. Respondent contends that the CHEJVA and the 2006 Novation Agreement *per se* could not give rise to any legitimate expectations and refers to the tribunal in *Parkerings v. Lithuania*, which stated "*contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law*" and to the tribunal in *Hamester v. Ghana*, which held that "*it is not sufficient for a claim to invoke contractual*

[893] Respondent's Rejoinder, ¶¶ 406-408. **Exhibit RE-18**, ¶¶ 68-69.
[894] Respondent's Rejoinder, ¶ 410.
[895] Respondent's Rejoinder, ¶ 411.
[896] Respondent's Rejoinder, ¶ 412.

rights that have allegedly been infringed to sustain a claim for a violation of the FET standard."[897]

863. Respondent further argues that even if the CHEJVA and related agreements could be a source of legitimate expectations, the only expectation that Claimant could have had in this case was that it would need to fulfil "*routine Government requirements*" before it would be granted a Mining Lease. According to Respondent, this is "*an important caveat*" which precludes the agreements, without more, from generating a "*legitimate expectation*" sufficient to found a breach of the FET obligation.[898]

864. Respondent notes that Claimant cannot point to any provision of the CHEJVA stipulating that it would be granted a mining lease or that it would be entitled to mine 99.4 square kilometers of Reko Diq.[899] Respondent further argues that if the CHEJVA had in fact given such a right, thereby effectively overriding and circumventing the provisions of the licensing regime, it would have been invalid pursuant to section 23 of the Pakistan Contract Act 1872.[900]

865. Respondent also refers to Article 5.2 of the CHEJVA pursuant to which Claimant did not even have the right to conduct exploration activities without obtaining a license from the Licensing Authority; much less did it have the right to mine.[901] Similarly, Respondent argues that Article 11.8.2, which Claimant primarily relies on, did not entail a right to mine and refers to the preamble to the CHEJVA in which the parties stated their intention to "*enter into a joint venture for the purpose of conducting exploration for and, **if warranted**, developing any Mineral deposits within the Exploration Area.*"[902]

866. Respondent submits that the text of Article 11.8.2, as well as the context in which it is located, confirms that the CHEJVA granted only a right to apply for a mining lease, subject to the satisfaction of "*routine Government requirements,*" *i.e.*, those under the 2002 BM Rules, and further contractual preconditions, but did not guarantee a "*right to mine.*"[903] Respondent argues that Article 11.8.2 refers to the standing of the Joint Venture or the sole Participating Party to apply for a mining lease, but does not contain a promise by the BDA (or Balochistan) to grant a mining lease; in Respondent's view, it rather

[897] Respondent's Post-Hearing Brief, ¶ 48 lit. a. *Parkerings v. Lithuania* [RLA-121], ¶ 344; Gustav *Hamester v. Ghana* [RLA-48], ¶ 337.
[898] Respondent's Post-Hearing Brief, ¶ 48 lit. a; Respondent's Rejoinder, ¶ 413.
[899] Counter-Memorial, ¶¶ 133-134.
[900] Counter-Memorial, ¶ 135.
[901] Counter-Memorial, ¶ 136.
[902] Counter-Memorial, ¶¶ 136-138. **Exhibit CE-1**. Preamble (emphasis added by Respondent).
[903] Respondent's Rejoinder, ¶ 418; Counter-Memorial, ¶ 139.

clarifies "*how the relations between the parties will operate in the event the Joint Venture or a Participating Party elects to develop a mine.*"[904]

867. Respondent claims that, contrary to Claimant's allegation, the word "*routine*" does not only entail administrative tasks, but is rather meant to refer to "*regularly followed procedures*," as defined in the Oxford English Dictionary. In Respondent's view, the term demonstrates that Claimant would not receive any special or preferential treatment, but would be subject to the regular procedures under the 2002 BM Rules, without any variation or change.[905]

868. As to the context of Article 11.8.2, Respondent notes that Article 11 is entitled "*Decision as to Mine Development*," and sets out the procedure for taking a decision to develop a "*Mining Area*" in relation to a specific "*Mineral deposit*." Article 11.8.2 in turn refers to a "*secure title over the required Mining Area*" and therefore limits the scope of the lease that can be sought to a specific mineral deposit located within the identified "*Mining Area*."[906] Respondent argues that Article 11.8.2 thus applies only to a mining lease in respect of the "*Mining Area*," *i.e.*, as defined and limited by the feasibility study.[907]

869. Respondent contends that a mining lease cannot be validly sought if the procedure set out in Article 11 has not been followed.[908] Further, any rights of a single Participating Party under Article 11.8.2 are conditional upon compliance with Article 11.6, *i.e.*, the acquisition of the Non-participating Party's interest, before any mining lease application can be filed.[909]

870. Respondent also refers to the broader context of the CHEJVA, *i.e.*, its Articles 12, 17(a) and 5.9, and clauses 5.2-5.4, 5.7 and 13.2-13.3, and argues that those provisions further support Respondent's argument that the CHEJVA did not confer any right to receive a mining lease on Claimant, even if the requirements of Article 11 had been met.[910] According to Respondent, however, those requirements were not met in the present case, as the condition precedent set out in Article 11.4.2 (acquisition of Balochistan's interest by TCCP) was never satisfied so that any right under Article 11.8.2 never arose.[911]

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[904] Counter-Memorial, ¶ 139.
[905] Counter-Memorial, ¶ 466.
[906] Counter-Memorial, ¶¶ 140-141. Respondent describes this procedure in detail in Counter-Memorial, ¶¶ 142-149.
[907] Counter-Memorial, ¶ 140. Respondent refers in particular to Article 11.8.1 pursuant to which a "*Mining Area*" cannot encompass a space larger than that required for "*a single mining enterprise*" as defined in scope by the feasibility study. Counter-Memorial, ¶ 149.
[908] Counter-Memorial, ¶ 141.
[909] Counter-Memorial, ¶ 152.
[910] Counter-Memorial, ¶¶ 153-154.
[911] Counter-Memorial, ¶¶ 156-159.

871. Respondent claims that the "*routine Government requirements*" referred to in Clause 11.8.2 of the CHEJVA are "*entrenched*" in the 2002 BM Rules, which Claimant undertook to abide by in its 2006 Undertaking.[912] Respondent argues that pursuant to rules 47 and 48, the Licensing Authority is *obliged* to reject mining lease applications unless the application satisfies various objective (*e.g.*, the failure to show that a mine could be "*profitably developed and operated*" and the failure to address "*value addition*") and subjective requirements (*e.g.*, that the mining lease application is "*satisfactory*" and "*in the interest of the development of the mineral resources of Balochistan*").[913]

872. In addition, Respondent refers to rules 9(5) and (6) of the 2002 BM Rules, which provide:

> *"(5) Any provision contained in a mineral agreement which is inconsistent with any provision of these rules or any other law shall, to the extent of the inconsistency, be of no force or effect.*
>
> *(6) Nothing contained in a mineral agreement shall be construed as absolving any party thereto from complying with any requirement laid down by law or from applying for, and obtaining, any licence, approval, permission or other document required by law.*[914]

873. Respondent submits that these provisions invalidate any agreement contrary to the 2002 BM Rules, a fact of which Claimant was or should have been aware, as it was part of the legal framework in which Claimant was operating. Respondent concludes that, as a consequence, the CHEJVA could not give rise to a legitimate expectation of a guaranteed right to mine.[915]

iii. No Representations Were Made That Reduced "*Routine Government Requirements*" in the CHEJVA to Mere Administrative Niceties

874. Respondent contends that, even though Claimant attempts to reduce "*routine Government requirements*" to an "*administrative rubber stamp*," the following conduct of Claimant illustrates that it was aware of the fact that any mining lease application would have to comply with the 2002 BM Rules:[916]

(i) Claimant attempted to obtain a guaranteed right to mine through a Mineral Agreement, which would not have been necessary if it already had such a right

[912] Respondent's Rejoinder, ¶ 414. **Exhibit CE-206**.
[913] Respondent's Rejoinder, ¶ 414.
[914] Respondent's Rejoinder, ¶ 415. **Exhibit RE-1**, rules 9(5) and (6).
[915] Respondent's Rejoinder, ¶¶ 415, 416.
[916] Respondent's Rejoinder, ¶¶ 418, 419.

under the CHEJVA or if an application to obtain a mining lease under the 2002 BM Rules were a mere formality;

(ii) Claimant's stated reasons for its desire to amend the 2002 BM Rules during the Mineral Agreement negotiations included avoiding any "*discretionary actions*" under the 2002 BM Rules, which demonstrates that it was aware that there were discretionary and subjective elements in the 2002 BM Rules that could be used to reject a mining lease application;[917]

(iii) Claimant gave the Undertaking to abide by the 2002 BM Rules "*as approved/amended from time to time*," which confirms that it regarded the 2002 BM Rules as one of the Government requirements to be complied with; and

(iv) Claimant did not consider that it had a guaranteed "*right to mine*" under the CHEJVA; otherwise, it would have referred to that right in the Mining Lease Application.

875. Respondent further refers to rule 48(3) of the 2002 BM Rules, which provides:

> *"(a) A mining lease shall not be granted unless –*
>
> *(i) the feasibility studies show that the mine can be profitably developed;*
>
> *(ii) the proposed plan for development and operation of the mine and the programme of the mining operations of the application will ensure the efficient, beneficial and timely use of mineral resources;*
>
> *(iii) the applicant in question has or can obtain the technical and financial resources and experience to carry out mining operations effectively;*
>
> *(iv) the applicant is a fit and proper person to hold the lease;*
>
> *(v) the proposals submitted with the application are satisfactory;*
>
> *(vi) it is in the interests of the development of the mineral resources of Balochistan to grant the lease; and*
>
> *(vii)a concrete proposal for value addition for the Ore to be produced/exploited from the applicant's mining ease within the country is submitted, or if the facility is not available in the province, the Ore could be taken out of the province with the prior approval of the Provincial Government;*
>
> *(b) If at the time of the application the applicant in question is in default."*[918]

[917] **Exhibit CE-64**, p. 2.
[918] Respondent's Rejoinder, ¶ 420. **Exhibit RE-1**. rule 48(3).

876. In Respondent's view, Claimant was aware that a mining lease would not be granted unless its application satisfied *all* of the requirements in rule 48(3). Respondent claims that Claimant's witness Ms. Boggs accepted this during the Hearing, including that it was legitimate for the GOB to desire local smelting/refining and that the Licensing Authority was entitled to take the Governments' value addition objectives into account when deciding whether the Application was satisfactory.[919]

877. According to Respondent, rule 48(3) contains "*significant, mandatory and in some instances subjective Government requirements*" to be satisfied before a mining lease can be granted.[920] Respondent contends that even if the objective criteria were satisfied, the Licensing Authority still had "*a wide margin of discretion*" under rule 48(3)(a)(vi) to deny a mining lease which it considered not to be in the "*interest*" of Balochistan in terms of "*the development of its mineral resources*." As a result, Respondent claims that an applicant could not maintain that it had an unqualified "*right*" to receive an approval of its application.[921]

878. Respondent asserts that TCCP acknowledged this discretion when, in the context of negotiating the Mineral Agreement, it stated that "[t]*he BMR include a number of powers and discretions that are inconsistent with creating the certainty and security of tenure required for investment and financing on the scale for Reko Diq*" and therefore proposed to amend the 2002 BM Rules.[922]

879. Respondent further contends that it is widely known that the 2002 BM Rules confer upon the Licensing Authority broad discretion whether to grant or refuse a mining lease. Respondent refers to the 2003 World Bank report on Pakistan's policy on the development of its mineral sector in which it concluded that "*provincial rules*" such as the 2002 BM Rules:

> "*include as a criteria* [sic] *for the grant of a mining lease that it must be* 'in the best interest of the development of the mineral resources of [the province] to grant the lease.' ***This criterion introduces a discretionary element into the procedure for granting mining rights to an investor who has completed a successful exploration program. . . . [I]t may be impossible for an applicant to effectively respond to a determination that the development of a particular mine is not in the***

[919] Respondent's Post-Hearing Brief, ¶¶ 66-67 referring to Transcript (Day 4), p. 822 line 14 to p. 823 line 8 and p. 764 lines 1-6.
[920] Respondent's Rejoinder, ¶ 420. *See also* Respondent's Post-Hearing Brief, ¶ 68.
[921] Counter-Memorial, ¶ 184.
[922] Counter-Memorial, ¶ 186. **Exhibit CE-227**, p. 4. Respondent also refers to the 27 October 2008 letter in which TCCP made specific proposals on how to amend the 2002 BM Rules in order to ensure that the provisions of mineral agreements would take precedence over the Rules. Counter-Memorial, ¶ 187. **Exhibit RE-64**.

> ***best interests of the province. That determination is essentially a political one.***"[923]

880. Respondent claims that the 2002 BM Rules reflect the political and socio-economic conditions prevailing in Pakistan and, specifically, Balochistan and argues that Balochistan's power to regulate its economic life in the public interest is clearly expressed in rule 48(3) aiming to enhance the "*development of the mineral resources of Balochistan*" and to ensure "*the efficient, beneficial and timely use of mineral resources.*"[924]

881. Respondent also refers to its witness Mr. Khohkar who explained that:

> "[t]*he Licensing Authority's discretion under the BM Rules 2002 is broader than that provided for under the Punjab Mining Rules. We were conscious of the need to ensure that mineral development takes place while keeping in view of* [sic] *unique socio-economic scenario of Balochistan. A quick comparison of Article 48 in each of the Punjab and Balochistan Rules makes it plain that the latter was crafted to maintain greater regulatory discretion for the Balochistan Licensing Authority."*[925]

882. Respondent contends that Claimant was aware of the applicable rules when it allegedly invested in Balochistan and argues that it is irrelevant whether Claimant considers it "*unjust, unfair or inconvenient*" that such discretion is included in the 2002 BM Rules.[926] Respondent emphasizes that the Governments adopted the firm position in all of their statements, and in particular in the Mineral Agreement negotiations, that the 2002 BM Rules would apply in their entirety and that no exemptions would be granted to Claimant's project.[927]

883. Respondent submits that Claimant relies on the 1994 Relaxations to argue that it had a guaranteed "*right to mine,*" despite the fact that the 2002 BM Rules intentionally did not provide for the power to relax the Rules which existed under rule 98 of the 1970 BMC Rules.[928] Respondent claims that, apart from the fact that they were declared illegal by the Supreme Court, the 1994 Relaxations were of no effect once the 2002 BM Rules had entered into force and, in addition, Claimant provided its 2006 Undertaking to comply with the regular procedures under the 2002 BM Rules.[929] Respondent also argues that by

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[923] Respondent's Rejoinder, ¶ 423 quoting the World Bank Report, Republic of Pakistan, Mineral Sector Development Policy Note, 20 November 2003, p. 22, **Exhibit RE-65** (emphasis added by Respondent).
[924] Respondent's Rejoinder, ¶ 424.
[925] Respondent's Rejoinder, ¶ 425. Respondent's Post-Hearing Brief, ¶ 69. Khokhar I, ¶ 19.
[926] Counter-Memorial, ¶ 191.
[927] Counter-Memorial, ¶¶ 460, 461, 464. *See also* Respondent's Post-Hearing Brief, ¶ 48 lit. b.
[928] Respondent's Rejoinder, ¶ 421. Respondent's Post-Hearing Brief, ¶¶ 71-72.
[929] Counter-Memorial, ¶ 479.

providing the 2006 Undertaking, Claimant accepted that the Licensing Authority could cancel any mineral title on the basis of any breach of conditions for the transfer of Exploration License EL-5 from BHP to TCCA.[930]

884. In any event, Respondent argues that the 1994 Relaxations do not support Claimant's position as (a) the notification by which the relaxations were granted did not itself grant BHP any right to convert its exploration license into a mining lease (Claimant's quotes are rather derived from BHP's request); (b) the notification did not "*vitiate*" the provisions of the CHEJVA, which contains a provision dealing with changes in legislation in its Article 17; (c) the 1994 Relaxations were no longer applicable under the 2002 BM Rules given that only leases and licenses granted or renewed under the 1970 BMC Rules were saved; and (d) the 1994 Relaxations did not benefit Claimant since they were specifically granted to BHP and lapsed with the introduction of the 2002 BM Rules; in addition, Claimant became a party to the CHEJVA (via the 2006 Novation Agreement) in the knowledge that the grant of all mineral titles would take place pursuant to the 2002 BM Rules and undertook to comply with them, without seeking any relaxations.[931]

885. Finally, Respondent claims that Claimant concedes in its Reply, the Feasibility Study "*and elsewhere*" that it only had a right to apply for a mining lease pursuant to the CHEJVA, rather than a guaranteed "*right to mine*."[932] According to Respondent, Claimant further conceded during the Hearing that it did not receive any assurance from Respondent it would be exempted from the requirements of the 2002 BM Rules when making its Mining Lease Application.[933]

iv. No Purported "*Assurance*" Could Have Legitimately Been Construed as Trumping the 2002 BM Rules

886. Respondent claims that Claimant seeks to establish that its alleged expectations in respect of mining in the Reko Diq area "*trumped*" the routine, *i.e.*, the usual, application of the Government requirements in the 2002 BM Rules; nevertheless, Respondent maintains

[930] Counter-Memorial, ¶ 486.
[931] Counter-Memorial, ¶¶ 480-483.
[932] Respondent's Rejoinder, ¶¶ 426-428. Respondent quotes Claimant's alleged concession in its Reply at ¶ 362: Claimant "*never claimed an automatic right to mine a specific, pre-determined area, but rather the right to receive a mining lease upon the submission of an application that met all applicable requirements*" and in its Feasibility Study at Ch. 1.8.5, p. 22 (**Exhibit CE-97**): "*TCCP has the right to apply for the granting of a Mining Lease*" and Ch. 3.2.1 (**Exhibit RE-60**): "*A M*[ining] *L*[ease] *will not be granted unless the* [applicable] *conditions are met*."
[933] Respondent's Post-Hearing Brief, ¶ 48 lit. b referring to Transcript (Day 3) p. 665 line 16 to p. 667 line 5 (cross-examination of Claimant's witness Mr. Luksic).

that its actions did not give rise to a legitimate expectation of a guaranteed "*right to mine*."[934]

887. Respondent refers to the "*mandatory legislative status*" of the requirements under the 2002 BM Rules and notes that pursuant to rule 9, not even a Mineral Agreement could dispense with these requirements, making it "*legally impossible*" to "*override*" the 2002 BM Rules. Therefore, Respondent argues that Claimant could not have legitimately relied on purported assurances that these requirements would be waived in relation to Claimant's project. In any event, Respondent emphasizes that it was under no obligation to conclude a Mineral Agreement and that none was ever, in fact, concluded. [935]

888. Respondent again quotes the World Bank report of 2003, which referred to a "*discretionary element*" in the procedure for granting mining rights to an investor,[936] and notes that this was a Joint Policy Note co-authored by the MPNR. In Respondent's view, Claimant could not reasonably have held a legitimate expectation that satisfying these requirements "*would be a given*" in light of this contrary representation from the MPNR.[937]

889. In light of the clear terms of the 2002 BM Rules and the Joint Policy Note of 2003, Respondent claims that Mr. van Borries' expectation as expressed in his presentation to the Supreme Court in 2011 in which he spoke of "*a certain sense of security*" that "*at the end of the day, if* [they] *were successful*, [they] *would have the certainty to be awarded the right to shape a mining-processing business*" is not realistic.[938] Respondent also argues that Mr. van Borries' position is contradicted by Claimant's stated objective during the Mineral Agreement negotiations, *i.e.*, "*avoidance of damaging discretionary actions.*"[939]

890. In Respondent's view, Claimant therefore either failed to notice the obvious subjective requirements in the 2002 BM Rules, which would result from a lack of due diligence, or it knew the potential impact of those requirements and thus the unreasonableness of its expectation.[940]

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[934] Respondent's Rejoinder, ¶ 429.
[935] Respondent's Rejoinder, ¶ 430. Respondent's Post-Hearing Brief, ¶¶ 61, 63.
[936] *See* paragraph 879 above (the criteria for the grant of a mining lease that it must be '*in the best interest of the development of the mineral resources of* [the province] *to grant the lease*' introduces a discretionary element into the procedure for granting mining rights to an investor who has completed a successful exploration program).
[937] Respondent's Rejoinder, ¶¶ 431-432. **Exhibit RE-65**.
[938] Respondent's Rejoinder, ¶ 434. **Exhibit RE-58(ix)(b)**.
[939] Respondent's Rejoinder, ¶ 435. **Exhibit RE-64**.
[940] Respondent's Rejoinder, ¶ 436.

891. With regard to Claimant's reliance on the 1995 NMP, which states that "[w]*here the Licensing Authority considers that the applicant has satisfied the specified criteria for assessment and grant of an ML, the ML will be granted*," Respondent argues that this statement does not support Claimant's position on legitimate expectations, but rather reiterates Respondent's point that there was no guaranteed "*right to mine*" because a mining lease could only be granted after the Licensing Authority had determined whether the criteria of rule 48(3) have been satisfied.[941]

892. Respondent also refers to Claimant's reliance on the fact that prior to the decision on the Mining Lease Application, Balochistan took some regulatory steps, such as renewing Exploration License EL-5. Respondent argues that such actions could not give rise to a legitimate expectation that Claimant would also receive a mining lease, which would have been an entirely different and much longer-lasting title than EL-5.[942]

893. In relation to Claimant's reliance on "*extended negotiations*" with Respondent and Balochistan regarding a Project/Shareholders Agreement and the Mineral Agreement, Respondent emphasizes that those negotiations ultimately failed because the parties were not able to agree on critical issues, such as value addition in the form of a smelter/refinery within the country. In Respondent's view, the failure of the negotiations, which Claimant had pursued in order to avoid having to submit a mining lease application, demonstrates that Claimant never had a right to mine.[943]

894. Respondent further refers to Claimant's reliance on Pakistan's and Balochistan's "*affirmations*" made in the proceedings before the Balochistan High Court and the Pakistan Supreme Court and contends that these do not represent or waive the qualification contained in the CHEJVA or the conditions imposed by the 2002 BM Rules.[944]

895. In addition, Respondent submits that the officials of the GOP whose "*assurances*" Claimant relies on had no power to give any assurances in relation to mineral titles, which are within the competence of the Provincial Governments, and contends that Claimant must have been aware of this. Respondent further argues that even if the officials had power to intervene or opine on the grant of mineral titles, their statements do not contain

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[941] Respondent's Rejoinder, ¶ 437. **Exhibit CE-190**.
[942] Respondent's Rejoinder, ¶ 437.
[943] Respondent's Rejoinder, ¶ 437.
[944] Respondent's Rejoinder, ¶ 437. Similarly, Respondent emphasizes that while the 23 January 2009 Working Paper of the Steering Committee, which Claimant relies on, does state that "[the license holder is] *legally entitled* [to the] *conversion of prospecting license into mining lease*," the same sentence qualifies the same statement by adding "*once the area is proved" and "certain laid down requirements under the rules are fulfilled by the licence*." **Exhibit CE-69**.

a representation that Claimant would have a right to mine, as they were only "*general statements*" encouraging Claimant to invest in Pakistan.[945]

896. Respondent also claims that there is a "*lack of specificity*" in all of the assurances that were allegedly given, as Claimant cannot point to any specific assurance or affirmation that the subjective requirements in rule 48(3) of the 2002 BM Rules would not apply. In Respondent's view, all of the alleged assurances and affirmations are general in nature and "*non-committal*"; thus, it is "*inconceivable*" that Claimant would rely on them as the basis of its "*right to mine*."[946]

897. Respondent refers to the case of *Noble Ventures Inc. v. Romania* in which the tribunal found that the claimant could not establish that Romania had breached the FET standard under the applicable US-Romania BIT, as it was clear on the evidence that without the satisfaction of key requirements, the failure of the claimant's project was "*all too readily foreseeable*."[947]

898. In conclusion, Respondent argues that Claimant rather made its investment: (i) in awareness of the terms of the 1995 NMP; (ii) knowing that the 2002 BM Rules, which were adopted following the publication of the 1995 NMP, would be applicable to its investment; (iii) on giving the 2006 Undertaking that it would comply with the 2002 BM Rules "*as approved/amended from time to time*"; and (iv) knowing that BM Rule 48(3) left to the Licensing Authority "*some discretion and subjective latitude*" in respect to its power to grant or reject a mining lease application.[948]

c. The Tribunal's Analysis

899. The Tribunal will now determine the scope of Claimant's legitimate expectations that will form the basis of the subsequent analysis of whether such expectations were violated by Respondent's conduct. Given that legitimate expectations may vary over time, the Tribunal first has to define the relevant point in time for its analysis.

900. An investor's legitimate expectations have to be determined as of the date of the investment decision. In the present case, the Tribunal considers the conclusion of the 2006 Novation Agreement by which Claimant, on 1 April 2006, replaced BHP as a party to, and thereby acquired the rights and obligations under, the CHEJVA as the main investment decision.

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[945] Respondent's Rejoinder, ¶ 437.
[946] Respondent's Rejoinder, ¶¶ 438, 439. *See also* Respondent's Post-Hearing Brief, ¶ 48 lit. b and c.
[947] Respondent's Rejoinder, ¶ 441; *Noble Ventures v. Romania* [RLA-75], ¶ 152.
[948] Respondent's Post-Hearing Brief, ¶ 48 lit. c, ¶¶ 74-76.

901. In principle, Respondent's conduct after 1 April 2006 would therefore be irrelevant because it could not have influenced Claimant's decision to enter into the 2006 Novation Agreement. However, in light of the fact that Claimant incurred the major part of its exploration expenditures only after it had become party to the CHEJVA, the Tribunal considers that Respondent's conduct in the years following the 2006 Novation Agreement has to be taken into account as well – to the extent that it encouraged Claimant to continue investing in the Reko Diq Project and thereby to repeatedly confirm its investment decision.

902. Claimant claims that Respondent's conduct created a legitimate expectation that, after having successfully completed the exploration work, Claimant would be granted a mining lease over Reko Diq. More specifically, Claimant refers to the following two "*basic expectations*": (i) "*security of tenure*," meaning that if it succeeded in proving a viable mine, Claimant would be entitled to convert its exploration license into a mining lease; and (ii) both the GOB and the GOP would support and facilitate its investment.[949]

903. In support of this claim, Claimant relies on three different categories of assurances: (i) the contractual framework contained in the CHEJVA and its related agreements; (ii) the federal and provincial regulatory framework; and (iii) direct assurances made by Government officials.[950] The Tribunal will follow this structure in its analysis of whether Respondent indeed created legitimate expectations, in particular the two "*basic expectations*" referred to by Claimant above.

904. At the outset, the Tribunal notes that, contrary to Respondent's argument, Claimant does not claim that it had an "*automatic right to mine*," but rather that it legitimately expected that it would be granted a mining lease upon the submission of an application that met all "*routine Government requirements*." Therefore, the Tribunal will not analyze whether there should have been such automatic right to mine, but only deal with Claimant's actual allegation and in particular on the meaning of the term "*routine Government requirements*."

i. The Contractual Framework for Claimant's Expectations

905. The first category of assurances that Claimant relies on is contained in the CHEJVA and its related agreements, to which TCCA became a party by means of the 2006 Novation Agreement. While the Tribunal is aware that the Supreme Court has declared that the CHEJVA and its related agreements are null and void *ab initio*, the Tribunal considers that this is not relevant to the question as to whether the conclusion and performance of

[949] Memorial, ¶ 413; Claimant's Post-Hearing Brief, ¶ 28.
[950] Claimant's Post-Hearing Brief, ¶ 30.

the CHEJVA gave rise to legitimate expectations under Article 3(2) of the Treaty. Respondent acknowledges that acts or representations "*may*" give rise to liability under international law "*even if the acts or representations are considered legally non-existent or null and void or susceptible to invalidation as a matter of domestic law*."[951] In light of the fact that, up to early 2011, all parties involved in the conclusion and performance of the CHEJVA acted on the assumption that it was valid and there was no indication that the GOB thought otherwise, the Tribunal is of the view that the declaration of the Supreme Court in 2013 cannot have any effect on Claimant's legitimate expectations in 2006.

906. Therefore, the Tribunal will now turn to Clause 11.8.2 of the CHEJVA and its reasonable interpretation, while taking into account the negotiation history of the CHEJVA and the events that were closely related to its conclusion. In light of its overarching significance for Claimant's case, Clause 11.8.2 may first be quoted again:

> "*Where the Joint Venture or, pursuant to sub-clause 11.3.2, a Participating Party elects to develop a mine then, subject only to compliance with routine Government requirements, it shall be entitled to convert the relevant Prospecting Licence(s) held by it into Mining Licences so as to give secure title over the required Mining Area.*"[952]

907. The dispute between the Parties relates in particular to the meaning of the words "*subject only to compliance with routine Government requirements*." In this regard, the Tribunal considers it indicative that, in a letter of 16 September 1993 by which it sought relaxations of the 1970 BMC Rules, BHP gave the following interpretation of this phrase:

> "*9. Application for Mining Leases*
>
> *It is essential that the Joint Venture, or a sole* 'Participating Party' *under Clause 11, is entitled to convert the relevant PL into a ML if it wishes to develop a mine. Currently, the right of a holder of a PL to receive a ML is described in Rule 23 as a* 'preferential right' *only. The subjective discretion of the licensing authority here and under Rules 31(2), 38, 62 and 63 must be waived in favour of an absolute right of the Joint Venture, or a sole* 'Participating Party', *to a ML, provided that they comply with routine administrative requirements. Clause 11.8.2 of the Agreement anticipates this right of transition.*
>
> *International mining companies will view this aspect of a country's mining regulations as one of the most important. The necessary rights can be secured by appropriate Notified Orders.*

[951] Rejoinder, ¶ 412.
[952] **Exhibit CE-1**, Clause 11.8.2.

> *…The unqualified discretion of the licensing authority to void a ML application for failure to furnish evidence* 'to the satisfaction of the licensing authority' *must be removed in favour of defined requirements.*
>
> …"[953]

908. In light of the fact that the relaxations that BHP sought by means of this letter were granted by the GOB by simply reproducing the headings of BHP's request, including the heading "9. Application for Mining Leases,"[954] the Tribunal is of the view that the 1994 Relaxations must be construed as giving effect to the points made in BHP's letter. Likewise, it can be assumed that the interpretation given by BHP that Clause 11.8.2 "*anticipates*" the requested "*absolute right*" subject to compliance with "*routine administrative requirements*" corresponded to the common understanding of the contracting parties to the CHEJVA at the time with regard to the meaning of the disputed phrase in Clause 11.8.2.

909. The Tribunal is aware of Respondent's argument that the 1994 Relaxations were not validly granted because the requirements of rule 98 of the 1970 BMC Rules had not been fulfilled, as declared by the Supreme Court in its 2013 judgment. While the ICC Tribunal has taken a different view on the interpretation of rule 98 and consequently the validity of the 1994 Relaxations, this Tribunal is of the view that it does not need to express an opinion on their validity under Pakistani law. The Tribunal recalls its observation above that, despite its potential illegality, the CHEJVA may give rise to legitimate expectations because all parties acted on the assumption that it was valid and therefore performed it for many years. Likewise, the GOB (at least) created the impression that the 1994 Relaxations had been validly granted and even confirmed in a letter dated 11 November 2000, issued in connection with its consent to BHP's transfer of its interest to TCCA, that they "*still h*[e]*ld good*."[955]

910. In addition, the Tribunal is of the view that, for purposes of the FET obligation, Respondent could in any event not rely on a failure on the part of the GOB to comply with its own rules. As a result, the Tribunal considers that, irrespective whether they were in fact validly granted under Pakistani law, the 1994 Relaxations could in any case inform the scope of Claimant's legitimate expectations.

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[953] **Exhibit CE-187**, p. 7.
[954] The Notification states: "*In exercise of the powers confirmed by rule 98 of Mining Concession Rules 1970, the Government of Balochistan is pleased to grant the following relaxations as a special case in favour of BHP Company enabling the company to carry out its exploration work with out* [sic] *any complication:- 1. …, 9. Application for Mining Lease, 10. … .*" *Cf.* **Exhibit CE-189**.
[955] **Exhibit CE-195**.

911. As to Respondent's further arguments that the 1994 Relaxations were in any event superseded by the entry into force of the 2002 BM Rules (which did not contain an option to relax the rules similar to that under the 1970 BMC Rules) and the 2006 Undertaking in which Claimant undertook to abide by the 2002 BM Rules, the Tribunal is not convinced that those events should have any effect on the relevance of the 1994 Relaxations for Claimant's legitimate expectations. The 2002 BM Rules do not contain a provision relating to the future status of relaxations that had previously been granted under the 1970 BMC Rules,[956] and the 2006 Undertaking also does not contain an indication that TCCA thereby intended to waive its rights under the 1994 Relaxations.

912. It has to be noted that the 2006 Undertaking was given in the context of TCCA's becoming party to the CHEJVA by means of the 2006 Novation Agreement. At that time, the main focus of the parties was on the reaffirmation of the CHEJVA, and the GOB knew that it was on that basis, especially the security of tenure it conferred, that Claimant was going to raise money and invest in exploration; therefore, the 2006 Undertaking did not affect Claimant's legitimate expectation.

913. It appears that Respondent's argument that the 1994 Relaxations ceased to have any effect also does not correspond to the contemporaneous understanding of the GOB, given that it stated in its submission to the Pakistan Supreme Court on 15 December 2010 that the "*enactment of Rules is within the legislative competence of the Government from securing for the Province of Balochistan a better deal that* [sic] *one prescribed in the 1970 Rules or the 2002 Rules.*"[957]

914. Therefore, the Tribunal considers that the 1994 Relaxations, granted as requested in BHP's 16 September 1993 letter, support Claimant's understanding that Clause 11.8.2 was intended to give BHP, and later TCCA, security of tenure in the form of a right to convert its exploration license into a mining lease, provided that it would submit an application meeting the routine requirements.

915. This understanding of Clause 11.8.2 is further confirmed by the submission of the GOB to the Balochistan High Court in 2007 in which the GOB repeatedly emphasized that it had secured the "*best deal possible*" for Balochistan that would allow the Province to receive a 25% share in profits in addition to the royalty payments.[958] In its 11 December

[956] Rule 125 of the 2002 BM Rules provides only for the continued validity of licenses and leases that were granted, renewed or saved under the 1970 BMC Rules (or any other law in force before the 2002 BM Rules), but does not refer to relaxations granted under the 1970 BMC Rules. **Exhibit RE-1**, rule 125.
[957] **Exhibit CE-107**, pp. 11-12. Respondent does not contest Claimant's submission that, in this context, the "*enactment of Rules*" refers to the 1994 Relaxations. *See* Reply, ¶ 83.
[958] *Cf*. **Exhibit CE-212**, p. 9.

2010 submission to the Supreme Court, the GOB emphasized that the 25% profit share would come into play once the mining operations started, which would be the case once the review of the Feasibility Study was complete and the mineral agreement was executed.[959] In the Tribunal's view, the GOB thereby demonstrated that it considered it a given that Claimant would be granted the mining lease that it required in order to proceed to the mining of the explored area.

916. However, in light of the fact that Clause 11.8.2 conferred a right "*subject to compliance with routine Government requirements,*" the Tribunal considers that the scope of Claimant's expectation cannot be evaluated without taking into account the regulatory framework that shaped these requirements. This consideration therefore leads to the second category of alleged assurances, *i.e.*, the federal and provincial regulatory framework as it was in place at the time Claimant made its investment.

ii. The Regulatory Framework for Claimant's Expectations

917. While the minerals that Claimant sought to exploit through its investment are under the ownership of the Province of Balochistan, which therefore enacts the immediate regulatory framework that the investment and the investor is subject to, the federal law, the 1995 National Mineral Policy, sets out the overall directives on the regulation of the mineral sector.

918. With regard to the application for a mining lease, the 1995 NMP provides in its Article 8.6.2 (in relevant part):

> "*The Licensing Authority shall not unreasonably refuse an application for the grant of an ML. Where the Licensing Authority considers that the applicant has satisfied the specified criteria for assessment and grant of an ML, the ML will be granted.*"[960]

919. The 2002 BM Rules through which the 1995 NMP was implemented in the territory of Balochistan provide in their rule 48 (in relevant part):

> "*(1) Subject to these Rules, where the holder of exploration licence or a mineral deposit retention licence, makes an application for a mining lease in respect of –*
>
> *(a) an area of land in, or which constitutes, the exploitation area or, as the case may be, the retention area; and*
>
> *(b) any mineral or group of minerals included in such exploration licence or such mineral deposit retention licence, as*

[959] **Exhibit CE-107**, ¶ 14.
[960] **Exhibit CE-190**, Article 8.6.2.

> *the case may be, the licensing authority shall grant the mining lease.*
>
> […]
>
> *(3) Subject to sub-rules (4) and (5), a mining lease shall not be granted –*
>
> *(a) unless –*
>
> *(i) the feasibility studies show that the mine can be profitably developed and operated;*
>
> *(ii) the proposed plans for development and operation of the mine and the programme of the mining operations of the applicant will ensure the efficient, beneficial and timely use of the mineral resources;*
>
> *(iii) the applicant in question has or can obtain the technical and financial resources and experience to carry out mining operations effectively;*
>
> *(iv) the applicant is a fit and proper person to hold the lease;*
>
> *(v) the proposals submitted with the application are satisfactory; and*
>
> *(vi) it is in the interest of the development of the mineral resources of Balochistan to grant the lease;*
>
> *(b) if at the time of the application the applicant in question is in default.*"[961]

920. As of 1 October 2010, Rule 48(3)(a) was amended to include a new sub-clause (vii):[962]

> "*(vii) a concrete proposal for value addition of the Ore to be produced / exploited from the applicant's mining lease within the country is submitted, or if the facility is not available in the province, the Ore could be taken out of province with the prior approval of the Provincial Government.*"

921. The Tribunal notes that Article 8.6.2 of the 1995 NMP provides that, in case the applicant satisfies the specified criteria, the application *will be* granted. Similarly, rule 48(1) of the 2002 BM Rules provides that, in case the applicant makes an application subject to the Rules, the Licensing Authority *shall grant* the mining lease. This language indicates that the Licensing Authority does not have any discretion, but is bound to grant a mining lease if the applicant satisfies the criteria specified in the 2002 BM Rules.

[961] **Exhibit RE-1**, rule 48.
[962] **Exhibit RE-1**, p. 153.

922. However, the Tribunal also notes that the substantive criteria to be met by the application are spelled out in rule 48(3) of the 2002 BM Rules, which provides that the mining lease *shall not be granted* unless all six criteria are satisfied. In addition, the criteria spelled out in rule 48(3)(a)(v) and (vi), *i.e.*, that the proposals submitted with the application have to be *satisfactory* and that the mining lease has to be *in the interest* of the development of the mineral resources of Balochistan, contain discretionary elements, which have to be assessed by the Licensing Authority. The 1995 NMP states in this regard that the Licensing Authority *shall not unreasonably refuse* an application and thereby also recognizes a certain amount of discretion in the assessment of the application.

923. Claimant acknowledges that the "*routine Government requirements*" referred to in Clause 11.8.2 of the CHEJVA were shaped by the criteria set out in rule 48(3)(a) of the 2002 BM Rules.[963] The GOB likewise made clear during the negotiations of the Mineral Agreement that any application for a mining lease would be subject to these requirements. However, the Tribunal considers that it was reasonable for Claimant to expect that the assessment of these criteria would be made in light of the contractual agreement in the CHEJVA, in particular its Clause 11.8.2, which provided Claimant with security of tenure, *i.e.*, the comfort that its application would be granted if it met all routine requirements.

924. In the Tribunal's view, the existence of discretionary elements as such does not come into conflict with the expectation created under Clause 11.8.2 of the CHEJVA. In particular, the Tribunal considers that the discretion of the Licensing Authority under rule 48(3)(a)(vi) of the 2002 BM Rules is not so broad as to make unreasonable an expectation of security of tenure. Given the mandatory character of the 2002 BM Rules as provided for in rules 9(5) and (6), the criteria set out in rule 48(3)(a) of the 2002 BM Rules would prevail over any conflicting contractual criteria; however, this does not exclude that the exercise of the Licensing Authority's discretion can be informed by the existence of such contractual provisions.

925. In the present case, the Tribunal is of the view that there is no inconsistency between rule 48 of the 2002 BM Rules (implementing Article 8.6.2 of the 1995 NMP) and Clause 11.8.2 of the CHEJVA. Rules 9(1) and (3)(a) and (c) of the 2002 BM Rules (implementing Articles 8.12.1 and 8.12.2 of the 1995 NMP) confirm that the Provincial Government, in this case the GOB, may enter into contracts that contain provisions on the grant of mineral titles and in particular the mining lease, such as Clause 11.8.2 of the CHEJVA.

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[963] Claimant's witness Ms. Boggs confirmed during her oral testimony that "[w]*e always knew that we would have to submit an Application that met these criteria* [under rule 48(3)(a) of the 2002 BM Rules]." Transcript (Day 3), p. 766 lines 1-3.

926. Article 8.12 of the 1995 NMP provides in relevant part:

> "*8.12.1 The Provincial Government may enter into an agreement with an investor, within the framework of the law, to stabilize the terms or to predetermine procedures with respect to certain matters relating to the carrying out of operations under a license/lease, if government is satisfied that substantial foreign investment in exploration and mining operations is likely to be made and it is desirable in the interest of the development of mineral resources, to do so.* […]
>
> *8.12.2 The agreement may cover, for example, the right of the licensee to obtain a mining lease, assignment rights … .*"[964]

927. Rule 9 of the 2002 BM Rules provides in relevant part:

> "*(1) The Government may, at the request of a person proposing to carry on mineral operations, enter into an agreement, with that person relating to a mineral title, not inconsistent with these Rules or any other law, if the Government is satisfied that substantial foreign investment is likely to be made in mineral operations and that the carrying on of the undertaking in question is desirable in the interest of the development of the mineral resources of* Balochistan.[…]
>
> *(3) A mineral agreement may, in particular, make provision with respect to all or any other following matters –*
>
> *(a) the grant, renewal, cancellation or transfer of a mineral title;*
>
> […]
>
> *(c) the formation of joint ventures;*
>
> […]."[965]

928. In light of these provisions, the Tribunal considers that Clause 11.8.2 of the CHEJVA serves as a provision that specifies the procedure for granting a mineral lease to the Joint Venture, or as the case may be, the sole Participating Party, as it was permitted and in fact later specifically provided for in the 1995 NMP and the 2002 BM Rules. At this point, the Tribunal also notes that both the 1995 NMP and the 2002 BM Rules state that agreements such as the CHEJVA shall be entered only if the Provincial Government considers it to be "*in the interest of the development of* [the] *mineral resources*" of the province, *i.e.*, they contain the same language that embodies the main discretionary

[964] **Exhibit CE-190**, Article 8.12.
[965] **Exhibit RE-1**, rule 9.[966] **Exhibit RE-1**, Foreword.

element of the Licensing Authority's decision on the grant of the mineral lease in rule 48(3)(a)(vi).

929. Therefore, the fact the GOB entered into the CHEJVA with BHP (and later into the 2006 Novation Agreement with TCCA) implies that the GOB at those points considered that it was in the interest of the development of its mineral resources to have TCCA explore and eventually exploit its mineral resources. In this context, the words "*only*" and "*routine*" in Clause 11.8.2 indicate that they were intended to limit the Licensing Authority's discretion because the assessment whether such collaboration would be in the interest of the development of Balochistan's mineral resources had already been made by the GOB when it decided to collaborate with BHP and later TCCA. In the Tribunal's view, this consideration applies not only to the requirements provided for in the 1995 NMP and the 2002 BM Rules, which were not yet in force when the CHEJVA was concluded, but also to the discretion granted to the Licensing Authority under the 1970 BMC Rules.

930. In the Tribunal's view, such an interpretation is not in conflict with the mandatory character of the 2002 BM Rules as prescribed in rules 9(5) and (6). Apart from the above quoted provisions in Article 8.12 of the 1995 NMP and in the very same rule 9 of the 2002 BM Rules, the Foreword of the 2002 BM Rules states that the rules were enacted with the aim "*to put in place a set of rules internationally competitive*" and to "*attract the interest of the investors on such matters as … criteria for dealing with applications and the grant of Licences and Leases, … security of tenure, and to equitably meet the objectives of the investors as well as aspirations of the Government*."[966] Therefore, it was apparently not the aim of the legislator to prevent agreements that would give investors the comfort they required in order to invest considerable amounts of money in exploration before being granted the mining lease that would secure their right to ultimately benefit from the findings they had made through their expenditures.

931. The GOB's contemporaneous understanding of the regulatory framework is expressed in its submission to the Balochistan High Court in 2007, in which the GOB stated:

> "*It seems that the Petitioners have not bothered to read the law and the Rules because if they had they would not have made statements about inviting bids after the copper/gold had been discovered as the discoverer is entitled to retain the benefits thereof. It is submitted that if this was not so then no one would come forward to invest millions of dollar in exploration/prospecting when no benefit or advantage would accrue to them*."[967]

[966] **Exhibit RE-1**, Foreword.
[967] **Exhibit CE-212**, p. 14.

932. The GOB further stated in a Working Paper that was prepared for the second meeting of the Steering Committee on 23 January 2009:

> "*Under the Balochistan Mining Rules (BMR) 2002, the license holder is legally entitled for conversion of prospecting license into mining lease, once the area is proved and certain laid down requirements under the rules are fulfilled by the licensee.*"[968]

933. The GOP appears to have shared this understanding, given that it stated in its 23 November 2010 submission to the Supreme Court:

> "*Mineral Exploration is a high risk capital investment with a success ratio of less than 1:10. This is known as the 'finders – keepers' principle which is fundamental for the development of the mining industry and is recognized by the National Mineral Policy and the 2002 BMC Rules.*"[969]

934. In the Tribunal's view, both Governments thereby acknowledged Claimant's need for security of tenure in light of the "high risk capital investment" that was required for the exploration operations and, more importantly, expressed the opinion that such security of tenure was reflected in the 1995 NMP and the 2002 BM Rules.

935. In addition, the Tribunal notes that Claimant's witness Ms. Boggs testified in her written witness statement that the requirements set out in rules 47 and 48 of the 2002 BM Rules were "*in line with standard industry practice, as reflected in contemporaneous mining regulations*."[970] She further stated:

> "*It would make no sense for a major international mining company to undertake the substantial investments required to conduct exploration and feasibility activities on this scale if the requirements for obtaining the lease to actually mine the deposits were not clear and objective or if the government could simply refuse to grant the mining lease even if the company met those objective criteria.*"[971]

936. During the Hearing, Ms. Boggs qualified her initial statement to the extent that such requirements were "*in line with what* [she] *would expect to see in a jurisdiction such as Pakistan that was in the process of developing a mining sector*."[972] Nevertheless, Ms. Boggs maintained that the requirements set out in rule 48(3)(a) of the 2002 BM Rules were objective criteria and, in answer to the proposition that the terms "*efficient,*

[968] **Exhibit CE-69**, p. 5.
[969] **Exhibit CE-264**, ¶ 3.
[970] Boggs II, ¶ 3.
[971] Boggs II, ¶ 4.
[972] Transcript (Day 3), p. 757 lines 20-22.

beneficial and timely use of mineral resources" give rise to "*judgmental, subjective questions for the Licensing Authority to take a view on*," she gave the following explanation:

> "*No. I think in the mining world, these terms all have meaning, meaning that can be demonstrated by very objective evidence. So, an efficient Mine Development Plan, particularly one that you can demonstrate as being developed in accordance with international standards. Efficient, beneficial, and timely, those are criteria that you can establish by objective evidence.*"[973]

937. Specifically with regard to the terms "*satisfactory*" and "*in the interest of the development of the mineral resource of Balochistan*," Ms. Boggs was asked whether these were "*matters on which reasonable people might disagree on the same set of facts*." She answered:

> "*No, I don't think I would agree on that. I think professionals in the mining sector, people who understand what these terms mean, would come to a general agreement around that. … They* [*i.e.*, all mining companies] *don't have exactly the same view, but I think they are able to demonstrate objectively that they've met these criteria*."[974]

938. In the Tribunal's view, Ms. Boggs' testimony confirms that requirements such as the ones set out in rules 47 and 48, and in particular in rule 48(3)(a), of the 2002 BM Rules were not understood in the industry as providing for unrestrained discretion of the licensing authorities, but rather they were attributed a certain meaning that allowed the mining company to demonstrate the satisfaction of those requirements in an objectively comprehensible manner. According to their Foreword, the 2002 BM Rules were specifically intended to create an "*internationally competitive*" set of rules that was meant to "*attract the interest of the investors on such matters as transparency, criteria for dealing with applications and the grant of Licenses and Leases, expeditious decision making process, security of tenure, provision of adequate information on mineral titles, independent resolution mechanism* [illegible] *and to equitably meet the objectives of the investors as well as aspirations of the Government*."[975]

939. Therefore, it is apparent that the criteria in rule 48(3)(a) were intended to have the meaning attributed to such criteria according to the practice in the industry and thereby

[973] Transcript (Day 3), pp. 759 line 10 to p. 760 line 8.
[974] Transcript (Day 3), p. 760 line 17 to p. 761 line 12.
[975] **Exhibit RE-1**, Foreword.

also to constitute the "*specified criteria for assessment and grant*" of a mining lease that the 1995 NMP had envisaged.[976]

940. In any event, Claimant reasonably expected that the Licensing Authority would comply with the due process requirements set out in rule 48(4) and (5) of the 2002 BM Rules:

> "*(4) The licensing authority shall not refuse to grant a mining lease to the holder of a mineral title referred to in sub-rule (1) –*
>
> (a) in *accordance with sub-rule (3) (a), unless the licensing authority has –*
>
> *(i) by notice in writing informed the applicant, of its intended refusal and the reasons therefor;*
>
> *(ii) afforded the applicant an opportunity to make, within such reasonable period as may be specified in the notice, representations in relation to all matters relating to its intention and, if the applicant so desires, to make proposals in relation to any such matters; and*
>
> *(iii) taken any such representations into consideration.*
>
> […]
>
> *(5) The licensing authority shall not refuse to grant a mining lease on the ground that any proposals submitted with the application are inadequate or unsatisfactory unless the licensing authority has, by notice in writing, informed the applicant accordingly and afforded the applicant a reasonable opportunity to modify those proposals.*"[977]

941. The Tribunal is of the view that, together with the manner in which matters had previously been handled between Claimant and the Governments over the course of Claimant's exploration activities at Reko Diq, these procedural requirements support Claimant's expectation that any concerns of the Licensing Authority with regard to its Mining Lease Application would be subject to a fair discussion between the parties. In particular, Claimant reasonably expected that, in light of the security of tenure that had been promised to Claimant by means of the CHEJVA, the Licensing Authority would (a) spell out any concerns in a manner sufficiently clear for Claimant to be able to address them; (b) give Claimant a fair opportunity to give explanations and/or make proposals in relation to these concerns; and (c) take any such explanations and/or proposals into consideration in making its decision on the Mining Lease Application.

942. In light of the above, the Tribunal is of the view that the discretionary elements contained within the criteria in rule 48(3)(a) of the 2002 BM Rules do not exclude a legitimate expectation on the part of Claimant; they rather shape the scope of such expectation to

[976] *Cf.* **Exhibit CE-190**, Article 8.6.2.
[977] **Exhibit RE-1**, rules 48(4) and (5).

the effect that Claimant could expect that the Licensing Authority's discretion was limited as described above and that any remaining discretion would be exercised in a reasonable manner. In addition, Claimant could expect that the Licensing Authority would take into account the representations made by officials from both Governments in the relevant time period, as they will be examined as part of the third category of assurances that Claimant invokes.

iii. Expectations Based on Direct Assurances from Government Officials

943. Finally, the Tribunal will examine whether Claimant's expectations were further shaped by direct assurances given by officials from the GOB and/or GOP, in particular as regards the second "*basic expectation*" on which Claimant relies, *i.e.*, that both Governments would support and facilitate the investment.

944. With regard to the role of the GOB in the context of the Joint Venture, Clause 7.2(a) of the CHEJVA provides that the GOB (through the BDA) shall provide at its own expense, *inter alia*,

> "*appropriate administrative support as required for the obtaining of all leases, licences, claims, permits or other authorities of any kind whatsoever being necessary for the conduct of Joint Venture Activities.*"[978]

945. Clause 5.7.1 of the CHEJVA further provides that the GOB (through the BDA), if directed by the Manager of the Joint Venture, is responsible for making applications, *inter alia*, for Mining Leases. Pursuant to Clause 5.7.2 of the CHEJVA, the GOB is further responsible for

> "*liaising with relevant Provincial Government and local government authorities and with affected landholders to ensure that good relations are maintained between the Joint Venture and other persons during the conduct of Joint Venture Activities.*"[979]

946. Finally, Clauses 24.6.2 and 24.6.3 of the CHEJVA provide:

> "*The Parties shall be just and faithful to one another and will not do or omit to be done anything whereby the interests of the Joint Venture contemplated herein as a whole are prejudiced.*

[978] **Exhibit CE-1**, Clause 7.2(a).
[979] **Exhibit CE-1**, Clauses 5.7.1 and 5.7.2.

> *Each Party shall execute all necessary additional documents and do all such acts as shall be reasonably required to give effect to the purposes of this Agreement.*"[980]

947. Pursuant to these provisions, the GOB was under an obligation to provide administrative support in procuring the required licenses and permits and to perform all reasonable acts to give effect to the purposes of the CHEJVA and the interests of the Joint Venture as a whole, *i.e.*, to the exploration and exploitation of the mineral resources at Reko Diq. It is undisputed between the Parties that the GOB did provide such support for, and thus facilitated, Claimant's investment over a period of many years, including the time period in which the 2006 Novation Agreement was signed. Specifically on the Operating Committee, the GOB (through the BDA) encouraged Claimant to carry on its exploration activities and to prepare a feasibility study for the Western Porphyries, as evidenced by the following documents.

948. In its meeting on 15 July 2006, the Operating Meeting passed the resolution that "*the pre-feasibility studies as outlined in the work program should commence immediately and that this program should include both the drill out of the Western Porphyries as well as the drilling to upgrade the resources of the other significant ore bodies including the hypogene copper ore body below the Tanjeel supergene deposit.*"[981]

949. During the meeting on 26 October 2007, both parties on the Operating Committee agreed:

> "*After new work and additional analysis the Tanjeel project found not to be economic on its own.*
>
> *Only additional work outside the Tanjeel area by the JV developed a play for a larger scale project based on the newly discovered WP deposits, which discoveries also transformed the Tanjeel ore deposits to a potential economic and value adding activity.*
>
> […]
>
> *In view of the potential for developing the project TCC and BDA agreed that the JV through TCC as Manager should move immediately to commence and complete feasibility study. In this connection TCC presented a work plan and preliminary budget for full feasibility study on option 72 kptd and parallel pre-feasibility study on expansion options. The parties agreed the conceptual preliminary budget of US$ 106.5 million TCC was authorized to make carry out the feasibility.*"[982]

[980] **Exhibit CE-1**, Clause 24.6.3.
[981] **Exhibit RE-57**, p. 4.
[982] **Exhibit CE-64**, p. 3.

950. In this regard, it has to be noted that Respondent does not contest Claimant's submission that "*option 72 kptd*" refers to the deposits at the Western Porphyries,[983] and thus that the Operating Committee expressly authorized the preparation of a full feasibility study that focused on the Western Porphyries and in parallel a pre-feasibility study focusing on expansion options.

951. Beyond its actions on the Operating Committee, it is undisputed that the GOB twice renewed Exploration License EL-5 in 2005 and in 2008, and in general granted all required permits for the continuing exploration activities.[984] The GOB further started to negotiate with Claimant on the terms of the Mineral Agreement and the Project Agreement.

952. Shortly after a Constitutional petition was filed seeking the invalidation of the CHEJVA, the Operating Committee passed a resolution in its 24 February 2007 meeting that "*both parties of the joint venture have examined the Constitutional Petition in detail and have come to the conclusion that the case is without any merit*[,] *that it will be defending the challenge to their title to EL-5 and Tethyan is authorized to take steps as may be expedient to defend the same.*"[985]

953. In its 2007 submission to the Balochistan High Court, the GOB defended the validity of the CHEJVA and submitted that Claimant, being the one that discovered the copper and gold deposits, "*is entitled to retain the benefits thereof.*" The GOB further argued:

> "[I]*f this was not so then no one would come forward to invest millions in exploration/prospecting when no benefit or advantage would accrue to them. The benefits are earned by the Province of Balochistan are* [sic] *through Royalty payments, licence fees and the extraordinary benefit of retaining 25% of the profits.*
>
> *The answering Respondents have been kept abreast of all relevant developments and are constantly viewing that nothing is done which will in any manner adversely affect the interest* [of] *the Province of Balochistan.*"[986]

954. The GOP, in its 23 November 2010 submission to the Supreme Court, likewise stated that the "*finders-keepers*" principle is "*fundamental for the development of the mining industry and is recognized by the National Mineral Policy and by the 2002 BMC Rules.*"[987]

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[983] *Cf.* Memorial, ¶ 167.
[984] *Cf.* Livesey IV, ¶¶ 34-35.
[985] **Exhibit CE-60**, p. 6.
[986] **Exhibit CE-212**, pp. 14-15.
[987] **Exhibit CE-264**, p. 2.

955. Finally, Respondent does not contest the submission of Claimant's witnesses Mr. Luksic and Ms. Boggs that various officials on the highest levels of both GOB and the GOP, including the President and Prime Minister of Pakistan as well as the Chief Minister and Chief Secretary of Balochistan, assured Claimant of their support for its investment.[988] Respondent rather argues that those assurances were far too general and non-committal as to constitute a specific representation capable of giving rise to a legitimate expectation.[989] While this might be true if one were to look at some of the respective statements in isolation, the Tribunal is of the view that, together with the GOB's conduct both on the Operating Committee and in relation to the granting of permits required to conduct the exploration activities as well as the Governments' submissions in the High Court and Supreme Court proceedings (up to early 2011), those assurances contributed to the expectation that the Governments would support and facilitate Claimant's investment.

956. In addition, such conduct created the impression that the Governments considered Claimant's investment to be in the interest of the development of the mineral resources of Balochistan so that the Licensing Authority would assess this element under rule 48(3)(a)(vi) of the 2002 BM Rules in a positive manner.

957. Finally, the Tribunal notes that the assurances given by officials from both the GOB and the GOP continued when rumors started to emerge in 2010 that Balochistan was planning its own project at Reko Diq.[990] Even though this occurred at a time when the Novation Agreement had long been concluded, the Tribunal considers this conduct particularly relevant because at that time, Claimant was still to finish its Feasibility Study, which constitutes a significant part of the investment in light of the costs and efforts that were continuously put into this Study until it was presented to the GOB in August 2010.

958. In conclusion, the Tribunal finds that by means of both the contractual and the regulatory framework of Claimant's investment as well as the conduct of the GOB and the GOP during the time period in which Claimant explored the area at Reko Diq, Respondent created the legitimate expectation that Claimant would be entitled to a mining lease upon submission of an application that met the routine requirements as set out in rule 48(3)(a) of the 2002 BM Rules. Even though these requirements contained certain discretionary elements, the Governments created the impression that such discretion had either already been exercised or that it would be exercised in Claimant's favor because they recognized the general principle that, after having invested millions of dollars into the exploration of

[988] Luksic, ¶¶ 8-9, 13; Boggs I, ¶¶ 87-88. *See* also **Exhibits CE-95**, **CE-246**, **CE-317** and **CE-318**.
[989] *Cf.* Rejoinder, ¶¶ 438-439; Respondent's Post-Hearing Brief, ¶ 48 lit. b and c.
[990] *Cf.* **Exhibits CE-95** and **CE-246**; Boggs I, ¶¶ 87-88.

the area, Claimant should also be the one that would later reap the benefit of its exploitation together with its Joint Venture partner. Finally, both the GOB and the GOP repeatedly assured Claimant that they would support and facilitate Claimant's investment.

iv. Causality for Claimant's Investment Decision

959. As a final step, the Tribunal agrees with Respondent that Claimant's legitimate expectations are relevant only to the extent that they formed the basis for Claimant's investment decision. In this regard, Respondent claims that Claimant itself did not believe that it had security of tenure on the basis of the contractual and regulatory framework because it sought to obtain such security of tenure through the Mineral Agreement negotiations.[991] Respondent refers in particular to the 27 October 2008 letter that Ms. Boggs sent to Mr. Lehri, then Additional Chief Secretary of the GOB, in which TCCP proposed amendments to the 2002 BM Rules in order to avoid "*damaging discretionary actions.*"[992]

960. However, the Tribunal notes that Claimant argues that TCCP was not concerned with the Licensing Authority's scope of discretion to grant TCCP's future mining lease application, but rather with future amendments to the 2002 BM Rules that might change Claimant's rights.[993] This argument is supported by the same 27 October 2008 letter that Respondent relies on, given that Ms. Boggs in fact refers to the fact that "*any future amendment of the BMR would be mandatory and applicable to TCC notwithstanding any stability provisions of the Mineral Agreement.*"[994] In its 18 August 2008 letter, by which TCCP replied to the revised proposal for the Mineral Agreement that it had received from GOB and the GOP, TCCP likewise stated that their "*primary concern*" was that agreements creating the certainty and security of tenure required for the investment in, and financing of, the Reko Diq project would be "*negated by any changes to the BMR in the future*" and therefore, they proposed amendments to the 2002 BM Rules.[995]

961. The Tribunal is further convinced by Claimant's explanation that they sought to correct a "*defect*" in the 2002 BM Rules, which on the one hand intended to provide security of tenure (as expressly stated in the Foreword) and provided for the possibility of entering into mineral agreements, but on the other hand stipulated that any future amendment to the Rules would prevail over the terms of a mineral agreement (rules 9(5) and (6)). In the

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[991] *Cf.* Rejoinder, ¶¶ 418-419.
[992] **Exhibit RE-64**, p. 2.
[993] *Cf.* Reply, ¶¶ 378-379; Boggs II, ¶ 3.
[994] **Exhibit RE-64**, p. 2.
[995] **Exhibit CE-227**, p. 4.

Tribunal's view, this is supported by the fact that Pakistan identified and corrected this "*defect*" in 2013 NMP, which provides in its Article 7.8.2:

> "*The Mineral Agreement would have an overriding effect in case anything contained therein is inconsistent with any law or rules subsequently amended.*"[996]

962. In light of the above, the Tribunal considers that Claimant's request for amendments to the 2002 BM Rules does not exclude a finding that Claimant nevertheless relied on the legitimate expectation that it benefitted from security of tenure as regards the granting of the mining lease under the current contractual and regulatory framework. To the contrary, it appears rather obvious to the Tribunal that Claimant's decision to invest more than US$ 240 million and more than eight years of work in the exploration at Reko Diq[997] was based on the legitimate expectation that it would be granted the mining lease required to benefit from its exploration results thereafter and that the Governments would support and facilitate its investment.

3. Did Respondent Breach Its Obligation to Provide Fair and Equitable Treatment under the Treaty?

a. Summary of Claimant's Position

963. Claimant claims that Respondent breached the FET obligation imposed by Article 3(2) of the Treaty by: (i) denying the Mining Lease Application; (ii) developing and implementing a plan to take over the Reko Diq project; and (iii) together with the foregoing breaches, which also constitute independent violations, other Government conduct relating to TCCA's investment, including the conduct of both Governments during the Mineral Agreement negotiations and/or in the Pakistan Supreme Court proceedings which, according to Claimant, constitutes an overall course of action that is a composite breach of Article 3(2).[998]

i. Pakistan Breached Article 3(2) by Denying TCC's Mining Lease Application

964. Claimant contends that the Licensing Authority denied the Mining Lease on "*spurious and pretextual ground*s" and argues that Pakistan cannot rely on new grounds that were not specified in the Licensing Authority's Notice of Intent to Reject.[999]

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[996] **Exhibit CE-416**, Article 7.8.2. *See* also Transcript (Day 4), pp. 1114-115 and (Day 8), pp. 2272-2274.
[997] *See* ¶¶ 326 *et seq*. above.
[998] Claimant's letter dated 18 November 2014. *See* ¶ 174 above. *See also* Memorial, ¶ 392; Reply, ¶ 323.
[999] Claimant's Post-Hearing Brief, ¶ 59. *See also* Reply, ¶¶ 405, 416.

965. Claimant rejects Respondent's argument that only one of the grounds set out in the Notice of Intent to Reject has to be reasonable in order for TCCA's claim to fail and argues that the FET standard rather requires taking into account the State's overall course of conduct and thus assessing whether the Licensing Authority was acting as a "*normal, independent, good-faith regulator*," *i.e.*, in a way that TCCA should have expected, or instead in a manner that was "*arbitrary, partial, or aimed at achieving a particular end.*"[1000]

966. Claimant further argues that States must act in a proportional manner, while disproportionate action is held to be unfair and inequitable under international law. Therefore, Claimant argues that even if some of the grounds for the denial of the Mining Lease Application "*were arguably applicable*," the summary denial and thereby "*complete destruction*" of TCC's investment was disproportionate in light of the "*extraordinary time, effort, expertise and capital TCC had devoted to Reko Diq.*" [1001]

(a) Pakistan's Conduct in Denying the Mining Lease Breached Basic Notions of Fairness and Due Process

967. Claimant claims that Pakistan failed to treat TCC fairly and to observe its due process rights because it (i) did not provide TCC with adequate notice and explanation of the grounds for the rejection; (ii) failed to discuss with TCC the alleged concerns regarding the Application with a view to enabling the project to go forward; and (iii) violated TCC's basic due process rights on appeal given that the hearing date of the appeal was advanced on short notice and the decision was issued without appropriate reasoning.[1002]

968. Claimant submits that the FET standard as well as rules 48(4) and (5) of the 2002 BM Rules and Pakistani law in general required the Licensing Authority to identify clearly all the grounds for rejection and provide adequate reasoning explaining why TCC had failed to meet each in the Notice of Intent to Reject.[1003] In Claimant's view, the Notice of Intent to Reject did not meet these requirements because:[1004]

(i) the ten grounds for denial were "*confusing and vague*";

[1000] Claimant's Post-Hearing Brief, ¶ 60.
[1001] Claimant's Post-Hearing Brief, ¶ 62.
[1002] Claimant's Post-Hearing Brief, ¶ 63. *See also* Memorial, ¶ 489; Reply, ¶ 432.
[1003] Claimant's Post-Hearing Brief, ¶¶ 64-65. **Exhibit RE-1**. Rules 48(4) and (5). Claimant states that, under general Pakistani law, an administrative authority must "*act fairly and justly*" and give reasons for its opinion. [**CA-91**], p. 1080. Claimant also states that Pakistani administrative law requires authorities to "*redress the grievance of the citizens …with reasons*" rather than mere references to statutory law. Memorial, ¶ 494 referring to **Exhibit CE-36**, ¶¶ 4.21-4.28. *See also* Reply, ¶ 435 referring to *ADC v. Hungary* [**CA-61**], ¶ 435.
[1004] Claimant's Post-Hearing Brief, ¶¶ 66-68; Memorial, ¶¶ 491, 493. **Exhibits CE-7** and **CE-11**.

(ii) the reasoning was not "*commensurate with the size of the investment, the amount at stake, and the volume of material submitted in support*" (*e.g.*, no reference to any section of the Feasibility Study); and

(iii) three of the grounds now raised by Respondent (*i.e.*, the alleged failure to show that the mining project was economically viable; the alleged security risks relating to the slurry pipeline; and the alleged failure to prove the sufficiency of the water source) were not contained in the Notice.

969. These shortcomings were compounded by the rejection decision of 15 November 2011, which contained only a single sentence of reasoning ("[Y]*our reply was found unsatisfactory under Rules 10, 29(2)(c)(iii) 47, 48, 52 etc of Balochistan Mineral Rules 2002*") and did not refer at all to TCC's Interim Response.[1005]

970. Claimant argues that, in particular, the "*vague und overly broad allegations*" contained in the Notice of Intent to Reject and the mere reference to a variety of provisions of the 2002 BM Rules made it "*difficult if not impossible*" for TCC to respond to the stated concerns and draft its appeal.[1006]

971. Claimant further submits that the Licensing Authority did not really intend to consider the Mining Lease Application fairly because it refused to meet with TCC and to discuss its concerns regarding the Application during the months preceding the denial, even though the MMDD (*i.e.*, the Licensing Authority) was the GOB's representative on the Operating Committee.[1007] Claimant notes that neither the Supreme Court nor the 2002 BM Rules precluded the Licensing Authority from discussing the grounds of denial with TCC and contends that Respondent's witness Mr. Khokhar acknowledged during the Hearing that the Licensing Authority can provide clarification if the grounds for denial are unclear.[1008]

972. Claimant further asserts that the "*flaws of the denial process*" were compounded by the following events during the appeal process:[1009]

(i) on the instructions of the Pakistan Supreme Court, the hearing date for TCC's appeal was advanced on two days' notice (to 2/3 March 2012 from 12 March 2012),

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[1005] Claimant's Post-Hearing Brief, ¶ 69.
[1006] Memorial, ¶¶ 492-494.
[1007] Claimant's Post-Hearing Brief, ¶¶ 70-71. According to Claimant, during the seven-month time period between the filing of the application and its rejection, there was only one meeting between the GOB and TCC, on 21 July 2011, at which none of the grounds set out in the Notice of Intent to Reject was discussed, except for the smelter issue; following the Notice, the Licensing Authority refused to meet with TCC, despite TCC's repeated requests for clarification. Claimant's Post-Hearing Brief, ¶ 72. *See also* Memorial, ¶ 492.
[1008] Claimant's Post-Hearing Brief, ¶ 73 referring to Transcript (Day 7) pp. 1818-1819.
[1009] Claimant's Post-Hearing Brief, ¶¶ 74-76; Memorial, ¶¶ 497-498.

as a result of which TCCP's senior counsel could not be present during the hearing and TCCP did not have an appropriate opportunity to respond to the submission filed by the Licensing Authority on 22 February 2012;[1010]

(ii) on 3 March 2012, TCCP's counsel was not allowed to conclude his arguments because the Secretary of the MMDD announced that he had to leave to travel abroad;[1011]

(iii) as instructed by the Supreme Court, the Secretary of the MMDD rendered his decision immediately after the conclusion of the hearing on 3 March 2012;

(iv) the decision was not communicated directly to TCCP, but TCCP's counsel learned of the rejection from the media and had to request a copy of the written decision at the next session of the Pakistan Supreme Court on 5 March 2012; and

(v) the decision's reasoning was contained in a single conclusory paragraph, which stated that "*the decision of the Licensing Authority to reject the Mining Lease application of the TCCP, is up-held as reasons of declining mining lease were duly examined by the concerned mines committee, being consonant with settled law/prevailing rules, therefore, no interference is called for*."[1012]

973. In relation to Pakistan's argument that Claimant did not raise any lack of due process complaints in the Supreme Court proceedings, Claimant emphasizes that this Tribunal has exclusive jurisdiction to determine whether the conduct of the MMDD violated the Treaty and that the ICC Tribunal has exclusive jurisdiction to decide whether the same conduct violated the CHEJVA. Claimant argues that there is no requirement that local remedies have to be exhausted and notes that the Supreme Court did not act as appellate authority for the MMDD.[1013]

(b) The Grounds Stated in the Notice of Intent to Reject Provide No Rational Basis for Denial of the Mining Lease Application

974. Claimant claims that the grounds of rejection stated in the Notice of Intent to Reject were "*baseless and arbitrary*" and cites as an example the Fourth Ground, *i.e.*, that no exploration had taken place in Reko Diq in the past seventeen years, despite the fact that Balochistan as TCC's joint venture partner had participated in all important decisions regarding the exploration work and had received quarterly reports on the progress of the

[1010] **Exhibits CE-129** and **CE-131**.
[1011] **Exhibit CE-138**, ¶ 2.
[1012] **Exhibit CE-137**, p. 6.
[1013] Claimant's Post-Hearing Brief, ¶ 77.

exploration activities and an 18,000-page Feasibility Study.[1014] Claimant notes that Balochistan itself stated before the Balochistan High Court in 2007 that (i) "*BHP carried out reconnaissance and detailed work upto* [sic] *1999*"; (ii) "*TCC continued the work and carried out extensive exploration activities at Reko Diq*"; and (iii) following its acquisition by Barrick and Antofagasta in 2006, TCC "*started a very huge advanced drilling and exploration programme at Reko Diq.*"[1015]

975. Claimant also refers to the First Ground, *i.e.*, that TCCP was not incorporated in Pakistan, and notes that TCCP's certificate of incorporation was attached to the Application and the Licensing Authority thus must have been aware of TCCP's valid registration.[1016]

976. Claimant claims that the other grounds for denial are likewise not sufficient to justify the decision of the Licensing Authority to deprive Claimant of its right to mine Reko Diq and groups them into three sets: (i) TCCP held only 75%, rather than 100%, of the interest in Exploration License EL-5 and thus could not apply for a Mining Lease; (ii) the proposed Mining Lease Area included deposits and ore bodies that were not covered by the Feasibility Study; and (iii) TCC's planned project did not provide for smelting or refining.[1017]

(i) TCC Was a Proper Applicant for the Mining Lease

977. With regard to the first set of grounds set out in the Notice of Intent to Reject, *i.e.*, that TCCP was "*not competent to make application for grant of Mining lease,*" because "*the applicant alone was not allottee of exploration license,*"[1018] Claimant refers to Respondent's argument that pursuant to rule 48(2)(a) of the 2002 BM Rules, TCCP could apply for a Mining Lease only in conjunction with its Joint Venture partner or after buying out its partner's interest.[1019] Claimant notes that rule 48(2)(a) prohibits the Licensing Authority from granting a mining lease where "*any person other than the applicant holds any exploration license conferring an* ***exclusive right*** *to carry on exploration operations*" and argues that Balochistan never had an exclusive right to exploration, as this right was

[1014] Claimant's Post-Hearing Brief, ¶¶ 78, 79; Memorial, ¶ 457. **Exhibit CE-7**, ¶ 4.
[1015] Memorial, ¶ 458. **Exhibit CE-212** pp. 2-4, 16. Claimant also refers to the High Court's holding that "*exploration is a time consuming work, which involves drilling, collection of samples and tests, thus mining and cannot be started over night*" and that "*it can be safely concluded that, lot has been done and efforts have been made to start the mining, which of course is a slow and time consuming process*." **Exhibit CE-61**, p. 52.
[1016] Claimant's Post-Hearing Brief, ¶ 79. Memorial, ¶¶ 455-456. **Exhibits CE-6**, p. 2, **CE-21**, pp. 2 and 3, and **CE-14**.
[1017] Claimant's Post-Hearing Brief, ¶¶ 80-81.
[1018] Claimant's Post-Hearing Brief, ¶ 82 referring to Grounds 5 and 6 of the Notice of Intent to Reject. **Exhibit CE-7**, ¶¶ 5 and 6.
[1019] Claimant's Post-Hearing Brief, ¶ 83. Memorial, ¶ 459.

held by the Joint Venture, in which TCC had a 75% interest.[1020] According to Claimant, the 2002 BM Rules do not require that both joint holders of an exploration license apply for the mining lease.[1021]

978. Claimant also notes that pursuant to rule 47(1) which requires that an applicant be a "*body corporate*" under Pakistani law, the unincorporated Joint Venture could not have submitted the Application as only TCCP was a Pakistani corporation, and further claims that it was agreed in the CHEJVA that TCC alone would be able to apply for the Mining Lease in case Balochistan decided not to participate in the mining venture.[1022]

979. Finally, Claimant claims that it would be "*manifestly unfair*" if TCCP were required to buy out Balochistan's interest before being eligible to file the Application on its own, given that it was Balochistan which refused to engage in negotiations regarding the transfer of its interest, even though it was required to do so under the CHEJVA.[1023]

(ii) The Scope of the Feasibility Study and the Mining Lease Area Complied with the Applicable Rules

980. In relation to the second set of grounds set out in the Notice of Intent to Reject,[1024] Claimant refers to Pakistan's argument that the Application did not comply with rules 47 and 48 because the requested Mining Area did not cover only deposits H14 and H15, for which a feasibility study had been submitted, but also several other deposits and ore bodies that were not included in the Feasibility Study's initial mine development.[1025]

981. Claimant argues that TCC was not required under the 2002 BM Rules or the CHEJVA, nor did it undertake, to conduct a "*complete feasibility*" study of all mineral deposits within the Mining Area.[1026]

982. Claimant claims that pursuant to rules 47(2)(c) and 48(1), a mining lease application is made "*in respect of an area of land*," not exceeding 100 square kilometers, and must "*identify the mineral or group of minerals in respect of which the lease is sought*." In Claimant's view, these requirements were fully complied with as TCCP requested a

[1020] Claimant's Post-Hearing Brief, ¶ 84. **Exhibit RE-1**, rule 48(2)(a) (emphasis added by Claimant).
[1021] Memorial, ¶ 460; Reply, ¶ 418; Claimant's Post-Hearing Brief, ¶ 85.
[1022] Claimant's Post-Hearing Brief, ¶¶ 85-86. Reply, ¶ 418; Memorial, ¶ 460 referring to **Exhibit CE-1**. Clauses 11.8.2 and 11.4.2.
[1023] Claimant's Post-Hearing Brief, ¶ 87.
[1024] Claimant's Post-Hearing Brief, ¶ 88 referring to Grounds 2, 3, 7 and 8 of the Notice of Intent to Reject. **Exhibit CE-7**, ¶¶ 2, 3, 7 and 8.
[1025] Claimant's Post-Hearing Brief, ¶ 89.
[1026] Memorial, ¶ 467; Reply, ¶ 420.

Mining Area of 99.473 square kilometers and identified copper and gold as the minerals for which it sought the mining lease.[1027]

983. With regard to the scope of the Feasibility Study, Claimant refers to rule 47(2)(f), which provides that the feasibility study shall include "*detailed plans for* [the] *development and operation of the mine and the programme of proposed mining operations*," and rule 48(3)(a)(i), which requires the feasibility study to "*show that **the mine** can be profitably developed and operated*."[1028] Claimant emphasizes that those provisions do not limit the Mining Area to a single deposit and notes that Clause 11.8.1 of the CHEJVA also refers to "*all ore resources which may be properly mined as a single mining enterprise*" and submits that a "*mining enterprise*" usually includes several deposits.[1029] Therefore, Claimant argues that the "*mining operation*" set out in the Feasibility Study was the initial mine development comprising H14 and H15.[1030]

984. Claimant further contends that the BM Rules accord with industry practice regarding mine development: It is standard industry practice for mining companies to start a project with an initial mining operation and then use the revenues from that development to finance future expansions in order to increase the profitability of the project at economies of scale derived from additional volume.[1031] According to Claimant, it is also standard industry practice to prepare a feasibility study for initial mine development (the "*base case*") and then prepare additional feasibility studies if a decision is made to proceed with mine expansion, as TCC had done in preparing, with the consent and approval of its Joint Venture partner, a pre-feasibility study for an expansion in the present case.[1032] Claimant contends that, consistent with this practice, the Feasibility Study demonstrated, through the use of base case focused on the Western Porphyries, that mining operations at Reko Diq would be both technically viable and profitable.[1033]

985. Claimant emphasizes that without this phased development, mining companies would have to waste their resources on feasibility studies for secondary and tertiary deposits, which would lead to prohibitive costs and also significant delays in the development of

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[1027] Claimant's Post-Hearing Brief, ¶ 90. **Exhibit RE-1**. rules 47(2)(c) and 48(1). Claimant states that Respondent's witness Mr. Khokhar explained during the Hearing that the terms "*mineral*" or "*group of minerals*" refer to minerals such as gold and copper, but not to particular deposits. Transcript (Day 7), p. 1772.
[1028] Claimant's Post-Hearing Brief, ¶ 92. **Exhibit RE-1**, rules 47(2)(f) and 48(3)(a)(i) (emphasis added by Claimant).
[1029] Memorial, ¶ 476 referring to Livesey IV, ¶¶ 49-51.
[1030] Claimant's Post-Hearing Brief, ¶ 92. Claimant asserts that Respondent's witness Mr. Khokhar confirmed during the Hearing that a "*mine*" or a "*mining operation*" is not the same thing as a deposit or group of deposits. Transcript (Day 7) pp. 1784-1785.
[1031] Claimant's Post-Hearing Brief, ¶ 93.
[1032] Claimant's Post-Hearing Brief, ¶ 94. Memorial, ¶ 468.
[1033] Reply, ¶ 421 referring to Livesey IV, ¶¶ 36, 48-51.

Pakistan's mineral resources and limit exploration.[1034] According to Claimant, this is also reflected in the 2002 BM Rules, specifically in rules 45(1)(b) and 56(1)(a) pursuant to which the mining lease holder may carry out "*exploration operations*" within the mining area (in addition to the "*mining operations*") and must provide periodic summaries of that exploration work.[1035]

986. With regard to Pakistan's reliance on the Joint Venture's request for a second renewal of EL-5 pursuant to rule 29(2)(c)(iii), in which it was stated that the extension was needed to complete a "*full feasibility study*" in order to "*tie together all the deposits, which are spread over a large area of EL-5,*"[1036] and its contention that Balochistan understood this statement to be an undertaking by TCC to prepare a feasibility study covering **all** deposits and ore bodies within the EL-5 area, Claimant stresses that TCC and Balochistan decided at the 26 October 2007 OC Meeting that "*the JV through TCC as Manager*" should prepare a "*full feasibility study **on option 72 ktpd**,*" *i.e.*, the Western Porphyries, and "*parallel pre-feasibility study on the expansion options.*"[1037]

987. Claimant submits that the 31 December 2009 memo to the Chief Secretary confirms that Balochistan's MMDD understood that TCC would "*develop both* 'Tanjeel' *(H4) and western porphyry (H-14 and H-15) deposits*" and would do so in a phased manner whereby TCC would "*produce 110,000 tons of ore and 2000 tons of concentrate per day at the initial stage and . . . increase it to the maximum of 220,000 tons of ore and 4000 tons of concentrate per day at a later stage.*"[1038] According to Claimant, the Feasibility Study presented to Balochistan's MMDD on 25 August 2010 also makes clear that it covers "*an initial mining project designed to account for future expansion projects.*"[1039] Claimant argues that the Governments therefore cannot fault TCC for doing what was agreed.[1040]

988. Finally, Claimant argues that in relation to its own Reko Diq project, Balochistan: (a) copied TCC's proposed Mining Lease Area – coordinate by coordinate; (b) did not perform any feasibility work of its own that would cover all the deposits and ore bodies within the Mining Area; and (c) also considered a phased development of its mining

[1034] Claimant's Post-Hearing Brief, ¶ 95. Memorial, ¶ 468 referring to Livesey IV, ¶ 49.
[1035] Memorial, ¶ 469. Claimant's Post-Hearing Brief, ¶¶ 90, 91. *See also* Reply, ¶ 422.
[1036] Claimant's Post-Hearing Brief, ¶ 96. **Exhibit RE-15**.
[1037] Claimant's Post-Hearing Brief, ¶ 97 (emphasis added by Claimant). Memorial, ¶ 470. **Exhibit CE-64**, p. 3.
[1038] Memorial, ¶ 471 referring to **Exhibit CE-31**, p. 19.
[1039] Memorial, ¶ 471 referring to **Exhibit CE-166**, p. 5-77.
[1040] Claimant's Post-Hearing Brief, ¶ 97.

project, which would have started at the Tanjeel deposit and then have expanded to the Western Porphyries and other ore bodies.[1041]

(iii) TCCP Was Not Required to Provide for Smelting or Refining

989. With regard to the third set of grounds set out in the Notice of Intent to Reject, *i.e.*, that the Feasibility Study "*is silent about the processing, smelting and refining of the metals/minerals to be extracted from the mining area*,"[1042] Claimant notes that Chapter 6 of the Feasibility Study, entitled "*Metallurgy and Process Development*," and also several other chapters deal with, or relate to, the processing of the mined ore into concentrate. Claimant claims that TCC was not required to address smelting or refining of the extracted minerals in its Feasibility Study or to actually construct such a smelter and refinery.[1043]

990. Referring to Pakistan's argument that Claimant's failure to address the "*Governments' desire for a smelter/refinery*" in the Feasibility Study violated the "*value addition*" requirements in rules 47(2)(n) and 48(3)(a)(vii), Claimant notes that the "*value addition*" requirement was added to the 2002 BM Rules on 1 October 2010, *i.e.*, after TCC had submitted the Feasibility Study to Balochistan. Claimant further claims that, in any event, the Feasibility Study met the "*value addition*" requirement and refers to its witnesses Mr. Livesey and Ms. Boggs, who testified during the Hearing that the transformation of the ore into concentrate is in fact "*the most important link of the value chain*,"[1044] as well as to Respondent's witness Mr. Khokhar, who agreed that treatment of the ore creates value addition.[1045]

991. Claimant points out that on 5 August 2009, TCC provided Balochistan with a detailed study on the construction of a smelter at Reko Diq, which was prepared by TCC "*in light of the results of its current feasibility studies*" and concluded that a smelter would not be

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[1041] Claimant's Post-Hearing Brief, ¶ 98. Memorial, ¶¶ 472, 477; Reply, ¶ 423.
[1042] Claimant's Post-Hearing Brief, ¶ 99 referring to Ground 9 of the Notice of Intent to Reject. **Exhibit CE-7**, ¶ 9.
[1043] Memorial, ¶¶ 479, 480. Claimant's Post-Hearing Brief, ¶¶ 99-101; Reply, ¶¶ 424-425.
[1044] Claimant's Post-Hearing Brief, ¶ 102. Ms. Boggs stated that turning ore into concentrate is "*probably the biggest value addition to it in the mining process*." Transcript (Day 4), p. 1037 lines 14-15. Mr. Livesey further explained: "*A tonne of rock from Reko Diq can't be sold on the open market, but a tonne of concentrate can. So you have immediately added value to the ore by creating the concentrate. …In the case of this porphyry system, we increased the grade from half a percent copper to 30 percent copper in the concentrate. …so you've added value and you've created a product that is saleable on the international market.*" Transcript (Day 5), p. 1426 line 8 to p. 1427 line 1. *See also* Memorial, ¶ 481; Reply, ¶ 425.
[1045] Claimant's Post-Hearing Brief, ¶ 102. In response to the question: "*And you would agree with me that the treatment of the ore adds value to the ore; correct?*" Mr. Khokhar answered: "*Partially, yes.*" Transcript (Day 7), p. 1773 lines 18-20.

economically feasible. At the same time, Claimant notes that it offered to provide an amount of up to US$ 1 million to assist Balochistan in preparing its own smelter feasibility study.[1046]

992. In relation to Respondent's argument that it was within the Licensing Authority's discretion to impose the obligation to construct a smelter on TCC, Claimant argues that if this were the case, Balochistan could deny the mining lease on the sole ground that TCC was not willing to spend a billion dollars on loss-making facilities, which do not even form part of the industry sector in which TCC's parent companies are experienced. In Claimant's view, such an exercise of discretion would not only be "*wholly arbitrary*," but would also contradict the purpose of rules 47 and 48, *i.e.*, to ensure that mining operations are profitable and efficient, and further would violate Clause 11.8.2 of the CHEJVA, since the construction of a smelter is not a routine requirement.[1047]

993. As to Pakistan's argument that TCC's Feasibility Study should have discussed allocating ore for the Government's planned smelter, Claimant contends that besides there being no requirement under the 2002 BM Rules to do so, Balochistan never responded to TCC's offer on 5 October 2010 to provide concentrate to a Government smelter at internationally accepted commercial terms.[1048]

(c) Pakistan's New Grounds Are Irrelevant and Without Merit

994. Claimant submits that the three additional grounds raised by Pakistan in these proceedings, *i.e.*, that the Project was not economically viable, that the proposed slurry pipeline was infeasible, and that the water supply was insufficient, are irrelevant to the Tribunal's evaluation of the Licensing Authority's rejection of the Mining Lease Application, as they were not raised in the Notice of Intent to Reject or at any other occasion prior to the rejection. In any event, Claimant contends that those grounds are also without merit.[1049]

(i) The Proposed Project Was Economically Viable

995. In relation to Respondent's contention that the Feasibility Study failed to show that "*the mine can be profitably developed and operated*" as required under rule 48(3)(a)(i), Claimant refers to the Feasibility Study stating that "*given its strong economic results, and its strategic fit for the owners, it is recommended that the project advances to the*

[1046] Memorial, ¶ 480; Reply, ¶ 426; Claimant's Post-Hearing Brief, ¶ 103.
[1047] Claimant's Post-Hearing Brief, ¶¶ 104, 105.
[1048] Reply, ¶ 426 referring to Livesey IV, ¶¶ 85-89; Claimant's Post-Hearing Brief, ¶ 106 referring to **Exhibit CE-257**.
[1049] Claimant's Post-Hearing Brief, ¶¶ 107-108. With regard to the second reason, *see also* Reply, ¶ 428.

commitment phase" and to its witness Mr. Williams' testimony that "*a major mining house is not going to put a feasibility study out if they don't believe the project is economic.*"[1050]

996. Claimant rejects Pakistan's assertion that the 10% discount rate used for the "*base case*" in the Feasibility Study was too low "*in this sort of part of the world*" and claims that the discount rate was selected by the highly experienced mining industry professionals on TCC's Board of Directors, most of whom also served on the boards of Barrick Gold or Antofagasta who were planning to contribute to the project US$ 1.5 billion of their own funds as equity.[1051]

997. Claimant also argues that the IRR of 12.3% in the base case scenario was not "*worryingly low*" as alleged by Respondent, since Barrick and Antofagasta did not require a particularly high rate of return, given their very low cost of capital and easy access to debt capital as a result of long track records in conducting successful mining ventures.[1052] Claimant emphasizes that the project was highly sensitive to metals prices and refers to the statement in the Feasibility Study that "*there is significant upside considering current trend on metal prices*," which would have resulted in a considerably higher IRR at the time the Application was rejected.[1053]

998. With regard to the tax regime, Claimant asserts that it was reasonable to assume that the project would be granted EPZ status for at least part of the project life, given that (a) this status has been regularly granted to major investments in the mining sector, including the mining projects at Saindak and Duddar in Balochistan and, in 2002, TCC's own Tanjeel project; and (b) TCC expected to have Balochistan's support in the negotiations with the GOP once the Mining Lease was granted, as this would have been in Balochistan's own interest.[1054] In any event, Claimant claims that the project would have remained profitable even without EPZ status and cites the Feasibility Study, which noted that "*even in the*

[1050] Claimant's Post-Hearing Brief, ¶ 109. **Exhibit RE-133**, p. 1. Transcript (Day 3), p. 586.
[1051] Claimant's Post-Hearing Brief, ¶ 110.
[1052] Claimant's Post-Hearing Brief, ¶ 111. Transcript (Day 5), pp. 1226-1227, 1423.
[1053] Claimant's Post-Hearing Brief, ¶¶ 111-112 referring to **Exhibit RE-133**, p. 6. See also Mr. Livesey's testimony: "*The big issues here are the infrastructure requirements and the sensitivities are the metals prices. If, for example, you took today's long-term metal price predictions over the ones we put into the study here, the IRR would be virtually double what it is in this study.*" Transcript (Day 4), p. 1094 lines 16-22. Mr. Livesey further stated that "*if you were to take today's prices on copper and gold, you would actually be off the chart … and your IRR would be somewhere close to 20 percent.*" Transcript (Day 5), p. 1415 lines 16-19. Claimant further contends that IRR and Net Present Value (NPV) are generally not considered to be useful measures for a long-term project (in this case, 56 years) and refers to its witness Mr. Luksic testifying that the expansions of a mine, which were not taken into account in the Feasibility Study, tended to produce even more substantial returns than the starter project. Claimant's Post-Hearing Brief, ¶ 113. Transcript (Day 3), p. 632 lines 11-17.
[1054] Claimant's Post-Hearing Brief, ¶¶ 114-116.

case that TCC is not granted certain tax incentives requested, the project still show attractive economic results in the Normal tax regime."[1055]

999. In relation to the royalty rate, Claimant states that TCC assumed a 2% rate because, as explained in the Feasibility Study, the increase to a 5% rate adopted in July 2009 had not yet entered into force and there were still ongoing negotiations regarding the royalty rate. In addition, Claimant refers to its witness Mr. Livesey who stated that, while a 5% royalty rate would have had a "*substantial impact*" on the project, it would not have resulted in negative cash flows.[1056]

1000. Claimant further rejects Respondent's allegation that TCC would not have been able to obtain third-party funding for the project and notes that TCC's owners are "*two of the world's leading mining companies*," which have access to substantial debt capital. Claimant submits that, while it expected the Governments to resume negotiations once the mining lease was granted and ultimately to enter into a Mineral Agreement, the project could also potentially have been financed without a Mineral Agreement, as testified by its witness Mr. Livesey during the Hearing.[1057]

1001. With regard to security risks, Claimant notes that, besides a chapter on security and another one on risk, the Feasibility Study contains a risk register in which the risks are catalogued, assigned a mitigation strategy and tracked with respect to progress and mitigation level. In addition, Claimant submits that the costs associated with the security plans were included in the project's finances as part of the operating and capital expense estimates, including contingencies amounting to more than half a billion dollars in the capital expense estimates.[1058]

(ii) The Pipeline Plan Was Sensible and Feasible

1002. Claimant submits that TCC's decision to transport the concentrate from Reko Diq to the port of Gwadar through a slurry pipeline was taken only after extensive studies had been conducted, which compared the costs and benefits of a pipeline to those of road transport and rail and concluded that the pipeline was the "*safest and most economical option*," *inter alia*, because of "*several distinct security advantages*" over the other options: (a) securing operations required less manpower; (b) the transport via pipeline was less susceptible to theft; and (c) it involved and benefited local residents.[1059]

[1055] Claimant's Post-Hearing Brief, ¶ 117. **Exhibit RE-133**, p. 27.
[1056] Claimant's Post-Hearing Brief, ¶ 118 referring to Transcript (Day 5) pp. 1206-1209.
[1057] Claimant's Post-Hearing Brief, ¶ 119 referring to Transcript (Day 5) pp. 1235-1237.
[1058] Claimant's Post-Hearing Brief, ¶ 120.
[1059] Reply, ¶ 429; Claimant's Post-Hearing Brief, ¶¶ 122-123 referring to **Exhibit CE-219**, pp. 41, 45-46, 63.

1003. Claimant further states that it informed the GOB as early as December 2007 that a pipeline was one of the transport options and repeatedly raised the option thereafter.[1060] While Claimant acknowledges that the GOB expressed its interest in having TCC build a road to Gwadar, it claims that the GOB never raised any concerns that a pipeline would be unviable for any reason, including security concerns. Claimant also notes that Pakistan's witness Mr. Yaqoob admitted during the Hearing that he was not aware of any discussions within the GOB regarding security concerns relating to TCC's project.[1061]

1004. Claimant contends that TCC had prepared "*detailed plans to provide adequate security during both the construction and operation phases*," the costs of which were included in the project's operating and capital expense estimates. Claimant refers, *inter alia*, to its intention to create incentives for local tribes and communities to become involved in the pipeline's maintenance and security.[1062]

1005. In Claimant's view, the Reko Diq pipeline cannot be compared to the "*politically charged*" Sui gas pipeline, as it would have measured only eight inches in diameter, would have been buried several feet underground and would have transported non-flammable slurry. In addition, Claimant notes that the pipeline would have transported the slurry of a project in which Balochistan held a 25% interest and emphasizes that there have not been any major security incidents at Reko Diq during the years of exploration activities or even after TCC had to abandon its assets at the project site.[1063]

(iii) TCC's Water Source Selection Was Based on Sound Analysis

1006. As to the water source for the project, Claimant submits that, contrary to Respondent's allegation, the water study was investigated to full feasibility level, except for the areas located outside of Pakistan.[1064]

1007. Claimant states that it selected the fan sediments (also known as "*Baghicha*") as the project's water source because there were no competing users and TCC's testing revealed that it contained "*ample quantities*" of water. Claimant emphasizes that the largest part of the water is located on the Pakistani side of the border and claims that any impact on the Afghan side would be minimal.[1065]

[1060] Reply, ¶ 430; Claimant's Post-Hearing Brief, ¶ 124.
[1061] Claimant's Post-Hearing Brief, ¶¶ 124-125 referring to Transcript (Day 7) p. 1925.
[1062] Claimant's Post-Hearing Brief, ¶ 125.
[1063] Claimant's Post-Hearing Brief, ¶ 126.
[1064] Claimant's Post-Hearing Brief, ¶ 131.
[1065] Claimant's Post-Hearing Brief, ¶¶ 129-130.

1008. Finally, Claimant notes that for its own Reko Diq project, Balochistan also selected the Baghicha aquifer for the same reasons: "*No other groundwater user*," a "[l]*arge volume of groundwater storage*" and "[m]*ost* [of the] *area of resource is* [located] *in Pakistan*."[1066]

ii. Pakistan Breached Article 3(2) by the Takeover of Reko Diq

1009. Claimant asserts that Balochistan's decision to deny the Mining Lease Application can only be explained by Balochistan's plan to take over TCC's project and develop a Balochistan-only project, which started in early 2009. Claimant submits that, contrary to Respondent's allegation, Balochistan's project was in direct conflict with TCC's project. According to Claimant, Balochistan knew it had to overcome TCC's right to mine Reko Diq and therefore instructed the Licensing Authority to deny TCC's Mining Lease Application so that Balochistan could implement its own project.[1067]

1010. In Claimant's view, the Governments' repeated assurances to TCC that Balochistan's project would be complementary to that of TCC until the submission of TCC's Feasibility Study in August 2010, while Balochistan was already planning to take over the Project, constitute a "*flagrant violation*" of Respondent's good faith obligation under the FET standard.[1068] Claimant further argues that Balochistan's preference for its own "*indigenous*" project constitutes "*differential treatment*" of TCC "*motivated by a preference for other investments over foreign-owned investments*" and therefore violates Article 3(2).[1069]

1011. In addition, Claimant asserts that Pakistan and Balochistan started in 2008 to solicit and entertain a competing offer from MCC, as part of which they invited MCC to the Steering Committee meeting in January 2009. Claimant contends that despite the assurances following this meeting that it was "*officially decided to decline the proposal of MCC*," the Governments continued their negotiations with MCC in 2009, and refers to (a) a letter sent by MCC to the Embassy of Pakistan; (b) local media reports according to which MCC made an additional proposal in 2010; and (c) attempts of MCC employees to enter the Reko Diq site in 2012.[1070]

[1066] Claimant's Post-Hearing Brief, ¶ 132 quoting **Exhibit CE-372**, pp. 12-13.
[1067] Claimant's Post-Hearing Brief, ¶¶ 134-135.
[1068] Memorial, ¶ 441.
[1069] Memorial, ¶ 488 referring to *Saluka v Czech Republic* [**CA-44**], ¶ 307.
[1070] Reply, ¶¶ 391-394 referring to **Exhibits CE-69**, p. 2, **CE-339**, pp. 1-2, **CE-32**, p. 2, and **CE-149**, p. 1. *See also* Reply, ¶ 155

(a) With Federal Assistance, Balochistan Developed a PC-1 Proposal for a Balochistan-Only Project at Reko Diq

1012. Claimant submits that between May and December 2009, Pakistan's Planning Commission developed a "*proposal for mining and refining copper in the Reko Diq area of Balochistan*" and, even though TCC had been performing exploration work at Reko Diq for more than eight years, the Governments initially did not inform TCC about this proposal.[1071]

1013. Claimant submits that the Planning Commission and Balochistan recognized early on that the proposal would conflict with TCC's rights at Reko Diq[1072] and refers to the 17 November 2009 Working Paper of the Planning Commission in which it requested that "[t]*he sponsors may clarify whether Government of Balochistan is legally bound to convert Exploration License into long term renewable mining lease for thirty (30) years under Balochistan Mining Concession Rules 2002 or not.* ***If so, then what would be their strategy to implement the subject project?***"[1073]

1014. According to Claimant, the final PC-1 proposal, which was approved by the Federal Planning Commission on 9 December 2009 and by the Federal ECNEC on 9 December 2010, included a budget of 2.7 billion rupees (*i.e.*, US$ 57.1 million – approximately 30% of the overall budget) to mine at a rate of 15,000 tons of ore per day, which confirms that the "*mining of ore*" would be the "*principal activity*" of the project.[1074]

1015. Claimant further refers to a Working Paper titled "*Taking Over of Reko-Diq Copper & Gold Mining Project From TCCP by the Government of Balochistan,*" which was prepared by the MMDD for a meeting of the Balochistan Cabinet on 24 December 2009.[1075] Claimant submits that pursuant to the "*Background*" section, it was the common understanding of the parties that TCC would have a right to a mining lease "*if a suitable discovery* [was] *made,*" and notes that the section styled "*Work done by TCCP*" describes the extensive work undertaken by TCC at Reko Diq and reports expenditures for that work of US$ 200 million by October 2009.[1076] Claimant then refers to the 13 purported

[1071] Memorial, ¶ 431 quoting Mubarakmand I, ¶ 6. Reply, ¶ 396.
[1072] Memorial, ¶ 432; Reply, ¶ 396; Claimant's Post-Hearing Brief, ¶ 136.
[1073] Memorial, ¶ 436 (emphasis added by Claimant); Claimant's Post-Hearing Brief, ¶ 136. **Exhibit CE-240**, p. 4.
[1074] Claimant's Post-Hearing Brief, ¶ 137; Memorial, ¶¶ 434, 443. **Exhibit CE-242**, p. 2.
[1075] Claimant's Post-Hearing Brief, ¶¶ 140-141. **Exhibit RE-62**, p. 1. Claimant also refers to the following testimony of Mr. Lehri: **Q.** "*So, this* [Working Paper prepared by the MMDD] *would reflect the understanding of that department and those it assigned to prepare the Working Papers to the matters covered by the Working Paper; correct?*" [**Mr. Lehri:**] "*Yes.*" Transcript (Day 6), p. 1506 line 21 to p. 1507 line 3.
[1076] Claimant's Post-Hearing Brief, ¶ 142. **Exhibit RE-62**, pp. 1, 2.

"*Justifications for taking over the Project by Balochistan Government*" and highlights the following points:[1077]

(i) the MMDD asked the Cabinet for "*approval for awarding the **mining rights** of Reko-Diq Copper / Gold Project to Mines & Mineral Development Department*;"[1078]

(ii) the MMDD assured the Government of its technical expertise to "*run **mining activities** efficiently*" and referred to technical assistance *"in mining copper / gold in Reko Diq*";[1079]

(iii) the MMDD understood the proposal to encompass "*carrying out mining activities in the mine areas of Reko Diq*" and stated that in order to pursue the PC-1 proposal, "*the mining activities are also required to be undertaken by the Provincial Government*";[1080] and

(iv) the MMDD took the view that "*the Licensing Authority can exercise his power to reject* [TCCP's] *Mining Lease for the better interest of the province.*"[1081]

1016. Claimant also refers to the PowerPoint presentation given at the Cabinet meeting on 24 December 2009 and claims that this presentation makes clear that the PC-1 proposal contemplated a phased mining scheme, by which Balochistan would start by mining 5,000 tons per day and expand to 60,000 tons by the project's tenth year.[1082]

(b) Chief Minister Raisani's Cabinet Decided to Take Over Reko Diq

1017. With regard to the 24 December 2009 Cabinet meeting, Claimant refers to Agenda Item No. 4, *i.e.*, the "*Taking over of Rekodiq Copper & Gold Project from TCCP by the Government of Balochistan,*" in relation to which the minutes of the meeting record:

> "*The agenda was approved in principle. It was further decided **not** to go ahead with the proposed Mineral and Shareholder agreements with TCCP. Further course of action would be decided by the Chief Minister.*"[1083]

[1077] Claimant's Post-Hearing Brief, ¶¶ 143-144.
[1078] **Exhibit RE-62**, p. 5 (¶ 6) (emphasis added by Claimant).
[1079] **Exhibit RE-62**, p. 4 (¶ 5 (xii) and (xi)) (emphasis added by Claimant).
[1080] **Exhibit RE-62**, p. 4 (¶ 5 (xiii) and (viii)).
[1081] **Exhibit RE-62**, p. 3 (¶ 5 (vii)).
[1082] Claimant's Post-Hearing Brief, ¶¶ 145-146. **Exhibit CE-409**, pp. 11-12.
[1083] Claimant's Post-Hearing Brief, ¶ 147. **Exhibit CE-31**, p. 16 (emphasis in original). *See also* Memorial, ¶ 437; Reply, ¶ 400.

1018. Claimant submits that Respondent's witness Mr. Lehri testified at the Hearing that Balochistan had thereby decided what to do, *i.e.*, to take over TCC's project, but had left the implementation of the decision to the Chief Minister.[1084] Claimant argues that the decision "***not** to go ahead*" with the negotiations of the Mineral and Shareholder Agreements was "*the natural and immediate consequence*" of the takeover decision, as there was no reason to negotiate them if TCC were not to be permitted to go forward with its own project.[1085]

1019. In addition, Claimant refers to a "*Note for Chief Secretary*" dated 31 December 2009 in which employees of the MMDD reported on a site visit to TCC's project at Reko Diq, highlighting its value and the expertise TCC had brought to it, but also stating that the "*Government of Balochistan has decided to take over the project from TCCP*;" therefore, they advised that "*it is utmost important to establish a camp office of the Mines & Mineral Development Department at the site to closely monitor the project till proper taking / handing-over the project*." Claimant notes that this Note was signed and thus approved by the Chief Secretary.[1086]

(c) Balochistan and Pakistan Took Steps to Eliminate TCC's Rights and Secure Funding for Their Project

1020. Claimant submits that immediately thereafter, Balochistan undertook to eliminate TCC's rights and to obtain funding for its own project.[1087] Claimant cites a "*Summary for the Honorable Chief Minister*" dated 11 February 2010 in which the MMDD reported that "*with the consent of the Ex-Chief Secretary Balochistan*" and under the chairmanship of Dr. Mubarakmand, a committee "*had been constituted for negotiating the services of Legal Expert for Reko-Diq Gold/Copper Project*." The Summary continued:

> "*In the aftermath of the decision of the Provincial Cabinet to take over the Reko-Diq Project from Tethyan Copper Company Pakistan (TCCP) . . . it was deemed necessary to engage Legal Advisor/Consultant for*

[1084] Claimant's Post-Hearing Brief, ¶¶ 148-149. **Q.** "[I]*n effect, as I understand the substance of it was that the Cabinet had decided to take over Reko Diq, but it was basically saying to the Chief Minister,* 'Okay, now you take such steps as are appropriate;' *correct?*" [**Mr. Lehri:**] "*Exactly. It was a decision in principle which was not conclusive, but it was made subject to the Final Decision by the Chief Minister of Balochistan.*" **Q.** "*So the Chief Minister was basically given a freehand to decide what he wanted to do with respect to Reko Diq*?" [**Mr. Lehri:**] "*By the Cabinet*." Transcript (Day 6), p. 1505 line 16 to p. 1506 line 6.
[1085] Claimant's Post-Hearing Brief, ¶ 150.
[1086] Claimant's Post-Hearing Brief, ¶¶ 152-153. **Exhibit CE-31**, pp. 18-20. *See also* Memorial, ¶ 438.
[1087] Claimant's Post-Hearing Brief, ¶ 154. Memorial, ¶ 438.

> *advise* [sic] *before issuing legal notice to TCC for cancellation of Exploration Agreement*."[1088]

1021. In Claimant's view, this Summary "*conclusively demonstrates*" that the decision of the Cabinet decision was "*definitive*" and further shows that the people in charge of implementing this decision knew that they had to "*terminate TCC's rights in order to do so*."[1089]

1022. Claimant points to the minutes of a 28 May 2010 meeting of the Board of Governors of Balochistan's project at which *"various issues relating to mining of gold and copper at Reko Diq, Balochistan*" were discussed, which included, according to Respondent's witness Mr. Lehri, "*whether Balochistan would mine at Reko Diq, or take ore and turn it into concentrate, or take concentrate and smelt it*."[1090] Claimant also highlights the following sections of the minutes:[1091]

(i) Dr. Mubarakmand observed that litigation might be avoided if TCC agreed to do only the mining and leave the refining to Balochistan and suggested that the "*Government of Balochistan may opt for a joint project with TCC on profit sharing basis in which plant design, installation and operation will be our equity and the remaining part (mining) can be TCC equity*," predicting that the split would then be 80:20 in favor of Balochistan.[1092]

(ii) In response to the concern raised by a Board member that "*only giving prospecting license will earn a bad reputation for the country*," the Chief Minister stated that "*national interest is above all*" and observed that "*if TCC is keen on a mining license, then they can have it. We will buy the ore from them and do the refining and metal production ourselves.*"[1093]

(iii) According to the summary of decisions taken at the meeting, it was decided that "[t]*he future role of* [TCC] *will be decided by the Government of Balochistan, after they apply for a mining lease*"; the "*refining and production of pure copper and gold will be* [done] *in Balochistan*"; and "*under no circumstances will the pure metals be allowed to leave the country.*"[1094]

[1088] Claimant's Post-Hearing Brief, ¶ 155. Memorial, ¶¶ 438-439. **Exhibit CE-31**, p. 21.
[1089] Claimant's Post-Hearing Brief, ¶ 156.
[1090] Claimant's Post-Hearing Brief, ¶¶ 158, 159. **Exhibit CE-31**, p. 26. Transcript (Day 6), p. 1585.
[1091] Claimant's Post-Hearing Brief, ¶¶ 159-161.
[1092] **Exhibit CE-31**, pp. 26-27.
[1093] **Exhibit CE-31**, p 27.
[1094] **Exhibit CE-31**, p. 28.

1023. According to Claimant, the minutes demonstrate that the Chief Minister, who had been given a "*free hand*" by the Cabinet, would not decide on TCC's Application on the basis of TCC's legal rights, but rather "*on the determination of* [Balochistan's] *own best interests.*"[1095]

1024. Claimant further cites a 3 December 2010 interview of Dr. Mubarakmand in which he stated in response to an observation that "*the government of Baluchistan should give the contract to the local companies . . .* [s]*o that the flow of the money remains in Pakistan rather than going to foreign companies*" that:

> "*This is the reason why I had developed a technical project and presented it to the Chief Minister of Baluchistan. He appreciated my efforts and endorsed that this project should be handled by Pakistani scientists and engineers. If our project is approved in the* [E]*CNEC meeting on December 9, 2010, the Baluchistan government has the funds for us to start work on this project.*"[1096]

1025. Claimant also refers to an interview on 15 December 2010 in which Dr. Mubarakmand recognized that TCC had "*done the exploration work expecting that the mining license will be awarded to them*," but stated that "*this decision will be taken by the Government of Balochistan as these deposits belong to them*."[1097]

1026. Finally, Claimant argues that Pakistan cannot hide behind the smaller scale of the Balochistan-only project in light of Balochistan's apparent belief that TCC's project stood in the way of its own project and its corresponding actions to "*remove that obstacle.*"[1098]

(d) The Governments Sought the Supreme Court's Assistance in Implementing the Balochistan Project

1027. Claimant submits that, while Balochistan had defended the CHEJVA and its own pursuit of the Joint Venture project in the Supreme Court proceedings up to and including its 11 December 2010 submission, Balochistan changed its position in early 2011.[1099]

1028. Claimant contends that in its 22 January 2011 submission, Balochistan repudiated the position it had taken since 2006, stating that "*certain important developments have taken*

[1095] Claimant's Post-Hearing Brief, ¶ 162.
[1096] Claimant's Post-Hearing Brief, ¶ 164. **Exhibit CE-105**. *See also* Memorial, ¶ 432.
[1097] Claimant's Post-Hearing Brief, ¶ 164. **Exhibit CE-108**, p. 2. Claimant further quotes Dr. Mubarakmand stating: "*The Cabinet unanimously decided that the project will be done in Pakistan, with Pakistani manpower, engineers and scientists*" and that "[t]*here is no discussion regarding the involvement of foreign companies in* [the Government's project]." Memorial, ¶ 446. **Exhibit CE-108**, pp. 3, 4.
[1098] Claimant's Post-Hearing Brief, ¶ 167.
[1099] Claimant's Post-Hearing Brief, ¶ 169.

place that are necessary to be brought on the record," namely, that (i) ECNEC had approved Balochistan's project; (ii) a Board of Governors had been established; (iii) Dr. Mubarakmand was to give a briefing to ECNEC on Pakistan's technical capability to implement the project; and (iv) the ECNEC decision was consistent with the 26 December 2009 decision of the Balochistan Cabinet.[1100]

1029. Claimant further cites Balochistan's concluding request that the Court

> "*permit the Government of Balochistan to execute the decision of the ECNEC dated 9.12.2010 while declaring that in the circumstances of the case, no entity has any vested right for the mining concession and that only the Government of Balochistan can take any decision in this regard in the national interest.*"[1101]

1030. In Claimant's view, Balochistan thereby asked the Supreme Court to release it from its obligation to grant TCC a mining lease, which derived from the 2002 BM Rules and the CHEJVA, in order for Balochistan to be able carry out the project on its own.[1102]

(e) On the Chief Minister's Instructions, the Licensing Authority Denied TCC's Mining Lease Application so that the Balochistan Project Could Go Forward

1031. Claimant submits that despite an order of the Supreme Court dated 25 May 2011 by which it directed the Licensing Authority to evaluate the application "*transparently and fairly in accordance with the law and the rules,*" no action was taken by the Licensing Authority until 12 September 2011 when the Director General of the MMDD wrote to the Secretary of the MMDD, *i.e.*, the appellate authority, noting that he had received the "*following remarks*" from the Chief Minister:[1103]

> "***It was decided by the Board of Governors that:***
>
> ***i) We will do the mining***
>
> ***ii) We will do the refining.***"

1032. The Director General requested the Secretary "[i]*n light of said decision by the Board of Governors,*" that the "*future line of action in the matter may kindly be conveyed whether the TCC be refused Mining Lease for Reko-Diq Copper-Gold Project or otherwise.*" [1104]

[1100] Claimant's Post-Hearing Brief, ¶ 171. **Exhibit CE-269**, pp. 3-4.
[1101] Claimant's Post-Hearing Brief, ¶ 172. **Exhibit CE-269**, p. 6.
[1102] Claimant's Post-Hearing Brief, ¶ 173. *Cf.* Memorial, ¶ 444.
[1103] Claimant's Post-Hearing Brief, ¶¶ 175-176. **Exhibit CE-355** (emphasis in original).
[1104] Reply, ¶¶ 411-412; Claimant's Post-Hearing Brief, ¶ 175. **Exhibit CE-355**.

1033. Claimant claims that the Chief Minister's interference with the Licensing Authority's decision for the stated reason that he desired to do a Balochistan-only project, constitutes a "*fundamental violation of TCC's rights under the BM Rules and the CHEJVA.*" Claimant refers to Respondent's witness Mr. Lehri who confirmed that both the Licensing Authority and the Secretary of the MMDD (acting as the appellate authority) had an obligation to decide the applicant's entitlement "*impartially*" and "*tak*[ing] *into account only the merits of the Application*" itself.[1105]

1034. Claimant further argues that by providing the Director General with these instructions, the Chief Minister implemented the 24 December 2009 Cabinet decision to take over the Reko Diq project from TCC, and contends that, knowing that those instructions were improper, the Director General did not want to assume this responsibility on his own.[1106] Claimant submits that on 13 September 2011, the Secretary of the MMDD directed his Section Officer to "*ask the DG to dispose off the M.L. application,*" *i.e.*, to follow the Chief Minister's instructions, which the Section Officer did on 16 September 2011, to be followed by the two-page Notice of Intent to Reject on 21 September 2011.[1107] Claimant further notes that this Notice reproduced *verbatim* the grounds that the Mines Committee had identified during its meeting on 19 and 20 September 2011.[1108]

1035. Claimant also argues in this context that Respondent breached Article 3(2) of the Treaty because the Licensing Authority and Secretary of the MMDD were not independent and impartial decision makers, but rather organs of the GOB meant to implement the Governments' decision to "*oust*" TCC. Claimant emphasizes that the Licensing Authority as well as the appellate authority were offices held by the Director General, respectively the Secretary, of the MMDD, *i.e.*, the same department that was involved in the implementation of Balochistan's project. [1109]

[1105] Claimant's Post-Hearing Brief, ¶ 177 referring to Transcript (Day 6) pp. 1463–1464.
[1106] Claimant's Post-Hearing Brief, ¶¶ 178, 180. Claimant again cites Mr. Lehri's testimony: "***Q.*** *So is it your understanding or is your best reading of this document, in fact, that he was conveying that the Director General wanted to make sure—wanted instructions from the Secretary in light of Chief Minister Raisani's decision in his capacity as Chair of the Balochistan project, that Balochistan would go forward to do the mining?* **[Mr. Lehri:]** *He wanted the advice.* ***Q.*** *He's basically telling his boss what do I do; correct?* **[Mr. Lehri:]** *Exactly.* ***Q.*** *And he's asking what is he to do because he knows, as we talked about, that he has an obligation to pursue this Application in an impartial way but that the Chief Minister has got a competing project that he's now decided will go forward and do the mining; correct?* **[Mr. Lehri:]** *He might have got that impression. That's why he was referring it to the Secretary.*" Transcript (Day 6), pp. 1613-1614.
[1107] Claimant's Post-Hearing Brief, ¶¶ 182-183; Reply, ¶ 413. **Exhibits CE-356**, p. 2 and **CE-7**.
[1108] Reply, ¶ 414 comparing Exhibits **CE-357** and **CE-7**.
[1109] Memorial, ¶¶ 449-451; Reply, ¶ 405, 408, 410.

(f) Having Ousted TCC, Balochistan Completed the Takeover by Replicating TCC's Project

1036. Claimant submits that in 2012, the Governments began to implement their own project and contends that this project "*replicated the very project set forth in the Mining Lease Application Balochistan denied.*" Claimant refers to the following facts:[1110] (i) the area over which Balochistan sought rights was identical in size, shape and location to the mining area proposed by TCC;[1111] (ii) Balochistan expressly reserved not only Tanjeel, but also H14 and H15;[1112] (iii) Balochistan planned to use the same water source that TCC had chosen for its project; and (iv) Balochistan originally contemplated requesting a relaxation of rule 48(1) given that it did not hold an exploration license.[1113]

iii. The Mineral Agreement Negotiations and Supreme Court Proceedings Provide No Defense and Further Demonstrate the Governments' Treaty Breaches

1037. Claimant claims that the Mineral Agreement negotiations and the Supreme Court decision confirm the Governments' intent to take over Reko Diq and demonstrate the unfair and inequitable treatment that TCC was accorded.[1114]

(a) The Absence of a Mineral Agreement Does Not Excuse Pakistan's Breaches

1038. Claimant submits that the failure to agree on the terms of a Mineral Agreement was not a valid basis for denying TCC's application, as TCC's right to obtain a mining lease did not depend on the issues discussed at the negotiations for the Mineral Agreement. Claimant argues that TCC was not required to agree to the additional benefits that the Governments sought in these negotiations, in particular to construct a billion-dollar smelter, and points out that, under the 2002 BM Rules, a mineral agreement is not mandatory and its absence is not listed in rule 48 (nor is it mentioned in the Notice of Intent to Reject) as a reason for denying the mining lease application.[1115]

1039. In addition, Claimant claims that the Governments' conduct during the negotiations "*underscores the overall unfair and inequitable treatment TCC received*," given that at

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[1110] Claimant's Post-Hearing Brief, ¶¶ 184-185.
[1111] **Exhibits CE-272**, p. 16 and **CE-283**, p. 15.
[1112] **Exhibit CE-373**, p. 2.
[1113] **Exhibit CE-283**, p. 5. Claimant notes that Balochistan's fourth consideration was later resolved when it concluded that it did not have to file a mining lease application at all. Claimant's Post-Hearing Brief, ¶ 185.
[1114] Claimant's Post-Hearing Brief, ¶¶ 187, 188-202 and 203-214.
[1115] Claimant's Post-Hearing Brief, ¶ 190. *See also* Reply, ¶ 401.

least by December 2009, Balochistan had decided *not* to conclude a mineral agreement with TCC, as a consequence of its decision to take over the project rather than of its opposition to TCC's negotiation position in principle.[1116]

1040. Claimant asserts that there was no justification for the Government's refusal to engage in further good-faith negotiations. With regard to Pakistan's argument that TCC attempted to "*exempt itself entirely*" from the 2002 BM Rules relying on TCC's first 2007 draft of the Mineral Agreement and its definition of the "*Overall Development Plan*," Claimant contends that the purpose of this clause was to make it unnecessary to obtain further regulatory approvals in the future so long as the activity was contemplated by an overall plan to be agreed jointly by TCC and Balochistan. In any event, neither the Overall Development Plan nor "*an automatic right to mine*" was mentioned in any of the follow-up correspondence about the Mineral Agreement and thus dropped out of the negotiations after the parties' initial drafts.[1117]

1041. Claimant argues that TCC rather continued to pursue the "*concept of stability*" and sought to correct a "*defect*" in the 2002 BM Rules, which, while providing for mineral agreements, rendered them ineffective by having later changes in the rules take precedence over their terms. Claimant submits that Balochistan agreed to this point in principle and refers to a working paper prepared by Mr. Khokhar for the third Steering Committee meeting in which he noted that the parties "*have resolved main issues of DMA i.e. regulatory issues, infrastructure, stability provisions, fiscal system and dispute resolution*" and listed as one of the remaining issues to be discussed: "***drafting** of legal issues relating to exemption from Balochistan Mining Concession Rules, 2002*."[1118]

1042. Claimant claims that the reasonableness of TCC's proposal is further confirmed by the fact that Pakistan subsequently adopted that proposal in its 2013 NMP, which provides that the "*existing Mineral Rules will be amended to remove any conflict/overlapping with or other effect on, and to give effect to, the rights and obligations of the mining company under the mineral agreement in line with best international practices*."[1119]

1043. Referring to Pakistan's allegation that TCC was not willing to accept anything other than a 2% royalty rate, Claimant submits that, to the contrary, in October 2008 when Balochistan still had a royalty rate of 2% on copper and gold, TCC offered a rate that would increase over time from 2% to 4%, but instead of negotiating the issue, Balochistan

[1116] Claimant's Post-Hearing Brief, ¶¶ 192-193.
[1117] Claimant's Post-Hearing Brief, ¶¶ 194-195.
[1118] Claimant's Post-Hearing Brief, ¶ 196 quoting **Exhibit CE-71**, p. 3 (emphasis added by Claimant).
[1119] Claimant's Post-Hearing Brief, ¶ 198. **Exhibit CE-416**, p. 9.

rather amended the 2002 BM Rules, raising the royalty to 5%.[1120] Claimant claims that its subsequent return to the 2% proposal was due to the fact that it also offered an overall fiscal package to the Governments, including "*other substantial financial benefits*," favorable financing on Balochistan's equity interest, social investment, etc., to which the Governments never responded.[1121]

1044. With regard to Respondent's arguments that TCC was not willing to build a smelter or provide some comparable large-scale infrastructure development in Pakistan, Claimant argues that it repeatedly explained to the Governments that it was not in the smelter business and that it would cost approximately US$ 1 billion to build a smelter, which was "*unprofitable and environmentally risky.*" TCC also refers to the technical "*white paper*" about smelting that it provided to Balochistan and its offer to pay US$ 1 million in order to assist Balochistan in conducting its own smelter feasibility study to which Balochistan never responded.[1122]

1045. Claimant concludes that the Government's refusal to further negotiate with TCC was thus not caused by TCC's allegedly unreasonable demands, but rather was part of the "*pattern of unfair and inequitable treatment towards TCC*."[1123]

(b) Balochistan Cannot Use the Supreme Court Proceedings to Avoid International Liability

1046. Claimant submits that Balochistan's conduct in "*procuring*" the Supreme Court judgment provides further evidence of its attempt to defeat TCCA's legal rights and international arbitration remedies and thus of Pakistan's Treaty breach.[1124] In Claimant's view, Pakistan and Balochistan intended to deprive this Tribunal as well as the ICC Tribunal of jurisdiction in an attempt to escape liability under international law.[1125]

1047. Claimant refers to (i) Balochistan's 18 February 2012 submission in which, for the first time, it took the position that the CHEJVA violated the 2002 BM Rules and that the Supreme Court had the power to declare it void *ab initio;* and (ii) Balochistan's March 2012 request that the Supreme Court overturn the judgment of the Balochistan High Court, which had upheld the validity of the CHEJVA.[1126]

[1120] Claimant notes, however, that to the best of its knowledge, the amendment was never officially gazetted and thus never entered into force. Claimant's Post-Hearing Brief, ¶ 199.
[1121] Claimant's Post-Hearing Brief, ¶ 199.
[1122] Claimant's Post-Hearing Brief, ¶ 200. **Exhibit CE-237**.
[1123] Claimant's Post-Hearing Brief, ¶¶ 201-202.
[1124] Claimant's Post-Hearing Brief, ¶ 203.
[1125] Reply, ¶ 450.
[1126] Claimant's Post-Hearing Brief, ¶ 204. *See also* Reply, ¶¶ 442-443.

1048. In relation to Pakistan's argument that Balochistan's reversed position was based on the conclusion of former Advocate General Kanrani that the record of the GOB's actions concerning the CHEJVA was "*riddled with discrepancies and irregularities,*" Claimant notes that Respondent cannot explain (i) why this evidence of invalidity was discovered only after TCC had initiated the arbitrations against the Governments, even though litigation on these issues had been ongoing for years before the Pakistani courts; (ii) why no other Government official ever came to the same conclusion during the twenty-year history of the CHEJVA Agreements; and (iii) why Mr. Kanrani filed only one-sentence submissions, stating that the Petitioners' arguments about the invalidity of the CHEJVA were correct even though they had not had access to the record he reviewed.[1127]

1049. Claimant argues that Balochistan instead hoped that the Supreme Court "*would find a way to eviscerate TCC's rights*" that were to be vindicated by this Tribunal as well as by the ICC Tribunal.[1128] Claimant refers to Balochistan's 20 December 2012 submission to the Supreme Court:

> "*If this Honourable Court upholds the CHEJVA and other documentation, then the Memorial will state accordingly and the Government of Balochistan and the Government of Pakistan shall proceed to contest the matter on the merits on CHEJVA and other agreements. On the other hand if this Honourable Court declares CHEJVA void* ab *init[i]o, then the Government will argue before ICSID that an illegal investment is not protected by BIT and before ICC that arbitrations should end since the agreement from which it derives its jurisdiction has been struck down.*"[1129]

1050. According to Claimant, the Supreme Court "*heeded Balochistan's request*" when it issued a short Order on 7 January 2013 and invalidated every agreement that Balochistan had said gave TCC rights at Reko Diq. Claimant notes that this invalidation included two contracts to which neither Pakistan nor Balochistan were parties, as they were concluded between Australian entities and were governed by Australian law.[1130]

1051. As regards the reasoned Supreme Court judgment issued on 10 May 2013, Claimant notes that the Court copied entire passages *verbatim* from Balochistan's pleadings, including issues that it should have properly assessed for itself, such as the alleged improper intent

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[1127] Claimant's Post-Hearing Brief, ¶ 205. Claimant further argues that due to Mr. Kanrani's "*obstructionist approach*" to cross-examination, the Tribunal received no explanation from Mr. Kanrani so the record must speak for itself.
[1128] Claimant's Post-Hearing Brief, ¶ 206.
[1129] Claimant's Post-Hearing Brief, ¶ 207. **Exhibit CE-376**, ¶ 51.
[1130] Claimant's Post-Hearing Brief, ¶ 208. **Exhibit CE-289**. Claimant refers to the Option Agreement between BHP and Mincor and the Alliance Agreement between BHP and TCCA.

of GOB officials or private parties.[1131] According to Claimant, the judgment was rendered based on "*a cold, incomplete record and without the benefit of any contemporaneous testimony*" as well as "*a number of technicalities*" and disregarded undertakings and assurances given by Pakistan and Balochistan over a fifteen-year period that the CHEJVA was valid and enforceable and TCC was entitled to mine Reko Diq.[1132]

1052. Claimant rejects Respondent's allegation that TCCA is bound by the Supreme Court judgment and submits that only TCCP appeared before the Supreme Court. Claimant argues that despite Balochistan's attempts to convince them otherwise, both the Supreme Court and the ICC Tribunal confirmed that TCCA was not present in the Supreme Court proceedings.[1133] In relation to the "*Chronological Overview of Pakistan Court Proceedings*" provided by Respondent during the Hearing, Claimant notes that each of the four submissions listed as allegedly filed by TCCA was in fact filed by Respondent No. 4, which was TCCP.[1134]

b. Summary of Respondent's Position

1053. Respondent submits that there were legitimate reasons for the Licensing Authority to reject the Mining Lease Application and asserts that Claimant was not denied any due process rights. In addition, Respondent claims that neither Pakistan nor Balochistan had a plan to "*oust TCCA*" from Reko Diq in order to implement Balochistan's project.[1135] Finally, Respondent rejects Claimant's allegation that the Governments' conduct in the Mineral Agreement negotiations and in the Supreme Court proceedings adds to a composite breach of the FET obligation under Article 3(2) of the Treaty.[1136]

i. The Rejection of the Mining Lease Application Was in Accordance with the 2002 BM Rules

1054. Respondent submits that, in its analysis whether the rejection of the Mining Lease Application constituted a breach of Respondent's FET obligation, "*it is no part of the Tribunal's function to second-guess or substitute its view for the decision taken by the*

[1131] Claimant's Post-Hearing Brief, ¶ 209 comparing **Exhibit RE-18**, ¶¶ 63, 105, 108 to **Exhibit CE-376**, ¶¶ 43, 48-49, 56.
[1132] Reply, ¶ 445. Claimant also refers to the discussion of ICSID jurisprudence on the impact of corruption on jurisdiction and admissibility of claims at the end of the judgment, even though such case law had not been argued before the Court and was not relevant to its decision on the constitutional petitions pending before it. Reply, ¶¶ 446-447; Claimant's Post-Hearing Brief, ¶ 209 referring to **Exhibit RE-18**, ¶¶ 118-122.
[1133] Claimant's Post-Hearing Brief, ¶¶ 210-212 referring to **Exhibits RE-58(x)(e)**, p. 10, **RE-58(IX)(m)**, **RE-48(VI)(ak)**, p. 149 and ICC Preliminary Issues Rulings, ¶¶ 147, 165-172.
[1134] Claimant's Post-Hearing Brief, ¶ 213.
[1135] Respondent's Rejoinder, ¶ 443.
[1136] Respondent's Post-Hearing Brief, ¶¶ 184-186.

Licensing Authority on any given ground within the framework of the BMR."[1137] According to Respondent, Claimant has to prove that the Licensing Authority exercised its discretion "*outrageously, in bad faith or in neglect of duty, or at a minimum unreasonably*" in respect of each of the grounds for its decision. Respondent claims that in case Claimant fails to discharge this burden of proof on any one single ground, its claim must fail.[1138]

1055. Referring to Claimant's allegation that the Licensing Authority arbitrarily rejected the Mining Lease Application, Respondent submits that the term "*arbitrary*" has been described by the tribunal in *Lauder v. Czech Republic* as "*founded on prejudice or preference rather than on reason or fact*."[1139] Respondent also claims that the International Court of Justice stated in the *ELSI* case that even if a measure is unwise, inefficient or not the best course of action in the circumstances, it is not arbitrary if there is some rational relationship to the alleged objective of the measure.[1140]

1056. Respondent notes that in the present case, the Licensing Authority was prohibited by rule 48(3) of the 2002 BM Rules from granting the mining lease unless the various subjective and objective requirements set out in this provision had been satisfied by the applicant. In Respondent's view, the Feasibility Study that TCCP submitted as part of its Application was "*manifestly deficient*"; therefore, the Licensing Authority was in fact bound to reject, but in any event did not act arbitrarily when it did reject, the Application.[1141]

(a) The Five Grounds for Rejection Identified in the Notice of Intent to Reject

1057. Respondent submits that the Notice of Intent to Reject identifies at least five grounds for rejecting the Mining Lease Application under rule 48(3) of the 2002 BM Rules. With regard to the fourth and fifth grounds, Respondent acknowledges that they are not set out in the Notice of Intent to Reject "*as clearly as they might have been*," but claims that they nevertheless "*were referred to, were evidently in the minds of the Licensing Authority at*

[1137] Respondent's Post-Hearing Brief, ¶ 75.
[1138] Respondent's Post-Hearing Brief, ¶ 77.
[1139] Respondent's Rejoinder, ¶ 444 referring to *Lauder v. Czech Republic* [CA-62], ¶ 221.
[1140] Respondent's Rejoinder, ¶ 445 referring to *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Award of 20 July 1989 ("*ELSI*") [RLA-99]. Respondent also refers to the tribunal in *Enron v. Argentina*, which stated: "*The measures adopted might have been good or bad . . . but they were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis. Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from being desirable is nonetheless not entirely surprising in the context it took place.*" *Enron Corporation and Ponderosa Assets v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007 ("*Enron v. Argentina*") [CA-46], ¶¶ 264-266.
[1141] Respondent's Rejoinder, ¶¶ 446, 447.

the time, and constituted objectively justified reasons" for rejecting the Application. In Respondent's view, these two grounds should therefore be taken into consideration as well.[1142]

(i) Ground One: TCCP Lacked Standing to Make the Mining Lease Application[1143]

1058. Respondent submits that the Licensing Authority's view that TCCP (alone) was not the "*holder of* [an] *exploration licence*" within the meaning of rule 48(1) of the 2002 BM Rules, and therefore lacked standing to make the Mining Lease Application, was "*factually accurate*," given that the Exploration License (EL-5) was held by the Joint Venture in which TCC[P] had a 75% interest and the BDA had a 25% interest.[1144]

1059. Respondent notes that Ground 6 of the Notice of Intent to Reject refers to Claimant's letter of 3 March 2011 by which it sought to initiate negotiations for the acquisition of its partner's interest in the Joint Venture in accordance with Article 11.4 of the CHEJVA. Article 11.4 requires Claimant to acquire the transfer of the joint venture partner's interest before it can undertake a sole risk joint venture, subject to compliance with all required Government approvals to enable it to do so. According to Respondent, this demonstrates that Claimant never sought to do so before it filed its Application, despite the fact that it had given an express undertaking that it would comply with all of its obligations under the CHEJVA and the Licensing Authority had made this a condition for approving the assignment of BHP's interest in the Exploration License EL-5 to Claimant in 2006.[1145]

1060. In addition, Respondent submits that the Licensing Authority noted in Ground 1 that, even though the Joint Venture was the holder of Exploration License EL-5, it would not have been eligible to file the Application either because it was not a "*body corporate*" in Pakistan as required by rule 47(1) of the 2002 BM Rules.[1146]

1061. Finally, Respondent argues that the rejection was reasonable under rule 48(2), which provides that:

> "*the Licensing Authority shall not grant a mining lease . . . if . . . any person other than the applicant holds any exploration licence*

[1142] Respondent's Post-Hearing Brief, ¶¶ 78-79 referring to **Exhibit CE-354**, ¶¶ (ii)-(viii).
[1143] Respondent's Post-Hearing Brief, ¶ 80. Grounds 5 and 6 of the Notice of Intent to Reject.
[1144] Respondent's Post-Hearing Brief, ¶¶ 81-82.
[1145] Counter-Memorial, ¶ 558.
[1146] Counter-Memorial, ¶¶ 559-560.

conferring an exclusive right to carry on exploration operations in that area."[1147]

1062. Respondent emphasizes that pursuant to rule 23(1)(a), all exploration licenses are, by default, exclusive, which is why the right of the BDA to carry out exploration activities was "*exclusive*." In Respondent's view, the Licensing Authority was therefore "*duty bound*" to reject the Application under rule 48(2), but in any event, the decision was not "*outrageous, in bad faith or in neglect of duty, or unreasonable*."[1148]

(ii) Ground Two: The Mining Lease Application Failed to Provide "*Value Addition*"[1149]

1063. Respondent claims that the Licensing Authority rejected the Mining Lease Application because it did not provide value addition in the form of a smelter and refinery. Respondent refers to rules 48(3)(a)(ii), (v), (vi) and (vii) and notes in particular that rule 48(3)(b)(vii) requires "*a concrete proposal for value addition for the Ore to be produced/exploited from the applicant's mining lease within the country is submitted, or if the facility is not available in the province, the Ore could be taken out of the province with the prior approval of the Provincial Government.*"[1150] According to Respondent, Claimant's witness Mr. Livesey acknowledged during the Hearing that the amendment to the 2002 BM Rules of 1 October 2010, by which "*value addition*" was included as an express requirement, had been gazetted and that Claimant was aware of this requirement when it filed its Application.[1151]

1064. Respondent submits that the decision of the Licensing Authority on this issue clearly involved the exercise of discretion, which the Tribunal may only gainsay if it considers that the invocation of this ground was "*outrageous, in bad faith or in neglect of duty . . ., or at the very least unreasonable*."[1152] According to Respondent, Claimant's witness Ms. Boggs conceded that local smelting/refining was a legitimate objective and that, in its evaluation whether the Application was satisfactory, the Licensing Authority was entitled to take this objective into account.[1153]

1065. According to Respondent, "*value addition*" in this case was the need for smelting/refining capacities within the country, as it had been repeatedly stressed during the Mineral

[1147] Respondent's Post-Hearing Brief, ¶¶ 83-84. **Exhibit RE-1**, rule 48(1).
[1148] Respondent's Post-Hearing Brief, ¶¶ 85-86.
[1149] Respondent's Post-Hearing Brief, ¶ 87. Ground 9 of the Notice of Intent to Reject.
[1150] Counter-Memorial, ¶ 566.
[1151] Respondent's Post-Hearing Brief, ¶¶ 88-89 referring to Transcript (Day 5), pp. 1316-1318 line 2.
[1152] Respondent's Post-Hearing Brief, ¶ 90.
[1153] Respondent's Post-Hearing Brief, ¶ 92 referring to Transcript (day 4), p. 822 line 14 to p. 823 line 8.

Agreement negotiations.[1154] Respondent contends that, despite the fact that the GOB had pursued its "*core objective of securing local smelting/refining in the interests of the people of Balochistan and Pakistan to ensure a transfer of metals technology and skills, and job creation*" and emphasized the need for "*such local benefits in order to obtain a social licence to operate,*" Claimant nevertheless intended to export all of the concentrate via a pipeline to the sea, which would not bring any local benefits to the tribal people, and did not address this issue at all in its Application.[1155]

1066. Respondent argues that "*it was very far from being outrageous, in bad faith or in neglect of duty, and equally far from being unreasonable*" for the Licensing Authority to conclude that smelting/refining was required under the rule 48(3)(a), in particular given that smelting/refining was envisaged in the "*value addition of the ore*" requirement under rule 48(3)(a)(vii), as confirmed by the MMDD Summary of 11 June 2010 seeking the Chief Minister's approval for the 1 October 2010 amendment to the 2002 BM Rules, and was consistent with the GOB's desire for a local smelter/refinery.[1156]

1067. Respondent submits that in light of Claimant's failure, in its Mining Lease Application and again in its Interim Response, to address local smelting/refining or to offer to supply the Government's smelter with ore/concentrate (as Respondent claims it had been agreed) and also taking into account "*the long history of discussions on this key issue,*" the Licensing Authority was duty bound, but in any event entitled, to reject the Application as "*unsatisfactory*" and "*not in the interests of the development of the mineral resources*" as set out in paragraph 10 of the Notice of Intent to Reject.[1157]

(iii) Ground Three: The Mining Lease Application Was Incomplete and Failed to Ensure the Efficient, Beneficial and Timely Use of the Mineral Resources[1158]

1068. Respondent notes that the Feasibility Study undisputedly covered only two of the 14 deposits over which the mining lease was sought and asserts that Claimant had no plan to develop the other 12 deposits, given that there was only an undisclosed Expansion Pre-Feasibility Study for developing some, but not all, of them.[1159]

1069. Respondent claims that Claimant knew that the Feasibility Study should have covered all of the discovered deposits, not just within the mining lease area, but rather within the

[1154] Respondent's Rejoinder, ¶ 453.
[1155] Respondent's Post-Hearing Brief, ¶ 91; Counter-Memorial, ¶ 568.
[1156] Respondent's Post-Hearing Brief, ¶¶ 93, 94. **Exhibit CE-345**, ¶ 2.
[1157] Respondent's Post-Hearing Brief, ¶¶ 94-96. **Exhibit CE-7**, ¶ 10.
[1158] Respondent's Post-Hearing Brief, ¶ 97. Grounds 2, 3, 7, 8 and 10 of the Notice of Intent to Reject.
[1159] Respondent's Post-Hearing Brief, ¶¶ 98-99.

larger area of Exploration License EL-5, and refers to the minutes of the OC Meeting of 26 October 2007:

> "*TCC pointed out that EL-5 is to expire in February, 2008 and an application for renewal of the licence has to be filed with the Government of Balochistan by November 22, 2007.* ***TCC stated that given the wide area over which discoveries had been made and the time that would be needed to carry out the feasibility study to tie all the deposit together*** *. . .* ***TCC was recommending that the request for renewal be over 90% of the existing EL-5 area and that the term of the renewal be three years***."[1160]

1070. Respondent further refers to Claimant's second renewal application, filed on 2 November 2007:

> "[T]*he Applicant faced a number of technical and other challenges which have or will affect its ability to complete a* ***full*** *feasibility study during the first renewal period. . . . With EL-5 to expire in February, 2008 the Applicant will be able to commence activities for drawing up the Feasibility study in the first renewal period but will not be able to complete the same given the time that will be needed* ***to carry out the Feasibility Study to tie the development of all the deposits, which are spread over a large area of EL-5*** *. . .* ***together into one mining project.*** *. . . the Applicant considers that it requires a renewal for the full three year period over 90% of the existing EL-5 area to be in a position* ***to fully develop the discoveries***." [1161]

1071. According to Respondent, the reference to a "*full*" Feasibility Study reflected rule 29(2)(c)(iii) of the 2002 BM Rules which provides:

> "*An application for the renewal of a licence shall . . . not be made . . . in the case of a second renewal, unless the applicant can satisfy the authority that such a renewal is necessary for the completion of a* ***full feasibility study of the discovered deposits***.*"*[1162]

1072. Respondent submits that rule 29(2)(c)(iii) aims at ensuring the "*efficient, beneficial and timely use of mineral resources*" and therefore conditions a second renewal upon the submission of a feasibility study that covers all discovered deposits in the exploration

[1160] Respondent's Post-Hearing Brief, ¶ 100 quoting **Exhibit CE-64**, Item 5 (emphasis added by Respondent).
[1161] Respondent's Rejoinder, ¶ 448; Respondent's Post-Hearing Brief, ¶ 101 quoting **Exhibit RE-15**, pp. 317-318 (original numbering) (emphasis added by Respondent).
[1162] Respondent's Rejoinder, ¶ 449; Respondent's Post-Hearing Brief, ¶ 102. **Exhibit RE-1**, rule 28(2)(c)(iii) (emphasis added by Respondent).

area.[1163] Respondent argues that, by failing to do so, Claimant acted wrongfully because it:[1164]

(i) breached its promise under rule 29(2)(c)(iii) and was therefore in default pursuant to rule 48(3)(b);

(ii) failed to demonstrate that its "*proposed plans . . . will ensure the efficient, beneficial and timely use of the mineral resources*";[1165]

(iii) failed to submit "*the relevant feasibility studies*" with its Mining Lease Application;[1166]

(iv) breached its 2006 Undertaking to comply with the 2002 BM Rules;

(v) failed to submit "*satisfactory*" proposals;[1167] and

(vi) failed to convince the Licensing Authority that "*it is in the interest of the development of the mineral resources of Balochistan to grant the lease.*"[1168]

1073. Respondent claims that Claimant understood the concerns of the Licensing Authority as set out in paragraphs 2, 3, 7, 8 and 10 of the Notice of Intent to Reject, but failed to address them in its Interim Response. Referring to Claimant's submission that the Quarterly Report for the period ending September 2007 made clear that the focus lay on H-14 and H-15, Respondent argues that there is no indication in this Quarterly Report, or elsewhere, that the GOB had agreed to limit the Feasibility Study to those two deposits. Respondent adds that in any event, such an agreement would have been contrary to rule 29(2)(c)(iii), which was intended to prevent that the development of further deposits would be blocked.[1169] In Respondent's view, the Licensing Authority was therefore barred from granting the Application under rule 48(3)(b) which provides that "*a mining lease shall not be granted . . . if at the time of the application the applicant in question is in default.*"[1170]

1074. Respondent also contends that Claimant intended to "*flout*" rule 48(3)(a)(ii) of the 2002 BM Rules by "*land-banking*" the mining lease area for 56 years, as it stated in its Interim Response that ore sites other than H14 and H15 "***may** become viable*" in the future and

[1163] Counter-Memorial, ¶ 562.
[1164] Respondent's Post-Hearing Brief, ¶ 105; Counter-Memorial, ¶ 562.
[1165] **Exhibit RE-1**. Rule 48(3)(a)(ii).
[1166] **Exhibit RE-1**. Rule 47(2)(f).
[1167] **Exhibit RE-1**. Rule 48(3)(a)(v).
[1168] **Exhibit RE-1**. Rule 48(3)(a)(vi).
[1169] Respondent's Post-Hearing Brief, ¶¶ 109-111 referring to **Exhibit CE-8**, ¶ 3.23.
[1170] Respondent's Rejoinder, ¶ 452. **Exhibit RE-1**, rule 48(3)(b).

expressed its desire to avoid the inconvenience of having to submit further applications for mining leases if and when such an ore site became viable.[1171] In Respondent's view, it would not "*ensure the efficient, beneficial and timely use of the mineral resources*" if Claimant were granted a mining lease over areas in which it had no present intention of mining and for which it had not submitted a feasibility study.[1172] Therefore, Respondent claims that the Interim Response only confirmed the concerns of the Licensing Authority, which is why it reasonably concluded that the Application was incomplete and failed to *"ensure the efficient, beneficial and timely use of the mineral resources*."[1173]

(iv) Ground Four: The Feasibility Study Failed to Demonstrate that the Mine Could Be Profitably Developed and Operated[1174]

1075. Respondent claims that the GOB was concerned about the project's lack of economic viability and refers to the Feasibility Review Committee Report of January 2011 and the Summary for the Chief Minister of May 2011.[1175] According to Respondent, the Licensing Authority is referring to this concern in paragraphs 2 and 7 (ii)-(iv) of the Notice of Intent to Reject.[1176]

1076. Respondent argues that that this concern was "*genuine and legitimate*," given that the Feasibility Study failed to establish that the project was financially viable as demonstrated in particular by the following points:[1177]

(i) The base case IRR was only 12.3%, which Claimant's then CEO, Mr. Von Borries, described before the Supreme Court in January 2011 as being "*far too low compared to the risk rating of the country*";[1178]

(ii) the base case model incorrectly assumed an EPZ tax rate of 1% for the first 15 years of the project, rather than the normal tax rate of 35%, even though Ms. Boggs had accepted the regular rate during the Mineral Agreement negotiations;[1179]

[1171] Respondent's Post-Hearing Brief, ¶¶ 112-113 referring to **Exhibit CE-8**, ¶ 3.18(b) (emphasis added by Respondent).
[1172] Respondent's Rejoinder, ¶ 456; Counter-Memorial, ¶ 565.
[1173] Respondent's Post-Hearing Brief, ¶ 114.
[1174] Respondent's Post-Hearing Brief, ¶ 115 referring to **Exhibit RE-1**, rule 48(3)(a)(i).
[1175] Respondent's Post-Hearing Brief, ¶¶ 117-118 referring to **Exhibit RE-142** pp. 1, 2 and 15 and **Exhibit CE-354**, pp. 2-4. Respondent claims that the Licensing Authority became aware of the May 2011 summary by letter dated 8 September 2011.
[1176] Respondent's Post-Hearing Brief, ¶ 119 referring to **Exhibit CE-7**.
[1177] Respondent's Rejoinder, ¶ 454; Respondent's Post-Hearing Brief, ¶ 120.
[1178] **Exhibit CE-97**, Chapter 1.92; **Exhibit RE-58(ix)(b)**, p. 53.
[1179] **Exhibit CE-97**, Chapter 1.90; **Exhibit RE-145**.

(iii) Claimant "*naïve*[ly]" considered discount rates of only 0%-12%, even though Professor Damodaran evaluated Pakistan's country risk premium alone at 14% in January 2011, which would have led to a negative NPV of the project;[1180]

(iv) the application of the correct tax rate would have led to a negative NPV, even at a discount rate of 12%;[1181]

(v) the applicable royalty rate was incorrectly assumed to be 2%, even though Claimant was aware of the increase to the actual rate of 5% on 17 July 2009, as conceded by Claimant's witness Ms. Boggs during the Hearing;[1182]

(vi) it was acknowledged that obtaining financing would be "*particularly challenging*," in particular in the absence of a Mineral Agreement;[1183]

(vii) the "*obvious*" security risks of the project had not been costed;[1184] and

(viii) the Water Assessment Report ranked the fan sediments as the least favorable of three potential water sources, failed to consider any data on water availability outside Pakistan and stated that its hydrogeological assessment was not "*to Feasibility level*."[1185]

1077. Respondent alleges that Claimant knew about the "*skinny*" economics of the project, which is why Claimant decided to build a slurry pipeline and was not willing or not able to provide local benefits, such as transport, and/or value addition, *i.e.*, smelter/refinery, to make this "*hugely disruptive mega-project socially and politically acceptable to the tribal people and the GOB*."[1186]

1078. Respondent submits that in light of the "*obvious*" flaws in the Feasibility Study, it was reasonable for the Licensing Authority to conclude that Claimant did not "*achieve the targets required under the rules*" and thus failed to satisfy rule 48(3)(a)(i).[1187]

[1180] **Exhibit RE-133**, Chapter 28.1.10. For reference to Prof. Damodaran's website, *see* Respondent's Post-Hearing Brief, note 144 and screenshot on p. 33.
[1181] **Exhibit CE-97**, Chapter 1.95 (Table 1.35).
[1182] **Exhibit CE-101**, p. 27-1; **Exhibits CE-161**, p. 4 and **RE-1**, pp. 100, 153; Transcript (Day 4), p. 912 lines 2-16. Respondent further notes that Mr. Livesey conceded that the 17 July 2009 notification was gazetted. Respondent's Post-Hearing Brief, note 151 referring to Transcript (Day 4), p. 1108 lines 2-17.
[1183] **Exhibits RE-163**, Chapter 29.2 and **CE-97**, pp. 1-20 and 1-105.
[1184] Respondent quotes: "[R]*esidual risks have not been included in the current economic evaluation . . . includ*[ing] *direct violent attack in-country by any hostile force resulting in . . . business disruption*." **Exhibit RE-133**, Chapter 28.4.2. Respondent further quotes: "[N]*o safety and security has been included in the* [pipeline cost] *estimate due to the unknown issues related to Pakistan*." **Exhibit RE-119**, Appendix 6.01, p. 71.
[1185] **Exhibit CE-410**, Chapter 1.1.
[1186] Respondent's Post-Hearing Brief, ¶¶ 122, 123.
[1187] Respondent's Post-Hearing Brief, ¶ 124 referring to **Exhibit CE-7**, ¶ 7(v).

(v) Ground Five: The Mining Lease Application Failed to Demonstrate that TCCP Had the Financial Resources to Carry Out the Mining Operations Effectively[1188]

1079. Respondent refers to rule 48(3)(a)(iii) of the 2002 BM Rules, which requires the Licensing Authority to reject a Mining Lease Application unless "*the applicant in question has or can obtain the . . . financial resources . . . to carry out mining operations effectively*" and also to Article 3.1 of the 2000 Addendum, which required that the Feasibility Study include "*a plan for providing financing of all development costs of the mining project including external debt agreements*."[1189]

1080. Respondent states that, as TCCP undisputedly did not itself have the financial means to carry out the project, it had to demonstrate in the Application how it would have "*obtained*" the US$ 1.55 billion of third-party financing that it required in addition to shareholder funding. However, Respondent claims that TCCP addressed this issue only in the "*vaguest and most incomplete and unsatisfactory of terms*."[1190] In Respondent's view, this was due to the fact that the "*skinny*" economics of the project and the absence of a Mineral Agreement made the project unfinanceable.[1191]

1081. Referring to Claimant's argument that copper prices increased following the submission of the Feasibility Study and that Claimant's parent companies might have contributed additional funds to the project, Respondent emphasizes that the Licensing Authority could only judge the Application on the basis of the material provided to it; therefore, it had to conclude that TCCP had not established how it would raise the financial resources to fund the project and thus failed to satisfy rule 48(3)(a)(iii).[1192]

(vi) There Were No Assurances to Claimant Which Would Have Rendered the Rejection of the Mining Lease Application Arbitrary

1082. Referring to Claimant's argument that TCCA was assured prior to submitting its Application that the project was "*in the interest of the development of the mineral resources of Balochistan,*" Respondent submits that these alleged assurances do not

[1188] According to Respondent, this ground is mentioned in ¶ 7(iii) of the Notice of Intent to Reject. Respondent's Post-Hearing Brief, ¶ 125. **Exhibit CE-7**, ¶ 7(iii).
[1189] Respondent's Post-Hearing Brief, ¶¶ 126-127 referring to **Exhibit RE-1**, rule 48(3)(a)(iii) and **Exhibit CE-2**, pp. 2-3.
[1190] Respondent's Post-Hearing Brief, ¶¶ 128-129 referring to **Exhibits CE-98**, Chapter 2.5.3 and **CE-97**, pp. 1-5 and 1-88.
[1191] Respondent's Post-Hearing Brief, ¶ 130
[1192] Respondent's Post-Hearing Brief, ¶¶ 131, 132.

render the rejection of the Application by the Licensing Authority improper. Respondent notes that (a) four of the six statements that Claimant relies on were made in 2006/2007, *i.e.*, more than four years before the Feasibility Study and Application were submitted, and thus in an outdated context; (b) none of these statements were made by the Licensing Authority; and (c) all of these statements were very general and were not made on a review of the Application.[1193]

(b) The Mining Lease Application Was Handled in Accordance with Due Process

1083. Respondent rejects Claimant's claim that Article 3(2) of the Treaty was breached because the Licensing Authority did not handle the Application in accordance with due process and argues as follows:[1194]

(i) In accordance with rule 48(4) of the 2002 BM Rules, the Notice of Intent to Reject identified "*at least three clear grounds*" and referred to "*two other objectively justified grounds*" for rejecting the Application and Claimant was given the opportunity to respond to the Notice and make new proposals;[1195]

(ii) Respondent submits in this regard that, despite the "*succinct style*" of the Licensing Authority's rejection letters, the reasoning behind the decision was adequate and sufficiently clear, in particular when taking into account that the reasons had been raised in the context of the Mineral Agreement negotiations. Noting that Claimant was made aware of this style by Mr. Lehri, Respondent claims that it reflects the "*house style*" in Balochistan, which is the only standard to which the Licensing Authority can be held.[1196]

(iii) Claimant's Interim Response filed on 19 October 2011 showed that Claimant understood the grounds identified by the Licensing Authority; however, it did not address any of the legitimate concerns and requirements raised in the Notice of Intent to Reject, but rather adopted "*an inflexible and adversarial stance*," which is why any "*dialogue*" would have been fruitless;[1197]

[1193] Respondent's Rejoinder, ¶ 460.
[1194] Respondent's Post-Hearing Brief, ¶¶ 133, 142.
[1195] Respondent's Post-Hearing Brief, ¶¶ 134-135.
[1196] Respondent's Rejoinder, ¶¶ 461, 465-466 referring to **Exhibit CE-84**.
[1197] Respondent's Post-Hearing Brief, ¶ 136. *See also* Counter-Memorial, ¶ 553.

(iv) Respondent claims that Claimant's "*aggressive*" legal response demonstrates that Claimant was not aware of the administrative environment into which it made its investment, and was unable to communicate effectively;[1198]

(v) the Licensing Authority was not required under the 2002 BM Rules to meet, or "*engage in any informal dialogue*," with Claimant and, in fact, it would have been improper for the Licensing Authority to do so;[1199]

(vi) the 2002 BM Rules did not require the Licensing Authority to provide further reasons at the time the Application was finally rejected – beyond those set out in the Notice of Intent to Reject;[1200] and

(vii) Claimant did not make a due process complaint about the handling of the Application by the Licensing Authority before the Supreme Court or a complaint about the appeal decision of the Secretary of the MMDD, which it could have challenged before the High Court under Article 199 of the Pakistan Constitution.[1201]

ii. There Was No Plan to Oust Claimant

1084. Respondent claims that in order to succeed with its "*ouster theory*," Claimant must establish both that the alleged ouster plan existed at the relevant point in time and that such plan played a causative role in the rejection of the Application.[1202]

1085. According to Respondent, Claimant acknowledged at the Hearing that: (a) "[t]*here was no express repudiation* [of the CHEJVA]";[1203] (b) the parties continued to negotiate in 2010 after the Cabinet's (provisional) 24 December 2009 decision;[1204] and (c) the negotiations in 2010 contemplated that Claimant would supply ore/concentrate to the Government's project, which demonstrates that Respondent acted on the assumption that Claimant would be granted a mining lease.[1205]

1086. Respondent submits that the Application was rejected on the grounds set out in the Notice of Intent to Reject and argues that, "[w]*hatever might have seemed to have been the case from scraps of evidence as to the position months or years beforehand, there was*

[1198] Respondent's Rejoinder, ¶ 461.
[1199] Respondent's Post-Hearing Brief, ¶ 137.
[1200] Respondent's Post-Hearing Brief, ¶ 138.
[1201] Respondent's Post-Hearing Brief, ¶¶ 139-141.
[1202] Respondent's Post-Hearing Brief, ¶¶ 143, 144.
[1203] Transcript (Day 1), p. 145 line 5.
[1204] Transcript (Day 1), p. 104 lines 13, 19-20.
[1205] Respondent's Post-Hearing Brief, ¶¶ 145-146.

absolutely no ouster plan as at the time when the MLA came to be considered, and was rejected."[1206]

(a) MCC's Expression of Interest in Mining Reko Diq

1087. Respondent submits that Claimant has not established that the GOB intended to give Claimant's project to MCC or that the Application was rejected on this ground and notes that the Governments decided to reject MCC's proposal in early 2009, *i.e.*, two years before the Application was submitted, as Mr. Khokhar confirmed in his testimony.[1207]

1088. According to Respondent, the fact that the Governments were sincere in their consideration of Claimant's proposal is demonstrated by the minutes of the Second Steering Committee meeting on 23 January 2009:

> "*GOP/GOB to continue with TCC, as entertaining of MCC proposal at this stage may lead to legal implications and effect* [sic] *credibility of Pakistan in the international Mineral Sector."*[1208]

1089. Referring to Claimant's reliance on a letter of 9 June 2009 in which MCC stated it had been advised by the MPNR to submit its proposal through the Pakistani Embassy in Beijing, Respondent acknowledges that MCC "*would not take* 'no' *for an answer*" and argues that the Governments' letters were sent for diplomatic reasons and due to MCC's involvement in various other projects in Pakistan. According to Respondent, the Governments showed only "*polite interest*," but were not motivated by a plan to oust Claimant from Reko Diq in the invitation to submit a further proposal.[1209]

1090. Finally, Respondent notes that there is no evidence that MCC's proposal (rejected in 2009) played any causative role in the rejection of the Application in late 2011.[1210]

[1206] Respondent's Post-Hearing Brief, ¶ 147.
[1207] Respondent's Post-Hearing Brief, ¶¶ 150-152 referring to Exhibits **CE-71** and **RE-78** as well as to Khokhar I, ¶ 44 and Transcript (Day 7) p 1871 line 11 to p. 1873 line 10. *See* Respondent's Rejoinder, ¶¶ 463, 222-223. In Respondent's view, this was accepted by Claimant's witness Ms. Boggs during the Hearing. Respondent's Post-Hearing Brief, ¶ 153 referring to Transcript (day 4), p. 875 line 9 to p. 877 line 22, p. 883 lines 1-6, p. 886 lines 7-13 and p. 892 line 8 to p. 893 line 2.
[1208] Counter-Memorial, ¶¶ 517-519 referring to **Exhibit RE-78**, ¶ 43.
[1209] Respondent's Rejoinder, ¶¶ 229-233 referring to **Exhibit CE-339**. Respondent's Post-Hearing Brief, ¶ 154 referring to Khokhar II, ¶¶ 42-44 and Transcript (Day 7) p. 1874 line 21 to p. 1876 line 7. Respondent notes that the MPNR was not even responsible for approving mining projects in Balochistan and simply forwarded the proposal; in any event, no further steps were taken und MCC has never been awarded any mining rights in Reko Diq. Respondent's Rejoinder, ¶¶ 233-234.
[1210] Respondent's Post-Hearing Brief, ¶ 156.

(b) The GOB's Reko Diq Project Was a Complementary Smelter Project

1091. According to Respondent, Claimant's second argument that the GOB wanted to mine Reko Diq itself and this caused the Mining Lease Application to be rejected is contradictory to its first argument, *i.e.*, that Respondent wanted to give the project to MCC.[1211] In addition, Respondent submits that the GOB never intended to mine, but rather to secure a local smelter/refinery in Balochistan, as demonstrated by Article 5.5 of the GOB's August 2008 draft of the Mineral Agreement.[1212] Respondent argues that the GOB's own smelter proposal was caused by Claimant's unwillingness to accommodate the GOB's desire for a smelter and claims that, if Claimant had changed its mind at any time, the GOB would not have needed its own smelter project.[1213]

1092. According to Respondent, all three versions of the PC-1 proposal show that the GOB's project was complementary to Claimant's mining project and not competitive with it. Respondent emphasizes that the (only) reference to mining in the third PC-1 proposal contemplates the possibility of mining 15,000 t/d to supply the smelter, based on a budget of approximately US$ 100 million (compared to US$ 3.8 billion allocated by Claimant in order to mine the proposed 110,000 t/d).[1214]

1093. Respondent notes that the budget in Balochistan's project was actually allocated to "*costs of ore*" and argues that the Governments had not yet made a decision whether to purchase the ore from the CHEJVA or another mining project or whether to conduct the limited mining required to supply their smelter themselves.[1215] In addition, Respondent submits that, contrary to Claimant's allegation, the heavy machinery listed in the "*Funds Required*" document was not required for mining operations, but rather for processing.[1216]

1094. Respondent emphasizes that the Governments communicated to Claimant from the outset that they were considering options for setting up a smelter/refinery in Pakistan and refers to the Working Papers circulated prior to the second Steering Committee meeting on 23 January 2009 and the third Steering Committee meeting on 13 March 2009, as well as to

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[1211] Respondent's Rejoinder, ¶ 462; Respondent's Post-Hearing Brief, ¶ 157.
[1212] Respondent's Post-Hearing Brief, ¶ 159 referring to **Exhibit CE-216**, pp. 23-24. Article 5 is entitled "*Mining Facilities for Mining Projects*" and refers to the responsibilities of the Mineral Title Holder relating to the Mining Facilities.
[1213] Respondent's Post-Hearing Brief, ¶ 160.
[1214] Respondent's Rejoinder, ¶¶ 195-196; Respondent's Post-Hearing Brief, ¶ 161.
[1215] Respondent's Rejoinder, ¶¶ 204-205 referring to Mubarakmand, ¶ 29.
[1216] Respondent's Rejoinder, ¶ 206 referring to **Exhibit CE-242**.

Claimant's notes of its meetings with Chief Secretary Lehri on 4 March 2010 and on 2 June 2010.[1217]

1095. With regard to Claimant's reliance on the 24 December 2009 Working Paper, Respondent claims that this document is "*merely a discussion paper*" and does not reflect what actually happened at or after the Cabinet meeting.[1218] Respondent also refers to the Minutes of the Cabinet Meeting on 24 December 2009 and puts particular emphasis on the decision "*in principle*" to take over Claimant's project, but also a decision that the "*future course of action would be decided by the Chief Minister*," meaning that the Chief Minister had a free hand. Respondent further argues that the Chief Minister did not decide to "*take over*" the project, but rather opted to continue negotiations with Claimant in 2010 and even 2011, and actually wanted to buy concentrate from it.[1219] In Respondent's view, this was accepted by Claimant at the Hearing.[1220]

1096. In support of its argument that the Government continued to negotiate with Claimant in good faith and wanted the project to proceed, Respondent refers to a meeting of the Chief Minister with Claimant in January 2010 and a further meeting between Chief Secretary Lehri and Claimant on 4 March 2010 in which Mr. Lehri stated, according to Claimant's notes, that "*in his assessment TCC (Antofagasta/Barrick) was the best company to implement the Reko Diq project.*"[1221] However, Respondent notes that Mr. Lehri also pointed out the need to develop a lobby in support of the project and that TCC should agree to supply 25% of their output to the Government smelter, contribute to building a road from Gwadar to Reko Diq, set up 20-25 scholarships for students from western Balochistan at the Khuzdar University of Technology and Engineering and make public its plans for large scale training of Baloch people being prepared by TCC to meet its commitment to employ as many Baloch people as possible – in order to maintain a "*social licence to operate*."[1222]

[1217] Respondent's Rejoinder, ¶¶ 198-199 referring to **Exhibits CE-69** and **CE-71** and Lehri, ¶¶ 51, 77.
[1218] Respondent's Post-Hearing Brief, ¶ 162 referring to **Exhibit RE-62**.
[1219] Respondent's Rejoinder, ¶¶ 463, 247-248; Respondent's Post-Hearing Brief, ¶ 163 referring to **Exhibit CE-31**, p. 16.
[1220] Respondent's Post-Hearing Brief, ¶ 164 referring to Transcript (Day 1) p. 145 line 5.
[1221] Respondent's Rejoinder, ¶ 252 quoting **Exhibit CE-84**. Respondent claims that the Government's report to the MPNR of 28 September 2010 also confirms that there were ongoing negotiations as it stated: "*TCCP has been asked to submit it* [sic] *revised proposals on the subject as per GoB's principled stance for future consideration.*" Respondent's Rejoinder, ¶ 257 quoting **Exhibit RE-143**.
[1222] Respondent's Rejoinder, ¶¶ 252-253 referring to **Exhibit CE-84**. Respondent also refers to a second meeting between Chief Secretary Lehri and Claimant on 2 June 2010 in which Mr. Lehri again advised Claimant to be "*more proactive*" and "*to step up its PR efforts in the province.*" Respondent's Rejoinder, ¶ 246 quoting **Exhibit CE-90**.

1097. Respondent also refers to the Board of Governors' Meeting on 28 May 2010 in which the Chief Minister stated:

> "[I]*f TCC is keen on a mining lease, then they can have it. We will buy the ore from them and do the refining and metal production ourselves. . . .The future role of* [TCC] *will be decided by the Government of Balochistan, after they apply for mining lease.*"[1223]

1098. Respondent claims that the Chief Minister's intentions were communicated to Claimant at a meeting on 2 June 2010:

> "*DG(M) informed the Tethyan team of the 1st meeting of the BOG for the Reko Diq Refinery. The salient points that came under discussion in the meeting were as follows:*
>
> *a. GOB made its final decision to go for a refinery that would be made with the help of GOP at site.*
>
> *b. The refinery would get its concentrate / ore from Tethyan and Saindak and processing of Copper would be carried at site. It was decided that Tethyan would be told to apply for a mining lease and the lease would be approved under the Balochistan Mining Rules.*
>
> c. *Tethyan would supply concentrate / ore to the refinery set up by the GOB and GOB would buy it on international market rate*."[1224]

1099. Respondent submits that Claimant agreed in principle to this supply-purchase arrangement, as is apparent from its letter to the GOB dated 5 October 2010,[1225] and argues that this arrangement would not have worked if Claimant had not received a mining lease; thus, the Chief Minister could not have intended otherwise.[1226]

1100. Respondent claims that when the GOB realized in 2010 that there was no reference to this arrangement in the Feasibility Study, the Board of Governors of the PC-1 project decided

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[1223] Respondent's Rejoinder, ¶¶ 208, 255; Respondent's Post-Hearing Brief, ¶¶ 165, 167 quoting **Exhibit CE-31**, ¶¶ 5, 11(iii).
[1224] Respondent's Post-Hearing Brief, ¶ 168 quoting **Exhibit CE-91**.
[1225] Respondent's Rejoinder, ¶ 199; Respondent's Post-Hearing Brief, ¶ 169 referring to **Exhibit CE-257**. Respondent notes that Claimant's letter also confirms that there were ongoing negotiations, as it stated: "*Following our recent interaction, where you desired an improved offer that corresponded better to the aspirations of your Government and the people of Balochistan . . .*" Respondent's Rejoinder, ¶ 259.
[1226] Respondent's Post-Hearing Brief, ¶¶ 170, 178. Respondent also refers to a meeting held on 21 July 2011 in which the TCC representative stated that "*TCC are willing to negotiate an off take agreement for the sale of concentrate within Balochistan*." Respondent's Rejoinder, ¶ 209; Counter-Memorial, ¶ 521. **Exhibit RE-79**.

that "*we will do the mining*" to supply the GOB's smelter, as it was envisaged in the third PC-1 proposal, but not to take over Claimant's proposed project. [1227]

1101. Respondent refers to Claimant's reliance on the 30 May 2011 Working Paper, in which the Chief Minister's stated that "*we will do the mining*," and claims that it would not have made sense to "*carefully prepare*" this document "*recording the GOB's legitimate concerns regarding the Feasibility Study*" if the decision to reject the Mining Lease Application had already been taken.[1228]

1102. According to Respondent, the reference to the remark of the Chief Minister ("*we will do the mining*") in the Director General's internal letter of 12 September 2011 reflects that the Director General had not been involved in the Government's project and therefore sought clarification from his superior the Secretary of the MMDD when he learned of an apparent decision on the Government's project.[1229] In Respondent's view, the Government's decision to conduct limited mining activities itself did not intend to oust Claimant from its project, which is confirmed by the Chief Minister's press statement of 15 September 2011: "*If Tethyan wants to do the mining, well and good, but I have decided that the total refining will be done by us.*"[1230]

1103. Respondent further claims that the instruction of the Secretary to the Director General on 16 September to "*dispose off* [sic] *the Mining Lease application*" meant that the application should be considered in accordance with the 2002 BM Rules and contends that when the Director General did so, his decision was not affected by the Government's steps in 2012 to implement its own project.[1231] Finally, Respondent notes that pursuant to its draft mining lease application of 25 April 2012, the Government intended to mine only 15,000 t/d and proposed to start at H4, which was not covered by Claimant's Feasibility Study. In any event, Respondent contends that the Government's Reko Diq project was never implemented and has now been abandoned.[1232]

iii. Claimant's Assertion of a Composite Breach of the Fair and Equitable Treatment Obligation Adds Nothing to its Case

1104. Respondent refers to Claimant's assertion that there has been a "*composite breach*" of the FET obligation, comprised of the denial of the Mining Lease Application and the plan to

[1227] Respondent's Post-Hearing Brief, ¶¶ 171-172 referring to **Exhibits CE-354** and **CE-355**. *See also* Respondent's Rejoinder, ¶ 214.
[1228] Respondent's Post-Hearing Brief, ¶ 173 referring to **Exhibit RE-142**.
[1229] Respondent's Rejoinder, ¶¶ 211-212.
[1230] Respondent's Rejoinder, ¶¶ 214, 216 quoting **Exhibit CE-26**.
[1231] Respondent's Rejoinder, ¶¶ 217-218.
[1232] Respondent's Rejoinder, ¶ 219 referring to **Exhibits CE-369** and **CE-373**.

take over the Reko Diq project as well as the Governments' conduct in the Mineral Agreement negotiations and the Supreme Court proceedings.[1233]

1105. Respondent notes that Claimant has thereby abandoned its claims that some of those acts were wrongful *per se*, and instead invokes a concept of State responsibility that "*usually operates . . . in the context of genocide, apartheid, crimes against humanity or systemic discrimination*." In Respondent's view, the Tribunal should reject this alleged "*composite breach*," as there is no precedent for it and "*barely a scintilla of justification*" in the law of State responsibility.[1234]

1106. Respondent submits that Claimant abandoned its claim that the Government's and the Supreme Court's conduct during the Supreme Court proceedings constituted a breach of the FET obligation because there is no evidence that the Supreme Court was influenced in its decision making by any improper pressure or request from the Governments. Respondent refers to the order of May 2011 by which the Supreme Court ordered that the Mining Lease Application should be dealt with on the merits and should not be affected by the pending Supreme Court proceedings.[1235] In addition, Respondent notes that the Application was rejected in November 2011 and the Supreme Court's decision was rendered in 2013; thus, the latter cannot have played any causative role in the rejection of the Application.[1236]

1107. In any event, Respondent submits that Claimant does not explain how the Supreme Court's decision affects any purported investment and notes that Claimant has not pleaded that there has been any denial of justice. Respondent further argues that (a) Balochistan's change of position on the validity of the CHEJVA was due to new evidence that came to light as a consequence of the Supreme Court ordering disclosure of documents; (b) the Supreme Court's judgment was correct under Pakistani law and Claimant's Pakistani lawyers never stated that there was any issue related to due process in those proceedings; and (c) Claimant's complaints about the discussion of ICSID jurisprudence at the end of the Supreme Court's decision is irrelevant to the evaluation of Claimant's FET claim.[1237]

1108. With regard to the Mineral Agreement negotiations, Respondent claims that Claimant attempted to obtain fiscal and legal exemptions, including from the Licensing Authority's discretion to grant or reject mining lease applications, and thereby sought a guaranteed "*right to mine*" for multiple, not yet defined, mining projects within the area covered by

[1233] Respondent's Post-Hearing Brief, ¶ 184.
[1234] Respondent's Post-Hearing Brief, ¶¶ 185-186.
[1235] Respondent's Post-Hearing Brief, ¶¶ 180-182.
[1236] Respondent's Post-Hearing Brief, ¶ 183.
[1237] Respondent's Rejoinder, ¶¶ 468-471.

Exploration License EL-5 (pursuant to an "*Overall Development Plan*").[1238] Respondent argues that this request was intended to circumvent the requirements under rules 47 and 48, which was legally impossible under rules 9(5) and (6); therefore, the Governments made it clear in their revised draft that TCCP "*shall be subject*" to all provisions of the 2002 BM Rules.[1239]

1109. Respondent refers to Claimant's letter of 18 August 2008 by which it responded to the revised draft and expressed its disagreement with the royalty rate of 5%, the lack of EPZ status, the introduction of a Management Committee and the fact that the Mineral Agreement would be subject to the 2002 BM Rules.[1240] In addition, Respondent maintains that the Governments reiterated the smelter/refinery requirement to which Claimant was not willing to accede,[1241] emphasizing, however, that the "*central message*" was whether the Mineral Agreement should override the 2002 BM Rules or "*it should be the other way around*."[1242]

1110. Respondent claims that despite Claimant's attempt to obtain legally impossible concessions and its failure to address the value addition requirement as well as the Governments' financial concerns, which ultimately caused the negotiations to stall, the Governments continued to negotiate with Claimant throughout 2010 and even in 2011.[1243] Respondent refers to meetings between Claimant and the Governments,[1244] *e.g.*, (a) the Chief Minister in January 2010;[1245] (b) Chief Secretary Lehri in March and June 2010;[1246]

[1238] Counter-Memorial, ¶¶ 490-493 referring to **Exhibit CE-216**, clauses 14.2 and 1.1. Respondent's Rejoinder, ¶ 49, 56-59. Clause 14.2 of TCCA's draft reads: "*The Parties agree that, except as expressly provided under the terms and conditions of this Agreement, the Mineral Title Holder shall not be subject to any obligations under the terms and conditions of the BMR.*"

[1239] Counter-Memorial, ¶¶ 494, 505-507; Respondent's Rejoinder, ¶¶ 59-61 referring to **Exhibit CE-226**, clause 1.6. Clause 1.6 of the revised Government draft reads: "*The Parties agree that, under the terms and conditions of this Agreement, the Licensee shall be subject to all obligations under the terms and conditions of the BMR in force at the time.*"

[1240] Counter-Memorial, ¶ 512 referring to **Exhibit CE-227**.

[1241] Respondent's Rejoinder, ¶ 64. Respondent refers to Clause 5.5 of the revised draft which reads in relevant part: "*The Licensee shall install smelter/refinery for processing of ore . . .*" According to Respondent, the GOB's insistence on the smelter/refinery requirement was justified by rule 9(1) of the 2002 BM Rules pursuant to which the GOB could only enter into the Mineral Agreement "*if the Government is satisfied . . . that the carrying on of the undertaking in question is desirable in the interest of the development of the mineral resources of Balochistan*"; nevertheless, Claimant failed to address this issue, which thus remained unresolved. Respondent's Rejoinder, ¶¶ 64-68, 74.

[1242] Counter-Memorial, ¶¶ 512-514.

[1243] Respondent's Rejoinder, ¶¶ 49-50.

[1244] Respondent's Rejoinder, ¶ 77. In addition to these meetings, Respondent notes that Claimant itself referred to recent discussions in its letter of 5 October 2010. **Exhibit CE-257**.

[1245] **Exhibit CE-85**.

[1246] **Exhibits CE-84** and **CE-90**. Lehri, ¶ 77.

(c) the Prime Minister of Pakistan in July 2010;[1247] (d) the MPNR in September 2010;[1248] and (e) officials from both Governments in July 2011.[1249]

1111. In Respondent's view, the falsity of Claimant's allegation that the Governments conducted the negotiations in bad faith is further confirmed by the fact that the Governments did not even consider proposals from other parties such as MCC, despite the fact that they would have offered significantly more attractive terms.[1250]

iv. Claimant's Own Conduct Precludes a Finding that the FET Standard was Breached

1112. Finally, Respondent refers to the three duties of an investor set out by Professor Muchlinski, *i.e.*, "*a duty to refrain from unconscionable conduct, a duty to engage in the investment in light of an adequate knowledge of its risks, and a duty to conduct its investment in a reasonable manner.*" Respondent claims that Claimant breached each of these duties and therefore cannot rely on provisions of the Treaty to cure the defects in its own conduct.[1251]

1113. Respondent argues that Claimant did not "*refrain from unconscionable conduct*" because it sought illegal exemptions from mandatory local legislative requirements under the 2002 BM Rules and filed a Mining Lease Application that it must have known was doomed to fail, in order to "*manufactur*[e]" its international arbitration claims seeking specific performance.[1252]

1114. In addition, Respondent claims that Claimant did not "*engage in the investment in light of an adequate knowledge of its risks*" because it failed to conduct a proper risk assessment when it began its activities in an underdeveloped region with limited experience in large-scale mining; it failed to conduct a proper due diligence into BHP's activities prior to acquiring its interest and the requirements of the BM Rules; and it also failed to address the need to maintain a "*social licence to operate*" in Balochistan.[1253]

1115. Finally, Respondent contends that Claimant did not "*conduct its investment in a reasonable manner*" because it tried to mislead the Governments with regard to the economic viability of its project, in particular by making incorrect assumptions in the Feasibility Study and stating before the Supreme Court that it was "*still confident that the*

[1247] **Exhibit RE-162**.
[1248] **Exhibit RE-80**. WS Khokhar II, ¶ 27.
[1249] **Exhibit RE-79**.
[1250] Counter-Memorial, ¶¶ 517-519.
[1251] Respondent's Rejoinder, ¶ 472 quoting *Muchlinski* [RLA-193], p. 530.
[1252] Respondent's Rejoinder, ¶ 473.
[1253] Respondent's Rejoinder, ¶ 474.

international financial community will be willing and happy to finance this project." In Respondent's view, Claimant's attempt to "*force through*" its Application despite the "*numerous shortcomings*" in the Feasibility Study" likewise reflected the unreasonable manner in which Claimant pursued its project.[1254]

c. The Tribunal's Analysis

1116. It is Claimant's position that there were two separate, independent breaches of the FET obligation by (i) the denial of the Mining Lease Application; and (ii) the development and implementation of the GOB's plan to take over Claimant's project. In addition, Claimant claims that there was a composite breach of the FET standard by the foregoing conduct, together with the Governments' conduct in the Mineral Agreement negotiations and/or the Supreme Court proceedings.

1117. In the Tribunal's view, however, a separate analysis of the purported individual breaches appears rather artificial because the two are inextricably linked. The planned takeover of Claimant's project, if proven as the motive for denying the Mining Lease Application would, in the absence of any valid grounds for the denial, be the ground upon which the denial amounted to a violation of Respondent's FET obligation.

1118. Therefore, the Tribunal will assess as a first step whether Claimant has established that there was a plan to take over Claimant's project and whether this motive informed the decision of the Licensing Authority to deny TCCP's Mining Lease Application. However, even if the Tribunal were to conclude that this was indeed the case, this would not in itself be sufficient for a finding that the denial of the Mining Lease Application amounted to a violation of the FET obligation. In its Notice of Intent to Reject, the Licensing Authority did not invoke the GOB's own project as a ground for denial but rather, on its face, based its decision on ten other grounds, which could lead to the conclusion that there were in fact legitimate reasons for denying the Mining Lease Application.

1119. Consequently, the Tribunal will analyze as a second step whether the Grounds given in the Notice of Intent to Reject and/or the additional reasons invoked by Respondent in this arbitration nevertheless provide a justified basis for the denial or whether they rather served as a pretext designed to conceal the true motive of implementing the GOB's own project. Only if the latter were the case, the Tribunal would reach the conclusion that Respondent has breached its FET obligation under Article 3(2) of the Treaty.

[1254] Respondent's Rejoinder, ¶¶ 475-476 quoting **Exhibit RE-58((ix)(b)**.

i. The Takeover of Claimant's Project as a Motive for Denying the Mining Lease Application

1120. At the outset, the Tribunal notes that it is undisputed between the Parties that the GOB prepared a total of three proposals for a "*Reko Diq Gold/Copper Project*," the third of which was approved by an organ of the Federal Planning Commission (the CDWP) on 9 December 2009 and by the ECNEC, the Executive Committee of Pakistan's National Economic Council, on 9 December 2010. The Parties are in dispute, however, as to whether this project was meant to be complementary to Claimant's project, as alleged by Respondent, or whether it was a competitive project by means of which the GOB intended to "*oust*" Claimant from the Reko Diq area, as alleged by Claimant.

1121. In light of the differing submissions of the Parties on the purpose of the GOB's project, the Tribunal has reviewed the contemporaneous evidence in order to shed light on the project's scope as it evolved over the course of the proposals and through the decisions taken by the relevant authorities.

(a) The Evidentiary Record on the Scope of the GOB's Project

1122. The first proposal that was submitted on 16 May 2009 contemplated "*the processing of copper ore 5000-tons per day to produce copper metal and other valuables*."[1255] The second proposal submitted on 19 October 2009 was still based on the plan to process 5,000 tons of ore per day, but included in its cost analysis an item "*Annual profit for processing 15000 ton/day*."[1256]

1123. In its Working Paper for the Planning Commission dated 17 November 2009, the Planning & Development Division of the GOP stated in relation to the "*Status of Mining Rights*":

> "*It is understood that Tethyan Copper Company (TCC) is a joint venture between Antofagasta of Chile and Barrick Gold of Canada and has completed exploratory work in its mining concession, which is valid up to 2010. The sponsors may clarify whether Government of Balochistan is legally bound to convert Exploration License into long term renewable mining lease for thirty (30) years under Balochistan*

[1255] **Exhibit CE-111**, p. 16.
[1256] **Exhibit CE-80**, p. 42.

> *Mining Concession Rules 2002 or not. If so, then what would be their strategy to implement the subject project?*"[1257]

1124. The third proposal that was submitted and approved by the CDWP on 9 December 2009 was still based on the plan to process 5,000 tons of ore per day but nevertheless included in its "*Annual operating and maintenance cost after completion of the project*" an item "*Mining of Ore 15000 ton/day*."[1258]

1125. The Working Paper for a meeting of the Balochistan Cabinet on 24 December 2009 that was prepared by the MMDD sets out a total of 13 items as "*Justification for taking over the Project by Balochistan Government*": (i) transfer of TCCP's shares to Antofagasta and Barrick Gold without the GOB's consent; (ii) TCCP's reluctance to build a refinery plant; (iii) TCCP's refusal to exempt the GOB from its obligation to invest into the project in accordance with its 25% equity share; (iv) TCCP's desire to obtain exemptions from federal and provincial taxes through the Mineral Agreement; (v) TCCP's unwillingness to invest into a mining academy; (vi) TCCP's plan to transport the ore via pipeline to the Gwadar port and then on to Chile / Canada for refining purposes; (vii) TCCP's lack of a mining lease to be granted by the Licensing Authority, which "*can exercise his* [sic] *power to reject Mining Lease for the better interest of the province*"; (viii) the PC-1 proposal submitted by the GOB for processing 15,000 tons of ore per day; "[f]*or this processing plant we require Ore that's why the mining activities are also required to be undertaken by the Provincial Government for smooth and efficient supply of Ore*"; (ix) the expiry of the agreement between the GOP and MCC on the Saindak Copper & Gold Project in October 2011, which would then be handed over to Balochistan so that the ore produced in the Saindak mine could also be used for the GOB's project; (x) an anticipated annual profit of the GOB's project in the amount of Rs. 15,375 million; (xi) technical assistance ensured by the Director General, Strategic Plans Division for mining copper and gold at Reko Diq; (xii) sufficient technical staff at the MMDD "*to run mining activities efficiently*," in particular after having absorbed the mining staff of the BDA; (xiii) anticipated submission of a PC-1 proposal by the MMDD for "*carrying out mining activities in the mine areas of Reko-D*iq."[1259]

1126. Against this background, the MMDD requested that the Balochistan Cabinet "*solicit approval for awarding the mining rights of Reko-Diq Copper / Gold Project to* [the MMDD] *for the larger interests of the province*."[1260]

[1257] **Exhibit CE-240**, p. 4.
[1258] **Exhibit CE-242**, p. 18. *See* also **Exhibit CE-409**, pp. 6 and 7.
[1259] **Exhibit RE-62**, pp. 2-4.
[1260] **Exhibit RE-62**, p. 5.

1127. Claimant further submitted a PowerPoint presentation that was apparently presented at the 24 December 2009 meeting. The document itself, which is entitled "*REKO DIQ Gold/Copper 2009*,"[1261] is undated and does not reveal the occasion at which it was presented. However, Claimant pointed out during the Hearing and again in its Post-Hearing Brief that Respondent disclosed the presentation during document production as "*Presentation on* 'Baluchistan Copper Gold Project' *given to the Baluchistan Cabinet in its meeting on 24 December 2009*."[1262] Respondent did not dispute that it had described the presentation in this manner. The cost analysis presented therein includes an item "*Annual profit for processing 30000 ton/day*."[1263] Under the heading "*Mining*," the document states:

> "*The growth path currently envisaged, will start at*
>
> *5,000 T/d and expanding to*
>
> *15,000 t/d (year 4),*
>
> *30,000 t/d (year 6) and*
>
> *60,000 t/d (year 10).*"[1264]

1128. The minutes of the Balochistan Cabinet meeting on 24 December 2009 record under item no. 4 on the agenda, *i.e.*, "*Taking over of Rekodiq Copper & Gold Project from TCCP by the Government of Balochistan*," that "[t]*he agenda was approved in principle. It was further decided* ***not*** *to go ahead with the proposed Mineral and Shareholder agreements with TCCP. Further course of action would be decided by the Chief Minister*."[1265]

1129. In a memorandum to the Chief Secretary dated 31 December 2009, the Secretary of the MMDD reported on the progress made by Claimant's project and concluded by stating:

> "*Since the Government of Balochistan has decided to take over the project from TCCP, it is utmost important to establish a camp office of*

[1261] **Exhibit CE-409**, p. 2.
[1262] Transcript (Day 1), p. 95 lines 9-14; (Day 6), p. 1530 line 20 – p. 1531 line 2; (Day 7), p. 1943 lines 17-19; (Day 8), p. 2202 lines 12-16; Claimant's Post-Hearing Brief, ¶ 145.
[1263] **Exhibit CE-409**, p. 9. The document then presents the GOB's net profit pursuant to the following three scenarios: (i) "*Tethyan Copper Co. Operation*," in which the GOB has a 25% profit share and receives royalties at a 5% rate, resulting in a net profit of US$ 325.8 million per year; (ii) "*Indigenous Operation (Strategic Orgs.)*," resulting in a net profit of US$ 2,448 million per year; and (iii) "*Joint Venture: TCC + Indigenous – Indigenous Operation*," resulting in a net profit of US$ 1,676 million per year. **Exhibit CE-409**, p. 10.
[1264] **Exhibit CE-409**, p. 12. The document also contains a section entitled "*Mine Equipment*" in which the type and size of the selected equipment is presented for the purpose of estimating the mine capital expenditures. The presented on-site infrastructure further includes "mine service buildings." **Exhibit CE-409**, pp. 15 and 16.
[1265] **Exhibit CE-31**, p. 16 (emphasis in original).

> *Mines & Mineral Development Department at the site to closely monitor the project till proper taking / handing-over the project.*"[1266]

1130. In a further memorandum to the Chief Minister dated 11 February 2010, the Secretary of the MMDD reported on the negotiations of legal services to be rendered in relation to the Reko Diq Gold/Copper Project and stated:

> "*In the aftermath of the decision of the Provincial Cabinet to take over the Reko-Diq Project from Tethyan Copper Company Pakistan (TCCP) …, it was deemed necessary to engage Legal Advisor / Consultant for advi*[c]*e before issuing legal notice to TCC for cancellation of Exploration Agreement.*"[1267]

1131. On 18 March 2010, the CDWP recommended the GOB's project for submission to the ECNEC. According to the project description, the "*Government of Balochistan envisages creating a facility for processing 15,000 tons per day of copper ore to produce copper metal, and other valuables*." However, the breakdown of the capital cost again included the item "*Mining of Ore 15,000 ton/day*."[1268]

1132. According to the minutes of the Board of Governors meeting on 28 May 2010, Dr. Mubarakmand informed the other participants of the meeting that Claimant was not willing to refine the ore within Pakistan, but was planning to export the ore for the refining process. He then stated that "[w]*ith deposits worth billions of dollar discovered till now, it is worth considering that the ore may be kept within the country and refined locally*" and requested guidance from the Chief Minister. In response to the Chief Minister's inquiry whether they should adopt a course of litigation, Dr. Mubarakmand stated that he would not recommend litigation, but rather to inquire about Claimant's willingness "*for mining the ore only while the Government of Balochistan may install and commission the refining plant*."[1269]

1133. When another Board member raised the concern that "*only giving prospect license will earn a bad reputation for the country*," the Chief Minister stated that "*national interest is above all*" and observed that "*if TCC is keen on a mining licence, then they can have it.*

[1266] **Exhibit CE-31**, p. 20.
[1267] **Exhibit CE-31**, p. 21.
[1268] **Exhibit RE-87**, pp. 1 and 4. The CDWP identified, *inter alia*, the following "*Sector Issues*": "*Lack of expertise in mining and processing of minerals*"; "*Inadequate infrastructure for mining*"; and "*Dependence on foreign companies*." The "*Sector Strategy*" included, *inter alia*, the following items: "*Indigenously development of mineral resources*"; "*Self-reliance in the production of Hi-tech materials*"; and "*Infrastructure development*." **Exhibit RE-87**, p. 2.
[1269] **Exhibit CE-31**, p. 26.

We will buy the ore from them and do the refining and metal production ourselves."[1270] The Board ultimately decided, *inter alia*, as follows:

> "*(iii) The future role of Tithium Copper Company (TCC) will be* d*ecided by the Government of Balochistan, after they apply for mining lease.*
>
> *(iv) Plants for refining and production of pure copper and gold will be designed, developed and commissioned in Balochistan and under no circumstances will the pure metals be allowed to leave the country.*"[1271]

1134. On 3 December 2010, Dr. Mubarakmand, who led the technical development of the GOB's project, participated in a talkshow on the *Duniya* television network. Dr. Mubarakmand emphasized that, while the exploration work at Reko Diq had been performed by a foreign company, Pakistan itself possessed the technical capability for the mining of copper and gold and added that "*it remains to be seen whether the government of Baluchistan will sanction the mining contract to Pakistan or to foreign companies.*"[1272] In response to the interviewer's comment that the GOB "*should give the contract to the local companies rather than the outsiders,*" Dr. Mubarakmand stated:

> "*This is the reason why I had developed a technical project and presented it to the Chief Minister of Baluchistan. He appreciated my efforts and endorsed that this project should be handled by Pakistani scientists and engineers. If our project is approved in the ACNEC meeting on December 9, 2010, the Baluchistan government has the funds for us to start work on this project.*"[1273]

1135. On 9 December 2010, the ECNEC considered the Summary on the Reko Diq Gold/Copper Project that the Federal Planning Commission had submitted to it on 15 July 2010. According to the minutes of the 9 December 2010 meeting, the ECNEC was informed that the "*Government of Balochistan envisaged creating a facility for processing 15,000 tons per day of copper ore to produce copper metal and other valuables.*" The minutes further record:

> "*It was also added that a foreign firm had done a feasibility study, but they intend to work as a joint venture, but would take raw gold/copper for refinery to their country at 50:50 share, thus it could not be established as to whether final distribution would be fair or not?*

[1270] **Exhibit CE-31**, p. 27.
[1271] **Exhibit CE-31**, p. 28.
[1272] **Exhibit CE-105**, p. 2.
[1273] **Exhibit CE-105**, p. 2.

> *ECNEC was apprised that local technology and expertise is available to develop the mines, therefore it would be appropriate to consider this option in the larger national interest. It was also pointed out that some cases related to the project are pending consideration in the courts of law.*"[1274]

1136. At the meeting, the ECNEC approved the GOB's project and further directed:

> "[I]*f an agreement has not been signed with any firm for mining and refining etc, then Govt. of Balochistan may decide, as to whether the project is to be executed by them. If the project is to be bifurcated involving some other companies, the draft agreement shall be vetted by Law & Justice Division to ensure transparency and consistency with International Law.*
>
> […]
>
> *Before launching the project, Government of Balochistan will check from the courts about litigation on the issue, if any.*"[1275]

1137. On 15 December 2010, Dr. Mubarakmand gave a telephone interview on *Dawn* television about the GOB's project and confirmed that "*ECNEC has approved this project and the project is to be done by Pakistan herself. … There is no discussion regarding the involvement of foreign companies in it.*"[1276] In response to the interviewer's comment that "i*t is generally said that mining contracts are awarded to those companies who do the exploration work*" and the question what the "*best international practices*" were in this regard, Dr. Mubarakmand stated:

> "*Under the international best practices it is not necessary that one who does exploration will also get the mining license. People initially enter into an exploration contract with the Government which owns the minerals. This contract contains terms and conditions whether or not the exploration license will convert into a mining license and upon which terms. So the exploration license which they [Tethyan Copper Company] obtained from the Balochistan Government must in my opinion contain such terms and conditions. The Balochistan Government and this company must be aware of such terms and conditions in accordance with which a mining license can or cannot be awarded. This condition must be there.*"[1277]

[1274] **Exhibit CE-352**.
[1275] **Exhibits CE-106** and **RE-88**.
[1276] **Exhibit CE-108**, p. 4.
[1277] **Exhibit CE-408**, pp. 4-5.

1138. In his submission to the Supreme Court dated 19 January 2011, Dr. Mubarakmand compared the total profit (share) to be generated by the GOB over the 56-year life of the mine under (i) the project presented by Claimant in its Feasibility Study (US$ 8.97 billion); and (ii) the GOB's own project (US$ 131.824 billion).[1278] With regard to the GOB's project, Dr. Mubarakmand explained that, while the plant would initially be installed for processing 15,000 tons of ore per day, "*as the mine grows wider and deeper with time, more ore is expected per day and therefore every 5-6 years the size of the plant is enhanced*."[1279] He emphasized:

> "*That the local project is designed to start with mining of the Ore and finally produce 99.9% pure Copper and Gold metal. All steps of the process are catered for in the design of the plant and have been duly budgeted*."[1280]

1139. Dr. Mubarakmand further submitted:

> "*That the Feasibility Study submitted by TCC is just the tip of the ice berg in the EL-5 area. If the indigenous project is sanctioned though a decision of the Supreme Court of Pakistan and the Government of Balochistan, it will be launched using the H-15 Ore deposits. That while the project is running, a massive exploration effort will simultaneously commence to bring out the content and location of mineral deposits containing Copper, Gold or other metals in the Chaghi region.*"[1281]

1140. Three days later, the GOB also filed a submission in the Supreme Court proceedings in which it informed the Court about the approval of its project by ECNEC and stated that this approval was "*also in conformity with the earlier decision taken by the Balochistan Cabinet on 26 December 2009 wherein the Balochistan Government had expressed its interest to execute the project*."[1282] The GOB further stated that it considered TCC's Feasibility Study "*deficient in several aspects,*" although it was still in the course of being examined, and submitted:

> "*That it is thus clear that no entity holding a license for exploration has a vested right for the grant of the mineral concession and the grant of the said right / concession, partly or fully continues to be the discretion of the Government of Balochistan.*

[1278] **Exhibit CE-111**, ¶¶ 9-10 and Annexes D and E.
[1279] **Exhibit CE-111**, ¶ 10.
[1280] **Exhibit CE-111**, ¶ 13.
[1281] **Exhibit CE-111**, ¶ 17.
[1282] **Exhibit CE-269**, ¶¶ 3-9.

> *That accordingly, the Government of Balochistan is interested to implement the approval / decision received from the ECNEC and also take appropriate decision in its own right about the fate of the mining concession based on its independent judgment*."[1283]

1141. Balochistan concluded by requesting that the Supreme Court:

> "*permit the Government of Balochistan to execute the decision of the ECNEC dated 9.12.2010 while declaring that in the circumstances of the case, no entity has any vested right for the mining concession and that only the Government of Balochistan can take any decision in this regard in the best national interest*."[1284]

1142. On 25 April 2012, Balochistan prepared, but ultimately did not file,[1285] a mining lease application for an area identical to the Mining Area that TCCP had applied for in its Mining Lease Application of 15 February 2011.[1286] On 20 May 2012, Balochistan submitted a proposal to the Federal Planning Commission regarding a water supply project for its Reko Diq Copper Gold Project that envisaged using water from the "*Baghicha Site*," *i.e.*, the same groundwater source that Claimant had discovered and identified in its Feasibility Study as the groundwater source for its mining operations.[1287] Finally, on 30 May 2012, Balochistan also applied for surface rights at Reko Diq, which overlapped Claimant's exclusive Surface Rights Lease and proposed Mining Area.[1288]

1143. In its meeting on 12 September 2012, the Board of Governors decided, *inter alia*, as follows:

> "*Government of Balochistan will grant permission to B*[alochistan] *C*[opper] *G*[old] *P*[roject] *to start their operations at the designated sites, including exploration, mining and refining.*
>
> […]

[1283] **Exhibit CE-269**, ¶¶ 10-12.
[1284] **Exhibit CE-269**, p. 6.
[1285] On 12 September 2012, the Board of Governors decided that the Project was "*an implementation unit of the Government of Balochistan*" and therefore did not require a separate mining lease for its operations. **Exhibit CE-282**, p. 3.
[1286] The coordinates of TCCP's proposed Mining Lease Area presented in the Detailed Topographical and Geological Description, enclosed to its Mining Lease Application dated 15 February 2011, as "*Lambert India Zone-1*" are identical to the coordinates included by Balochistan in its draft application for a mining lease as the "*AREA APPLIED BY M/S REKO DIQ COPPER GOLD PRJECT, FOR THE MINING LEASE OF COPPER, GOLD AND ASSOCIATED MATTALIC* [sic] *MATERIALS*." *Compare* **Exhibit CE-272**, p. 16 *with* **Exhibit CE-369**, p. 9.
[1287] **Exhibit CE-283**, p. 6; **Exhibit CE-282**, p. 3. *See* **Exhibit CE-251**, pp. 8-8, 8-9 and 8-13.
[1288] **Exhibit CE-283**, pp. 5 and 19; **Exhibit CE-182**; **Exhibit CE-272**, p. 16.

> *The area previously identified by … BGCP in their application may be reserved for the project for their future activities and that the same may not be allotted to any other agency or organization.*"[1289]

(b) The Tribunal's Considerations on the Evidentiary Record

1144. In the Tribunal's view, the contemporaneous evidence shows that the GOB's project was not only a complementary smelting project intended to process ore that it would buy from Claimant (or any other mining company operating in Pakistan). The question raised in the Working Paper of 17 November 2009 whether the GOB was bound to convert Claimant's Exploration License into a mining lease and if so "*what would be the strategy to implement the project?*" rather demonstrates that at least as of that time, the GOB intended to implement a competing mining project in the same area.[1290]

1145. The third and final proposal that was ultimately approved by the Planning Commission and the ECNEC further explicitly provided for a budget for the mining of ore at a rate of 15,000 tons per day.[1291] The Tribunal is aware that Claimant's project envisaged an initial rate of 110,000 tons per day, later expanding to 220,000 tons per day, and thus was planned to operate at a larger scale. The PowerPoint presentation that was apparently presented during the Balochistan Cabinet meeting on 24 December 2009 indicates that the GOB intended to expand its own mining operations beyond 15,000 tons per day (up to 60,000 tons per day within ten years).[1292]

1146. A further indication for an expansion plan is contained in Dr. Mubarakmand's 19 January 2011 submission in which he stated that the size of the plant would be enhanced every five to six years along with the growth of the mine.[1293] However, the Tribunal notes that Dr. Mubarakmand was not a Government official and would have required the approval of the relevant authorities for his plans. Given that none of the summaries and/or working papers prepared by Government officials on the project mention such expansion plans, the Tribunal is not convinced that the GOB in fact had a concrete plan at the time to expand the capacity of its project to a scale comparable to that of Claimant's project.

1147. In the Tribunal's view, however, it is not relevant whether the GOB's project was at the same scale as Claimant's project. What matters is whether the implementation of the Government's project excluded the simultaneous implementation of Claimant's project and therefore presented a motive for denying TCCP'S Mining Lease Application. The

[1289] **Exhibit CE-282**, p. 3.
[1290] **Exhibit CE-240**, p. 4.
[1291] **Exhibit CE-242**, p. 18.
[1292] **Exhibit CE-409**, p. 12.
[1293] **Exhibit CE-269**, ¶ 10.

Tribunal considers it established that the GOB intended to mine (at least) 15,000 tons of ore per day at the area that was covered by Claimant's Exploration License (EL-5) and would have been part of Claimant's proposed Mining Area.[1294] In particular, the Tribunal is not convinced by Respondent's argument that it included the budget for mining only in case it did not reach an agreement with Claimant on the supply of ore.

1148. The minutes of the 24 December 2009 Cabinet meeting, the 31 December 2009 memorandum to the Chief Secretary as well as the 11 February 2010 memorandum to the Chief Minister record that the GOB had decided to "*take over*" the project from Claimant.[1295] The Tribunal does not follow Respondent's argument that this was only a decision in principle which had to be, and never was, implemented by the Chief Minister. Contrary to Respondent's submission, after the decision to "*take over*" the project and "*not to go ahead with*" the negotiations of the Mineral Agreement and the Project Agreement had been made, no actual negotiations took place but only high-level meetings in which Claimant was assured that there was no competing project. In addition, the GOB even considered in February 2010 that it was "*necessary to engage Legal Advisor / Consultant for advi*[c]*e before issuing legal notice to TCC for cancellation of Exploration Agreement.*"[1296]

1149. Further, the Working Paper for the 24 December 2009 meeting that sets out the "*Justification for taking over the Project by Balochistan Government*" expressly states that "*mining activities are also required to be undertaken by the Provincial Government*" and that the MMDD was planning to submit a PC-1 proposal "*for carrying out mining activities in the mine areas of Reko Diq*"; finally, the MMDD requested that the Cabinet "*solicit approval for awarding the mining rights of Reko-Diq Copper / Gold Project to* [the MMDD] *for the larger interests of this province.*"[1297]

1150. Finally, Dr. Mubarakmand's contemporaneous statements both during the interviews that he gave in December 2010 and in his submission to the Supreme Court in January 2011 demonstrate that he considered the GOB's project as an alternative, and not a supplement, to Claimant's project.[1298] While Dr. Mubarakmand served as a member of the Pakistan

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[1294] In his 19 January 2011 submission, Dr. Mubarakmand stated that the GOB's project would be launched by using the H-15 deposits, *i.e.*, the same deposits that Claimant intended to form part of its Initial Mine Development. **Exhibit CE-269**, ¶ 17. In his witness statement, Dr. Mubarakmand stated that when he was instructed "*to go ahead with the project*" in May/June 2012, he decided that the best place for the mining was H-4 in order to "*avoid any dispute with the Claimant over the areas that it had identified in their Feasibility Study, H-14 and H-15*" and also for technical reasons (at H-4, the copper is closer to the surface than at H-14 and H-15, and it contains copper oxide ore which is easier and less energy intensive to refine). Mubarakmand I, ¶ 17.
[1295] **Exhibit CE-31**, pp. 16, 20 and 21.
[1296] **Exhibit CE-31**, p. 21.
[1297] **Exhibit RE-62**, pp. 2-4.
[1298] Cf. Exhibits **CE-105**, **CE-108** and **CE-111**.

Planning Commission and was appointed as Chairman of the Board of Governors of the Reko Diq Project, his conduct as such may not be attributable to Respondent because he may not have been a "*Government official*." Nevertheless, the Tribunal recalls that he was responsible for the technical development of the project that was fully endorsed by the GOB and approved by the CDWP and later the ECNEC. Therefore, there is at least a strong indication that his statements reflected the view taken by the GOB and the relevant authorities as well.

1151. In the Tribunal's view, this is sufficient evidence that mining activities formed part of the GOB's project and that the GOB thus did not intend to implement a complementary processing project, but rather a competing mining and processing project (albeit at a smaller scale) that was not compatible with Claimant's project. This is confirmed by the fact that the GOB ultimately sought a mining lease over the exact same area that TCCP had proposed as the Mining Area in its Mining Lease Application.[1299]

1152. This finding is not contradicted by the statement made by the Chief Minister in the 28 May 2010 meeting of the Board of Governors that "*if TCC is keen on a mining licence, then they can have it. We will buy the ore from them and do the refining and metal production ourselves.*"[1300] While the GOB may have been willing to consider buying the ore from Claimant, the Chief Minister's further statement that "*national interest is above all*" and the Board's resolution that the "*future role of* [TCC] *will be decided by the Government of Balochistan, after they apply for mining lease*"[1301] shows clearly that the GOB did not consider itself bound by the contractual commitments and assurances it had given to Claimant. The GOB rather considered that it could interpret the requirements in the 2002 BM Rules, in particular rule 48(3)(a)(vi), in a manner that would allow it to impose any obligation on Claimant that would be labelled as being in the "*national interest*." This approach is confirmed by Balochistan's submission in the Supreme Court proceedings dated 22 January 2011 in which it requested that the Supreme Court allow it to execute its own project and declared that "*no entity has any vested right for the mining concession and that only the Government of Balochistan can take any decision in this regard in the best national interest.*"[1302]

1153. The Tribunal recalls its statement above that the desire of the GOB to implement its own project as such does not impact Claimant's investment and therefore cannot constitute an FET breach in itself, but only if it is established that this desire became the motive for denying TCCP's Mining Lease Application. In this regard, the Tribunal considers that the

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[1299] *Compare* **Exhibit CE-272**, p. 16 *with* **Exhibit CE-369**, p. 9. *See* note 1286 above.
[1300] **Exhibit CE-31**, p. 27.
[1301] **Exhibit CE-31**, p. 28.
[1302] **Exhibit CE-269**, p. 6.

remarks made by Chief Minister Raisani as recorded in the letter from the Director General to the Secretary of the MMDD dated 12 September 2012 and their apparent impact on the decision of the Licensing Authority are particularly relevant. The Chief Minister is recorded to have said:

> "*It was decided by the Board of Governors that:-*
>
> i) *We will do the mining*
> ii) *We will do the refining.*"[1303]

1154. In light of these remarks, the Director General (*i.e.*, the Licensing Authority) requested from the Secretary of the MMDD (*i.e.*, his superior and the appellate authority) that "*future line of action in the matter kindly be conveyed whether the TCC be refused Mining Lease for Reko-Diq Gold-Gold Project or otherwise*."[1304] In response to this request, the Secretary of the MMDD requested on 13 September 2011 "*to dispose off the Mining Lease application.*"[1305] While the Tribunal agrees with Respondent that the term "*dispose off*" could be interpreted differently and does not necessarily imply that the Application was to be rejected, the Tribunal has to take into account the context of the Director General's request for guidance. In this particular context, the Secretary's instruction can only be understood to mean that the Director General should decide on the Application in line with the Chief Minister's remarks, *i.e.*, that he should deny the Application.

1155. At this point, the Tribunal notes that the Chief Minister, the Director General and/or the Secretary of the MMDD could have explained in evidence that the refusal of the Mining Lease Application was nevertheless a *bona fide* decision, which was taken independently of the developments regarding the GOB's project, but Respondent decided not to present any of them as a witness in this arbitration. Consequently, there is no evidence that would rebut the strong indication from the above-mentioned evidence that the refusal was motivated by the GOB's desire to take over the project from Claimant.

1156. In fact, the Tribunal considers that this indication is confirmed by the various news articles, which record statements made by Government officials with regard to the project at the time. For example, the online edition of the Pakistani newspaper *The Dawn* reported on 25 December 2009, *i.e.*, the day after the Cabinet meeting in which it was decided to take over the project, that the "*Reko Dik exploration contract* [was] *cancelled*." The article cited Chief Minister Raisani stating that the "[c]*ancellation of the Reko Dik copper and*

[1303] **Exhibit CE-355**.
[1304] **Exhibit CE-355**.
[1305] **Exhibit CE-356**.

gold project agreement is a step towards getting control over provincial resources in accordance with the wishes of the people."[1306]

1157. On 22 May 2010, Balochistan's Directorate of Public Relations issued a press release describing an "*official handout*" issued the day before, which reportedly stated that "*the foremost objective of the provincial government would be to take full control of Reko-Diq Copper and Gold Project from its present operators i.e. M/s. Tethyan Copper Company (TCC) and thereafter the provincial government would run the project itself*." Pursuant to the press release, the newly constituted Board of Governors would discuss at its first meeting "*the role of TCC in the project, if any*." The press release then reported that "[t]*he Government of Balochistan had decided to take over the Reko-Diq Copper and Gold Project and cancel the agreement with TCCP*" and quoted the thirteen grounds referred to in the Working Paper for the 24 December 2009 Cabinet meeting.[1307]

1158. According to a further news article in *The Dawn* dated 4 November 2010, Chief Minister Raisani said that "[TCC's] *exploration licence would expire next year and his government had decided that afterwards it would run the project itself*."[1308] On the same day, the daily newspaper *Balochistan Express* also reported that Chief Minister Raisani had said that "*a company had been issued only exploration license and it will be ended in 2011 after that government will take over the project*."[1309]

1159. While the Tribunal is aware that officials from both the GOB and the GOP repeatedly assured Claimant's representatives during this time period that these news articles and also the press release issued by Balochistan's own public relations department did not represent the official position of the Governments, it rather appears that the press was given reasonably accurate accounts of the GOB's decision. In particular, the press release quoted from an "*official handout*" that used the same wording that was also used in the Working Paper for, and the meeting minutes of, the 24 December 2009 Cabinet meeting strongly indicates that it was rather TCC that was deceived until it had finished and submitted its Feasibility Study to the GOB. Dr. Mubarakmand further expressly stated during his 15 December 2010 interview: "*Now when we work we will have the results of exploration in front of us which will help us and we will be able to benefit from those results.*"[1310] Therefore, the Tribunal considers that the press coverage in 2010 reinforces its conclusion that the GOB had decided to take over the project and, accordingly, to deny TCCP's Mining Lease Application.

[1306] **Exhibit C-81**.
[1307] **Exhibit CE-89**.
[1308] **Exhibit C-262**, p. 5.
[1309] **Exhibit C-262**, p. 8.
[1310] **Exhibit CE-108**, p. 6.

1160. However, as stated at the outset of its analysis, the Tribunal considers that the existence of such motive in itself is not sufficient for a finding that Respondent is in breach of its FET obligation because there may have been, at the same time, legitimate reasons for denying the Mining Lease Application. The Tribunal will therefore assess in a second step whether the Grounds given in the Notice of Intent to Reject and/or the additional reasons invoked by Respondent in this arbitration nevertheless provide a justified basis for denial or whether they only served as a pretext to disguise the true motive of implementing the GOB's own project. Only if the latter were the case, the denial would amount to a violation of Respondent's FET obligation.

ii. The Stated Grounds for Denying the Mining Lease Application

1161. As to the various grounds for the denial that Respondent invokes, the Tribunal will first analyze the ten grounds given in the Notice of Intent to Reject. As both Parties grouped these grounds into three main reasons in their Post-Hearing Briefs, the Tribunal will follow this structure in its analysis as well. Thereafter, the Tribunal will determine whether Respondent can rely on the additional grounds it invokes in this arbitration and whether they could justify the denial of TCCP's Mining Lease Application.

(a) The Grounds Given in the Notice of Intent to Reject

1162. Before analyzing the three main reasons identified by the Parties in more detail, the Tribunal will address the two grounds that were only summarily touched upon by the Parties. The first ground states:

> "*That from the record, it appears that the Balochistan Development Authority had signed a Chagai Hills Exploration Joint Venture Agreement with BHP, thereafter M/S Tethyan Copper Company Pakistan (Pvt) Ltd for exploration, evaluation of Gold, Copper and Associated Minerals during the period of license existing for exploration and prospecting of the area. The record reflects that neither any company was registered and incorporated under the Companies Act 1984 with the registrar of the Firm's nor in any other law.*"[1311]

1163. Pursuant to rule 47(1) of the 2002 BM Rules, "[a]*n application for the grant of a mining lease may be made only by a body corporate formed by or under a law for the time being in force in Pakistan.*"[1312] The Mining Lease Application of 15 February 2011 was submitted by TCCP and included in its enclosure no. 12 a copy of the Memorandum and the Articles of Association of TCCP with an attested copy of its certificate of

[1311] **Exhibit CE-7**, ¶ 1.
[1312] **Exhibit RE-1**, rule 47(1).

incorporation in Pakistan.[1313] Pursuant to this certificate of incorporation, TCCP is incorporated as a company under Pakistani law as of 30 November 2000.[1314] Therefore, the Tribunal finds that there is no merit in the first ground given by the Licensing Authority in its Notice of Intent to Reject.

1164. The fourth ground states:

> "*That on account of non-exploration and failure to explore the area during the last 17 years, the Government of Balochistan and the local inhabitants of the area has been deprived of the fruitful results.*"[1315]

1165. Pursuant to rule 48(3)(a)(ii) of the 2002 BM Rules, the Licensing Authority shall not grant the mining lease unless "*the proposed plans for development and operation of the mine and the programme of the mining operations of the applicant will ensure the efficient, beneficial and timely use of the mineral resources.*"[1316] In the Tribunal's view, it is apparent from the evidentiary record that Claimant did not fail to explore the area covered by Exploration License EL-5. Apart from the fact that the GOB was continuously informed about the status and progress of the exploration work through both the Operating Committee meetings, in which it was represented by the BDA and later by the MMDD, and the quarterly reports that Claimant submitted to the GOB, the Tribunal considers it established that Claimant has indeed performed a considerable amount of work as recorded in the sections above on TCC's initial and expanded exploration work during the time period from 2002 through 2009.[1317]

1166. The Tribunal recalls that the GOB itself recognized at various times that Claimant had performed a significant amount of exploration work at Reko Diq. For example, in its submission to the Balochistan High Court in 2007, the GOB stated:

> "*It was as a result of* [the foreign investors' US$ 200 million] *investment that the large copper and gold deposits were discovered in 1996-1997.* [The GOB and the BDA] *have been very closely monitoring the progress of the subject project and receive* [sic] *Quarterly Reports which detail the progress that is being made, local employment that has been provided and investments made in each quarter*."[1318]

1167. The MMDD also reported in its 31 December 2009 memorandum to the Chief Secretary:

[1313] **Exhibit CE-6**, p. 2.
[1314] **Exhibit CE-14**.
[1315] **Exhibit C-7**, ¶ 4.
[1316] **Exhibit RE-1**, rule 48(3)(a(ii).
[1317] *See* ¶¶ 332 *et seq.* and 350 *et seq.* above.
[1318] **Exhibit CE-212**, p. 6.

> "[TCC] *ha*[s] *done tremendous efforts in discovering the Reko-Diq Copper & Gold prospects, and going according to schedule. … Mining is one of the most difficult activities to be carried out requiring huge amount of investment, rich expertise and skills, and very careful planning and proper management to make it a success. The way of working and performance reflect that their attitude is serious and they are committed to develop the project.*"[1319]

1168. In light of the above, the Tribunal sees no basis for the allegation that Claimant failed to explore the area over the last 17 years and finds that there is no merit in the Licensing Authority's fourth ground.

(i) The First Set of Grounds: TCCP Was Not the Proper Applicant

1169. The first set of grounds invoked by Respondent is based on the argument that TCCP was not eligible to file the Mining Lease Application without its Joint Venture partner under the CHEJVA, given that it had not acquired the GOB's interest in the Joint Venture beforehand. The fifth and sixth ground state:

> "*That the present application has been filed on behalf of M/S Tethyan Copper Company Pakistan (Pvt) Ltd and not on behalf of co sharer, who was alleged to be co-associate in the working project under the Rule 48 of the Balochistan Mineral Rule 2002. Since the applicant alone was not allottee of exploration licence and thus not legally applicant is not competent to make application for grant of Mining lease.*
>
> *That the Mines Committee has noted the fact that the application was received on 18-02-2011 and the licence had expired on 19-02-2011 later on request was made to the Secretary, Mines & Mineral Department, Government of Balochistan on 03-03-2011 for participating in the mining lease. This fact indicates that the application was filed alone by the company and the co sharer was not made party in it. In such circumstances, the application is incomplete and is in violation of rule 48 of the Balochistan Minerals Rule, 2002.*"[1320]

1170. As to the requirements to be met by TCCP, the Tribunal considers that it has to be distinguished between (i) the regulatory requirements established by the 2002 BM Rules; and (ii) the contractual procedure foreseen in the CHEJVA.

[1319] **Exhibit CE-31**, p. 19.
[1320] **Exhibit CE-7**, ¶¶ 5 and 6.

1171. As stated above, rule 47(1) of the 2002 BM Rules requires that the applicant be "*a body corporate formed by or under a law for the time being in force in Pakistan.*"[1321] Rule 48(1) of the 2002 BM Rules refers to "*the holder of exploration licence*" making an application for a mining lease and rule 48(2)(a) provides that a mining lease shall not be granted "*if, at the time of the application, any person other than the application holds any exploration licence conferring an exclusive right to carry on exploration operations in that area of land in respect of that mineral or group of minerals.*"[1322] Pursuant to rule 23(1)(a) of the 2002 BM Rules, "*an exploration licence shall confer on the licensee – (a) the exclusive right to carry on exploration operations in the exploration area in respect of any mineral or group of minerals to which the licence relates.*"[1323]

1172. In sum, the 2002 BM Rules require that (i) the applicant is a company incorporated in Pakistan; (ii) the applicant is an exploration license holder; and (iii) no person other than the applicant has been granted an exclusive right to explore the area over which the mining lease is being sought. While the first requirement has clearly been met as set out above, Respondent argues that TCCP held only a 75% interest in Exploration License EL-5, while its Joint Venture partner held the other 25%, and therefore was not the exploration license holder; in addition, its partner also held an exclusive right to explore the area according to rule 23(1), which prevented the grant of a mining lease to TCCP under rule 48(2)(a).

1173. The Tribunal is not convinced by Respondent's first argument. The Joint Venture was unincorporated and, pursuant to Clause 4.1 of the CHEJVA, nothing in the CHEJVA was intended to create a trust, mining or commercial partnership or a new legal entity "*for any purpose whatsoever*."[1324] Clause 4.3 of the CHEJVA further provides that the Joint Venture partners held a beneficial interest in the Joint Venture Property as tenants-in-common according to their respective Percentage Interest.[1325] While the Tribunal is aware that EL-5 was granted and renewed in favor of the Joint Venture, the parties to the CHEJVA apparently considered that TCCA (and later TCCP) held an interest in the Exploration License EL-5 – distinguishable from Claimant's interest in the Joint Venture as such.

1174. This understanding of the parties is demonstrated by the fact that the GOB, BHP and TCCA entered into a separate Novation Agreement for Exploration License EL-5,

[1321] **Exhibit RE-1**, rule 47(1).
[1322] **Exhibit RE-1**, rules 48(1) and 48(2)(a).
[1323] **Exhibit RE-1**, rule 23(1)(a).
[1324] **Exhibit CE-1**, Clause 4.1.
[1325] **Exhibit CE-1**, Clause 4.3.

which states that the parties intended "*to transfer by novation BHPB's undivided interest in the Licence to TCC such that TCC shall replace BHPB as a party to the Licence*."[1326] Subsequently, on 5 November 2007 and 3 January 2008, the GOB gave its no-objection to the transfer of TCCA's interest in EL-5 to TCCP through the amalgamation of TCCA's Pakistani branch into TCCP.[1327]

1175. The Tribunal thus considers it undisputed that TCCP held a 75% interest in EL-5 (and not only in the Joint Venture Property as a whole). Given that there is no requirement in the 2002 BM Rules that the applicant must hold a 100% interest in the exploration license, the Tribunal is of the view that TCCP can thus be considered an exploration license holder under rule 48(1) of the 2002 BM Rules. In fact, the Amalgamation demonstrates that Claimant transferred its interest in EL-5 to TCCP for the exact purpose of creating an eligible applicant for the Mining Lease Application.[1328] The Amalgamation further records that the GOB and the BDA "*had already given their no objection to the amalgamation as the same is necessary to meet the requirement of rule 47(1) of the Balochistan Mineral Rules, 2002.*"[1329]

1176. In addition, the negotiations between TCCA and the GOB for a Shareholders Agreement illustrate the parties' initial plan that the GOB would acquire a 25% share in TCCP in exchange for the assignment of its 25% interest in EL-5 to TCCP.[1330] The Tribunal notes

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[1326] **Exhibit RE-153**, Recital E. It is not clear from this document on which date the Agreement was concluded. However, by letter of 8 April 2006, the Licensing Authority referred to an application dated 28 March 2006 and informed the Joint Venture that it "*has been pleased to assign your Exploration License No. EL(5) … in favour of M/S Tethyan Copper Company Limited under rule 64 of the Balochistan Minerals Rules, 2002*." **Exhibit RE-25**.

[1327] **Exhibit RE-61**, pp. 116 and 117 (numbered as pp. 103 and 104). While the Tribunal is aware of the fact that the no-objection was "*subject to registering the share holding status of the component companies including the 25% share held by the Government of Balochistan (through BDA),*" a condition that was not fulfilled because the GOB never exchanged its interest in EL-5 for a 25% share in TCCP, this document confirms that both parties considered that Claimant's interest in EL-5 could be transferred separately from its interest in the Joint Venture.

[1328] The Amalgamation records: "*An application for the grant of a mining lease, under Rule 47(1) of Balochistan Mineral Rules, 2002, can only be granted to a body corporate which should be formed under the Companies Ordinance 1984 and other provisions of laws of Pakistan. Given the foregoing the respective Boards of Directors of the petitioners, after, inter alia, considering ways and means to improve and more economically carry on their businesses and to meet the requirements of Rule 47(1) of the Balochistan Mineral Rules, 2002, had resolved that it would be to the advantage of petitioner No. 1 and petitioner No. 2 and their respective shareholders if by way of reorganization of the assets/undertakings of petitioner no. 2, which along with other assets, comprising the Licences, are amalgamated with and transferred to petitioner No. 1.*" **Exhibit CE-21**, p. 3.

[1329] **Exhibit CE-21**, p. 5.

[1330] In its letter to the GOB dated 21 May 2008, Claimant wrote that "*the Shareholders Agreement only works where the Government of Balochistan becomes shareholder of TCCP and assigns its 25% interest in EL-5 to TCCP*." **Exhibit CE-331**. This intention is also recorded in the Preliminary Statements of the draft Shareholders Agreement returned to Claimant by the GOB with its comments on 24 October 2008: "[C]*oncurrently with the execution of this agreement, GOB is assigning and/or transferring its 25% undivided interest in EL-5 to TCCP for a twenty five percent (25%) of the paid up share capital as an equity interest in TCCP pursuant to the terms of the GOB Assignment Agreement.*" **Exhibit CE-231**, p. 7.

that it was due to the GOB's decision not to go forward with the negotiations of the Shareholder Agreement, as recorded in the minutes of the Cabinet meeting on 24 December 2009,[1331] that this plan was never implemented and TCCP thus did not acquire the remaining 25% interest in EL-5. In light of the fact that the GOB (i) was on notice at least as of 2008 when TCCA transferred its 75% interest in EL-5 to TCCP that TCCP was intended to become the (only) eligible applicant under rule 47(1) of the 2002 BM Rules; and (ii) chose to abandon the plan to transfer its 25% interest to TCCP, the Tribunal considers that, in any event, the GOB cannot invoke the missing 25% as a reason for denying TCCP the eligibility to apply for a mining lease under the 2002 BM Rules.

1177. As to Respondent's second argument, *i.e.*, the GOB's alleged exclusive right under rule 48(2)(a), the Tribunal is of the view that, while both Joint Venture partners held an "*exclusive right*" in relation to any third party to explore the area covered by EL-5, the GOB's 25% interest in the Joint Venture (and in EL-5) did not confer on it an "*exclusive right*" *vis-à-vis* its Joint Venture partner TCCA. Therefore, TCCP was an, and in fact the only, eligible applicant under the 2002 BM Rules.

1178. Apart from the regulatory requirements under the 2002 BM Rules, the CHEJVA contained a specific contractual procedure to be observed in relation to the application for a mining lease. Clause 5.7.1 provides that "[w]*here so directed by the Manager, the BDA shall be responsible on behalf of the Joint Venture for making all applications … for Mining Leases required pursuant to Clause 5.9 … .*"[1332] The referenced Clause 5.9 provides in relevant part:

> "*The Parties shall pursuant to Clause 2.2 seek an assurance from the Provincial Government, namely that the Joint Venture shall have the right to apply for a Mining Lease at any time during the conduct of Stage Three* [pre-feasibility work] *or Stage Four* [feasibility study work] *Activities if in the opinion of the Manager a decision to undertake mining development is likely to be made pursuant to either of sub-clauses 8.2.10(d)* [transfer of the Joint Venture Activities to the Mining Venture] *or 11.3.2* [any of the parties gives notice of intention to participate in mining development]. …"[1333]

1179. Clause 11.4.2 of the CHEJVA provides that in case Claimant gives notice of its intention to participate in mining development, but the GOB is (deemed) a Non-participating Party, "*then subject both to* [TCCA] *obtaining all routine Government approvals required and to compliance with Clause 11.6,* [TCCA] *shall be entitled to undertake sole risk*

[1331] *Cf.* **Exhibit CE-31**, p. 16.
[1332] **Exhibit CE-1**, Clause 5.7.1.
[1333] **Exhibit CE-1**, Clause 5.9.

investment … in a mining development within any of the relevant Prospecting Licences."[1334] In this case, Clause 11.5 stipulates that the parties shall negotiate in good faith and, within 120 days from the Election Date, "*agree upon the fair value to be paid by the Participating Party to the Non-participating Party as consideration for transfer of the Non-participating Party's Percentage Interest in all the Joint Venture Property pertaining to the proposed Mining Area*."[1335]

1180. In case the parties are unable to reach an agreement on the fair value, Clause 11.6.2 provides that the question shall be referred to an expert. Finally, Clause 11.6.3 of the CHEJVA stipulates that once the fair value has been determined by either means, "*the Non-participating Party shall do all things reasonable and necessary to transfer all legal and beneficial interest in the non-participating Party's Transfer Interest to the Participating Party*."[1336]

1181. According to Respondent, TCCP was not eligible to file the Mining Lease Application on its own, *i.e.*, without its Joint Venture partner, because, contrary to Clause 11.4.2, it did not acquire its partner's 25% interest in the Joint Venture pursuant to Clause 11.6 beforehand. At the outset, the Tribunal considers it questionable whether a failure to comply with this contractual procedure could theoretically serve as a ground for the Licensing Authority to deny the Mining Lease Application because this is not part of the regulatory requirements on which the Licensing Authority must base its decision. In any event, the Tribunal is not convinced by Respondent's argument.

1182. The Tribunal recalls that, under the 2002 BM Rules, the unincorporated Joint Venture was not eligible to apply for a mining lease; therefore, the CHEJVA provided that either (i) the Joint Venture partners would form a new, incorporated Mining Venture under a Project Agreement; or (ii) TCCA would notify the GOB of its intent to participate in a mining development and, in case, the GOB decided, or was deemed, not to participate, would be entitled to proceed with the mining development on its own.

1183. While it is correct that, under the second scenario, the CHEJVA provides for a detailed procedure as to how TCCA would then acquire the GOB's interest in the Joint Venture, the Tribunal does not agree with Respondent that this procedure had to be completed before TCCP could apply for a mining lease. First, Clause 11.4.2 does not state that the application for a mining lease, specifically, is subject to "*compliance with Clause 11.6*," but rather refers more generally to Claimant's entitlement "t*o undertake sole risk investment … in a mining development*." In addition and more importantly, the Tribunal

[1334] **Exhibit CE-1**, Clause 11.4.2.
[1335] **Exhibit CE-1**, Clause 11.5.
[1336] **Exhibit CE-1**, Clauses 11.6.2 and 11.6.3.

considers that, if Respondent's interpretation of the contractual provisions in the CHEJVA were correct, the GOB could in fact block any further mining development by refusing to participate in the procedure set out in the CHEJVA. This is particularly relevant given that in the present case Exploration License EL-5 was to expire three months after Claimant had notified the GOB of its intention to participate in mining development and there was no possibility under the 2002 BM Rules to apply for a further renewal.

1184. While Respondent correctly pointed out that Claimant did not even attempt to acquire the GOB's interest until 3 March 2011, *i.e.*, after the Application was filed, the record shows that Claimant repeatedly emphasized the need for action in light of the impending expiry of EL-5. According to TCC's minutes of a meeting with the MMDD on 8 November 2010, *i.e.*, before the time limit for the GOB's election to participate in the Mining Venture expired, the Secretary of the MMDD indicated that their review of the Feasibility Study would require at least six months. The minutes further record:

> "*Mr. von Borries explained that assuming the GOB elected to participate, both parties need to form a Mining Venture in order to submit the Mining Lease Application before the expiration of EL-5 on 19th February 2011. Therefore he asked whether the GOB would sign a Memorandum of Understanding in order to file for a Mining Lease Application. Mr. Raisani said the GoB would agree with the MOU and make its election to participate after the presentation* [of the Feasibility Study] *to the cabinet has been done*."[1337]

1185. In his letter to the Secretary of the MMDD dated 30 November 2010, Mr. von Borries (in his function as Manager of the Joint Venture) noted that the 90-day election period under Clause 11.3.1 of the CHEJVA had expired on 24 November 2010 and that he had received no notification from the GOB. Mr. von Borries informed both parties to the CHEJVA that "*the procedure laid out down in the CHEJVA … shall now follow*" and suggested that the parties and the Manager meet at their earliest convenience "*to discuss and formulate the future course of action pursuant to the CHEJVA.*"[1338]

1186. Following a request from the MMDD, dated 18 December 2010, to extend the 90-day election period under the CHEJVA until the review of the Feasibility Study would be completed,[1339] Mr. von Borries again noted in his letter to the Secretary of the MMDD dated 29 December 2010 that the election period under the CHEJVA had expired on 24 November 2010, with no response from the GOB. He further emphasized that Exploration

[1337] **Exhibit CE-103**, p. 3 (emphasis in original).
[1338] **Exhibit CE-24**.
[1339] **Exhibit CE-266**.

License EL-5 would expire on 19 February 2011 and, "[g]*iven these circumstances*," asked for "*advice as to how to move forward*" in considering this request.[1340] It appears from the record that there was no response to this letter.

1187. In a further letter to the Secretary of the MMDD dated 8 February 2011, *i.e.*, shortly before the Mining Lease Application was filed on 15 February 2011, Mr. von Borries again noted that EL-5 would expire on 19 February 2011 and stated:

> "[I]*t is imperative that the Mining Lease Application in relation to the Mining Area (as defined in the CHEJVA) for the Mining Operations (as defined in the CHEJVA) of the Reko Diq project may be filed with the licensing authority ahead of the expiration of EL-5. As per requirements of rule 47(1) of the Balochistan Mineral Rules, 2002, the Mining Lease Application will be filed by Tethyan Copper Company Pakistan (Private) Limited which is a company incorporated under the laws of Pakistan.*"[1341]

1188. Mr. von Borries further enclosed a draft letter to be signed by the Secretary of the MMDD by which the MMDD would ask the Manager of the Joint Venture "*to take all necessary steps in order to file the Mining Lease Application by* [TCCP] *on behalf of the … Joint Venture with the licensing authority in relation to the Mining Area*."[1342] The letter was never signed by the MMDD and it appears from the record that, again, there was no response.

1189. By letter of 3 March 2011, *i.e.*, two weeks after the Mining Lease Application was filed, Claimant notified the GOB of its intention to purchase the interest of the GOB (as Non-participating Party) in the Joint Venture and to engage with the GOB in agreeing the fair value of such interest pursuant to Clause 11.5.3 of the CHEJVA. At the same time, Claimant noted that "*it is still the wish of TCC and its shareholders to have the GOB as a 25% partner in the Reko Diq project. TCC would welcome the opportunity to discuss how this can be achieved*."[1343]

1190. By letter of 28 March 2011, the GOB stated that "*the matter is subjudice in the Hon'ble Supreme Court of Pakistan and the Provincial Government at this stage is not in a position to negotiate / discuss the provisions of CHEJVA for becoming either a participating or non-participating party, as well as consideration of Joint Application for mining lease till the decision of the Hon'ble Supreme Court of Pakistan is arrived*." In

[1340] **Exhibit CE-109**.
[1341] **Exhibit CE-113**, p. 1.
[1342] **Exhibit CE-113**, p. 2.
[1343] **Exhibit CE-25**.

conclusion, the GOB therefore requested that the time limit for its election be postponed until after the Supreme Court's decision would be rendered.[1344]

1191. Following Claimant's letter dated 29 April 2011 by which it noted that the 120-day period for reaching a mutually agreeable decision under Clause 11.6.2 had expired and notified the GOB of its intention to submit the matter to an independent expert,[1345] the GOB reiterated its position in its letter dated 8 May 2011 that it would be "*premature and unhealthy to proceed further in disregard of court proceedings*" and concluded that it would be "*better we may not proceed till the case is decided by the Hon'ble Supreme Court of Pakistan*."[1346]

1192. Against this background, the Tribunal considers it established that irrespective of the exact date on which Claimant notified the GOB of its intent to purchase the GOB's interest in the Joint Venture, the GOB refused to acknowledge, while the Supreme Court proceedings were still ongoing, that it was deemed a Non-participating Party pursuant to Clause 11.3.3 and, consequently, to negotiate with Claimant or participate in the contractual procedure for the determination of the fair value to be paid in consideration for the transfer of its interest. The GOB also refused to consider a joint application for a mining lease even though Mr. von Borries had repeatedly emphasized that the Exploration License EL-5 was about to expire and would have already expired by the time the GOB communicated such refusal in its letter of 28 March 2011, if TCCP had not taken unilateral action by then.

1193. Therefore, if Respondent's interpretation of the CHEJVA provisions were correct, the GOB could, and would successfully, have blocked any action that prevented EL-5 from expiring in February 2011 because there would not have been any eligible applicant at the time that could have filed a mining lease application for this area. In the Tribunal's view, this cannot have been the intent of the contracting parties when they entered into the CHEJVA and clearly does not correspond to the co-operation and good faith obligations of the GOB as set out in Clauses 24.6.2 and 24.6.3 of the CHEJVA. Therefore, the non-completion of the contractual procedure can in any event not serve as a ground for denying TCCP's Mining Lease Application.

[1344] **Exhibit CE-114**.
[1345] **Exhibit CE-115**.
[1346] **Exhibit CE-116**.

(ii) The Second Set of Grounds: The Feasibility Study Did Not Provide for Processing, Smelting and Refining the Ore

1194. The second set of grounds invoked by Respondent is based on the alleged silence of Claimant's Feasibility Study as to the further treatment of the ore after its extraction. The ninth ground states:

> "*That feasibility report is silent about the processing, smelting and refining of the metals / minerals to be extracted from the mining area.*"[1347]

1195. As to the processing of the ore, the Tribunal notes that Chapter 6 of the Feasibility Study is entitled "*Metallurgy and Process Development*" and presents at a total length of 145 pages how Claimant intended to process the ore into concentrate.[1348] Therefore, the Feasibility Study is clearly not "*silent about the processing*" of the minerals to be extracted from the Mining Area.

1196. With regard to the smelting and refining of the concentrate, Claimant anticipated in the Feasibility Study that the ore would be transported via a pipeline to the port of Gwadar and then be exported in order to be smelted and refined outside of Pakistan. The Tribunal is also aware that the GOB had repeatedly requested that Claimant build a local smelter and refinery, something which Claimant refused as being uneconomic. Therefore, the Tribunal has to assess whether the GOB was entitled to make such request or, more specifically, whether the Licensing Authority was entitled to refuse the Mining Lease Application on such grounds.

1197. Rule 48(3)(a)(vii) of the 2002 BM Rules, as amended as of 1 October 2010, provides that the Licensing Authority shall not grant the application for a mining lease unless the applicant submits "*a concrete proposal for value addition of the ore to be produced / exploited from the applicant's mining lease within the country …, or if the facility is not available in the province, the Ore could be taken out of province with the prior approval of the Provincial Government.*"[1349]

1198. Claimant's witness Mr. Livesey acknowledged during the Hearing that, even though the amendment was enacted only after Claimant had submitted the Feasibility Study to the GOB, this amended requirement had to be observed when TCCP filed its Mining Lease

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[1347] **Exhibit CE-7**, ¶ 9.
[1348] **Exhibit CE-249**.
[1349] **Exhibit RE-1**, Notification on p. 162.

Application in February 2011.[1350] However, the Parties are in dispute as to the meaning of the term "*value addition*" and, consequently, whether TCCP satisfied the requirement in its Application. While Respondent alleges that rule 48(3)(a)(vii) established a requirement to build a smelter and refinery within Pakistan, Claimant argues that the term "*value addition*" is used in the industry for the processing of the ore into concentrate. This was confirmed by Claimant's witness Ms. Boggs during the Hearing:

> "*Q. And is turning ore into concentrate value addition to the ore?*
>
> *A. Absolutely. I mean, if you don't turn it into concentrate, it's essentially just rocks.*
>
> *Q. Is that how it's widely understood in the industry?*
>
> *A. Absolutely. It's probably the biggest value addition to it in the mining process.*"[1351]

1199. In response to the question "[w]*hat is the* [sic] *understood under* 'value addition' *of ore in the mining industry in general*," Mr. Livesey confirmed that "*you have immediately added value to the ore by creating the concentrate*" and explained that the ore is thereby turned into "*a product that is saleable on the international market*."[1352] Mr. Livesey further emphasized that "[w]*e consider we have created value addition. Just to be clear, we don't consider this to be the request for a smelter, or the requirement, rather, for a smelter.*"[1353] Finally, he added that "*adding a smelter to the project would be value-destructive, not value accretive*."[1354]

1200. Respondent's witness Mr. Khokhar was also asked during the Hearing whether the processing of ore constitutes value addition:

> "*Q. And turning ore into concentrate is a form of treatment of ore; correct?*
>
> *A. To an extent, yeah, maybe.*
>
> *Q. Okay. And you would agree with me that treatment of the ore adds value to the ore; correct?*
>
> *A. Partially, yes.*"[1355]

[1350] Transcript (Day 5), p. 1317 line 22 to p. 1318 line 9.
[1351] Transcript (Day 4), p. 1037 lines 8-15.
[1352] Transcript (Day 5), p. 1425 line 19 to p. 1427 line 1.
[1353] Transcript (Day 5), p. 1317 lines 15-18.
[1354] Transcript (Day 5), p. 1318 lines 10-11.
[1355] Transcript (Day 7), p. 1773 lines 15-20.

1201. Taking into account the above testimony of the witnesses, the Tribunal considers that the term "*value addition*" in rule 48(3)(a)(vii) of the 2002 BM Rules cannot be interpreted to establish a requirement for a smelter and refinery within Pakistan. If it were otherwise, the Tribunal would have to assume that Respondent introduced the requirement specifically in order to target Claimant's project and to prevail with the GOB's request for a local smelter and refinery; such conduct would then not correspond to *bona fide* regulatory exercise of State power but rather to an abuse of sovereign power to achieve a concession that the Governments had failed to achieve through negotiations with Claimant. In light of the rather general wording of the requirement, which appears to have a different meaning in the industry, the Tribunal does not wish to go that far, but rather finds that TCCP's Mining Lease Application has satisfied this particular requirement by providing a "*concrete proposal*" for processing the ore into concentrate within Pakistan.

1202. The Tribunal recalls that the Licensing Authority further stated in its tenth ground:

> "*That in view of aforementioned reasons, the Committee found that the application submitted by the applicant is not satisfactory. It is also not in the interest of the Government and people of Balochistan that the lease cannot be granted on a documents which is in complete* [sic] *and sketchy*."[1356]

1203. The Licensing Authority thus (also) bases its denial of the Mining Lease Application on the discretionary elements contained in rules 48(3)(a)(v) and (vi) of the 2002 BM Rules pursuant to which a mining lease shall not be granted unless "*the proposals submitted with the application are satisfactory*" and "*it is in the interest of the development of the mineral resources of Balochistan to grant the lease*."[1357]

1204. While these elements indeed granted a certain amount of discretion to the Licensing Authority, the Tribunal also recalls its finding above that Claimant legitimately expected that the Licensing Authority would exercise such discretion in line with the security of tenure conferred in Clause 11.8.2 of the CHEJVA and the assurances given by Government officials throughout the years of Claimant's exploration work at Reko Diq. In particular, Clause 11.8.2 of the CHEJVA provides that Claimant shall be entitled to convert its exploration license into a mining lease "*subject only to compliance with routine Government requirements*."[1358]

1205. In the Tribunal's view, it has to be taken into account at this point that, following the GOB's repeated emphasis on having a local smelter and refinery, Claimant provided the

[1356] **Exhibit CE-7**, ¶ 10.
[1357] **Exhibit RE-1**, rules 48(3)(a)(v) and (vi).
[1358] **Exhibit CE-1**, Clause 11.8.2.

GOB with a white paper that set out the reasons why a local smelter and refinery would (i) "*not* [be] *economically justified*"; (ii) make the Reko Diq project "*unprofitable and therefore unviable*"; and (iii) "*not be necessary in order to ensure that TCC and the GOB are properly paid for the metal content of the concentrate that is produced*."[1359] Respondent further admitted during the Hearing:

> "*At no stage was the Government of Balochistan saying that it would be a profitable element on its own for a smelter to be constructed. But what they were saying was, it was necessary in order to get the social license to operate*."[1360]

1206. In light of this admission, the Tribunal considers that, while the construction of a smelter may have remained a point of negotiation for the Mineral Agreement (as evidenced by Claimant's 5 October 2010 offer to co-finance a feasibility study for a Government-owned smelter and to supply such smelter on mutually acceptable terms),[1361] spending an additional US$ 1 billion on, undisputedly uneconomic, non-mining facilities could certainly not be considered a "*routine*" requirement that the Licensing Authority could have imposed on Claimant as the price for receiving the mining lease. Therefore, the Tribunal finds that the denial of the Mining Lease Application based on such grounds was not in line with Claimant's legitimate expectation that TCCP's Application would be assessed in accordance with the contractual agreements and assurances given to Claimant.

(iii) Third Set of Grounds: TCCP Failed to Submit a Proper/Complete Feasibility Study on the Discovered Deposits in the Exploration Area

1207. Respondent further invokes that, contrary to the regulatory requirements and Claimant's undertaking in the application for the second renewal of Exploration License EL-5, the Feasibility Study that Claimant submitted together with its Mining Lease Application covered only the mine development of two deposits (H-14 and H-15) rather than of all deposits within the exploration area. The second, third, seventh and eight grounds in the Notice of Intent to Reject state:

> "2. *That the company did not make proper feasibility or exploration of the discovered deposits and achieve the targets under the rules.*
>
> *3. That the second renewal application submitted by the applicant, had given declaration that the applicant will submit the complete feasibility of the entire lease/exploration area. The applicant has utterly*

[1359] **Exhibit C-237**, p. 3.
[1360] Transcript (Day 9), p. 2600 lines 13-18.
[1361] **Exhibit CE-257**.

> *failed to submit the said feasibility reports and meaning thereby that they have failed to conduct and complete exploration in the exploration license / granted area.*
>
> […]
>
> *7. The relevant portion on the feasibility study report submitted by the expert committee was also examined by the Mines Committee and found following observation:*
>
> *(i) That the Company has failed to comment or dilate upon rest of discover deposits except H-14 and H-15;*
>
> *(ii) The proposed development, operation and scheme of the mines in programme of the mining operation for the 11 other potential resources is missing/omitted to be considered in the feasibility report;*
>
> *(iii) That the information given by the company in all respect keeping in to consideration the Balochistan Minerals Rules, 2002, the Company has further failed to identify all resources and achievements of all the targets within stipulated time.*
>
> *(iv) Misrepresentation for obtaining exploration licenses EL-6, EL-8, EL-26 and EL-27 where there is no share of partner. Despite being a world class Exploration/ Mining Company so called partner has failed to submit the technical, financial, economical viability report of the entire resources of EL-5 enjoying with special relaxations in all respect allegedly granted by the Government of Balochistan for the last 17 years.*
>
> *(v) There is a default and violation committed under rule 29 (2) (c) (iii) of Balochistan Minerals Rules, 2002 as well as failure to provide the required information as contemplated under rule 47 of Balochistan Minerals Rules, 2002.*
>
> *8. That the submission of the application relating to H-4, H-8, H-13, H-35 and H-79 etc is in violation of rule-48 of Balochistan Minerals Rule, 2002.*"[1362]

1208. Given that it is Claimant's position that the Feasibility Study covered only an initial mine development, which was later to be expanded as set out in the Pre-Feasibility Expansion Study, the Tribunal has to assess whether such a phased development of the mining area is in line with the regulatory requirements under the 2002 BM Rules.

[1362] **Exhibit CE-7**, ¶¶ 2-3, 7-8.

1209. Rules 48(3)(a)(i) and (ii) of the 2002 BM Rules provide that a mining lease shall not be granted unless "*the feasibility studies show that the mine can be profitably developed and operated*" and "*the proposed plans for development and operation of the mine and the programme of the mining operations of the applicant will ensure the efficient, beneficial and timely use of the mineral resources.*"[1363]

1210. Pursuant to rule 47(2)(f) of the 2002 BM Rules, the application for a mining lease "*shall be accompanied by the relevant feasibility studies, and shall include, for the approval of the licensing authority, detailed plans for development and operation of the mine and programme of proposed mining operations, including a forecast of – (i) the date by which the applicant intends to work; (ii) the capacity and expected rate of production and scale of operations; (iii) the anticipated overall recovery or ore and mineral products; and (iv) the nature of the products.*"[1364]

1211. The Tribunal notes that all of the above quoted provisions refer to a "*mine.*" The term is defined in rule 2(za)(i) of the 2002 BM Rules as "*any surface or underground excavation where any operation for the purpose of searching for or obtaining a mineral has been or is being carried on, and includes all works, machinery, tramway, ropeway and siding, whether above or below ground, in or adjacent or belonging to or appurtenant to a mine but does not include the manufacturing or processing plant.*"[1365]

1212. In the Tribunal's view, there is no indication in the above mentioned regulatory requirements that the phased development of a mine is prohibited. In particular, the Tribunal considers that a gradual development does not exclude a profitable development and operation of the mine or an "*efficient, beneficial and timely use of the mineral resources.*" To the contrary, Claimant's witness Mr. Luksic, Chairman of Antofagasta, the world's biggest copper mining company, explained that even if an initial mine development as anticipated at H-14 and H-15 did not turn out to be very profitable, "*the marginal expansions are very profitable.*" Mr. Luksic then explained that this approach is common in the industry and corresponds to what Antofagasta has very successfully been doing at one of its mines in Chile over the past years:

> "A. *Even if you have a start that is tight, your expansions are going to be extremely profitable. We have the experience, we have seen it. And this is how the mining industry operates.*

[1363] **Exhibit RE-1**, rules 48(3)(a)(i) and (ii).
[1364] **Exhibit RE-1**, rule 47(2)(f).
[1365] **Exhibit RE-1**, rule 2(za)(i).

> *Q. You mentioned about the expansion, but if you don't have a feasible and viable project, there is nothing to expand, is there Mr. Luksic?*
>
> *A. Of course there is. This is how the mining industry works. You do your first project, you work for five years, and then you present your next expansion.*"[1366]
>
> …
>
> "*H14 and H15 is a 5 billion tonne resource. You're going to work here, says 2 billion tonnes of those. In what? In 56 years.*
>
> *What you do is you start with a small mine or the smallest viable mine. So, you make the smallest investment first. And then you make marginal expansion on the same deposit, and those marginal expansions are extremely profitable. They're very, very, very useful. And this is what happened for us in one of our mines. We started with a plant the size of 85,000 tonnes per day. In the last ten years, we have taken that mine to 175,000 tonnes per day. And that is what happens in this mining world in mines, and that is what we believe is going to happen with H14 and H15.*"[1367]
>
> …
>
> "*What happens after this … starting project, as I called it, then you start making expansions. You go, and this happens. I mean, you go to any mining board, and that's what we all do when you have resources like this. You can actually expand further, and we have in our case, in one of our mines in Chile, in the last 12 years we have expanded four times, and that's how we managed to get where we are.*"[1368]

1213. In the Tribunal's view, the unrebutted statement of Mr. Luksic that a phased development corresponds to the common practice in the industry is relevant to the interpretation of the regulatory requirements in the 2002 BM Rules. Not only does the Foreword state that the Rules were intended to be "*internationally competitive*," but rule 31(1)(a), *e.g.*, provides that an exploration license holder shall carry on the exploration activities "*in accordance with good exploration practices*," which are defined in rule 2(q) (together with "*good reconnaissance practices*" and "*good mining practices*") as "*practices which are generally accepted internationally by persons involved in reconnaissance operations, exploration operations, or mining operations, as the case may be, as good, safe and necessary in carrying out such operations*."[1369]

[1366] Transcript (Day 3), p. 695 line 13 to p. 696 line 5.
[1367] Transcript (Day 3), p. 721 line 11 to 722 line 3.
[1368] Transcript (Day 3), p. 725 line 20 to p. 726 line 6.
[1369] **Exhibit RE-1**. Foreword, rules 31(1)(a) and 2(q).

1214. In addition, rule 45(1)(b(i) of the 2002 BM Rules expressly provides for the right of a mining lease holder to "*carry on in the mining area, in conjunction with mining operations …, exploration operations in relation to any such mineral or group of minerals.*"[1370] Rule 56(1)(a), which sets out the obligations of the mining lease holder with regard to keeping records on its mining operations, also repeatedly refers to "*exploration operations*" that are carried out within the mining area.[1371]

1215. As a result, the Tribunal is convinced that the 2002 BM Rules do not require an immediate development of all deposits that were discovered within the anticipated mining area throughout the exploration activities, but rather generally allow for a phased development, as intended by Claimant. However, Respondent further argues that Claimant specifically undertook to submit a feasibility study on all deposits that were discovered within the area of Exploration License EL-5 when the Joint Venture filed its application for a second renewal of EL-5 and was therefore required to do so under rule 29(2)(c)(iii) of the 2002 BM Rules.

1216. Rule 29(2)(c)(iii) provides that an application for a second renewal shall not be made "*unless the applicant can satisfy the authority that such a renewal is necessary for the completion of a full feasibility study of the discovered deposits and that the proposed activities could not have been reasonably completed during the period of the first renewal.*"[1372]

1217. In the application for a second renewal of Exploration License EL-5 dated 2 November 2007, the section entitled "*Justification for Second Renewal for 3 years over 90% of Existing El-5 Area*" includes, *inter alia*, the following statement:

> "*With EL-5 to expire in February 2008, the Applicant will be able to commence activities for drawing up the Feasibility Study in the first renewal period but will not be able to complete the same given the time that will be needed to carry out the Feasibility Study to tie the development of all the deposits, which are spread over a large are of EL-5, (some of which are still being reviewed through further drilling work) together into one mining project. …* [T]*he Applicant considers that it requires a renewal for the full three year period over 90% of the existing EL-5 area to be in a position to fully develop the discoveries.*"[1373]

1218. The regulatory requirement in rule 29(2)(c)(iii) of the 2002 BM Rules consists of a "*full feasibility study of the discovered deposits*." In the Tribunal's view, it is clear from the

[1370] **Exhibit RE-1**, rule 45(1)(b)(i).
[1371] **Exhibit RE-1**, rules 56(1)(a)(v), (vi), (vii) and (ix).
[1372] **Exhibit RE-1**, rule 29(2)(c)(iii).
[1373] **Exhibit RE-15**, p. 11.

application for the second renewal of EL-5 that the Joint Venture intended to satisfy this requirement, given that the application was expressly submitted "[p]*ursuant to Rule 29(2) of the Balochistan Mineral Rules, 2002*" and the language in the above statement was apparently used to reflect the language used in the provision itself. In any event, the Tribunal notes that the alleged default referred to in the seventh ground (rule 48(3)(b)) could be based only on a direct violation of rule 29(2)(c)(iii); therefore, the Tribunal will focus on the interpretation of the regulatory requirement itself.

1219. The Tribunal considers that the term "*full feasibility study*" does not mean that TCCP had to submit a feasibility study on each and every deposit within the exploration license area, irrespective of whether such deposit formed part of a reasonable (initial) mine development project. If the provision were interpreted in such a manner, this requirement would impose on the investor the uneconomic and irrational obligation to invest large amounts of money and working hours into the full assessment of deposits that were not meant to be part of the (initial) mine development because they were found to be too small or to have only limited potential in previous pre-feasibility studies.[1374]

1220. In addition, this interpretation would also be contrary to the approach explained by Mr. Luksic to start with a rather small investment into an initial project and then make additional investments into various expansions over the years when the initial investments had already paid off. Given that Respondent does not dispute that this is a common approach in the industry and further given that the 2002 BM Rules contain provisions expressly allowing for such phased development, the Tribunal is not convinced that rule 29(2)(c)(iii) BM Rules should be interpreted to require a development of each deposit to feasibility level before a mining lease can be granted.

1221. In addition, the Tribunal recalls that the GOB was aware of Claimant's actual plans both through the meetings of the Operating Committee and the quarterly reports by means of which Claimant continuously informed the GOB of the progress made at Reko Diq. In particular, the Operating Committee agreed in its 26 October 2007 meeting on the preliminary budget for "*full feasibility study on option 72 ktpd and parallel pre-feasibility study on expansion options*."[1375] Given that Respondent does not contest that "*option 72 kptd*" referred to the Western Porphyries, *i.e.*, the two deposits H-14 and H-15, the GOB was thus aware as of that date that Claimant would prepare a "*full feasibility study*" on these two deposits and, in parallel, a pre-feasibility study on future expansion options.

[1374] Claimant's witness Mr. Luksic confirmed during his oral testimony that such deposits might be developed later, "*once you are completely established in the area, and then you will continue to explore your other targets and hopefully develop now in the future*." Transcript (Day 3), p. 722 lines 11-14.
[1375] **Exhibit CE-64**, p. 3.

1222. Following the approval of this approach, the GOB was kept abreast of Claimant's work through the quarterly reports; Respondent does not allege that there was any indication in these reports that the approach approved by the Operating Committee was subsequently changed or expanded. In addition, the application for the second renewal itself, in its summary of the progress made during the first renewal period, reported that "*the focus of the geological team shifted from the Tanjeel area, primarily to the drill out of the resource at the W*[estern] *P*[orphyries]" and further that "[s]*coping studies for the pre feasibility and feasibility studies was carried out*."[1376]

1223. In its 31 December 2009 memorandum to the Chief Secretary, the MMDD also reported that Claimant was planning to "*produce 110,000 tons of ore and 2000 tons of concentrate per day at the initial stage and to increase it to the maximum of 220,000 tons of ore and 4000 tons of concentrate per day at a later stage*."[1377] This demonstrates that the GOB was aware at all times that Claimant intended to pursue a phased approach with an initial project and future expansions; nevertheless, the GOB never indicated to Claimant prior to completion of the Feasibility Study that it considered the Study's scope to be insufficient and/or incompatible with rule 29(2)(c)(iii) of the 2002 BM Rules.

1224. Finally, the Tribunal is not convinced by Respondent's argument that Claimant intended to block the deposits that it did not intend to mine in the near future from being developed by anyone else. First, Claimant established that its approach corresponds to international mining practice, and second, the GOB intended to apply for the exact same area when it drafted the mining lease application for its own project in 2012 even though it intended to mine only H-4 in the beginning and it remains unclear whether it had any concrete expansion plans beyond this deposit.

1225. Therefore, the Tribunal considers that the Licensing Authority could not use the fact that Feasibility Study covered only H-14 and H-15 while the proposed Mining Area covered a total of 13 discovered deposits, as a ground for denying the Mining Lease Application.

(iv) Conclusion on the Grounds Given in the Notice of Intent to Reject and Remarks on the Procedure

1226. In conclusion, the Tribunal finds that none of the reasons given in the Notice of Intent to Reject could have justified the denial of the Mining Lease Application. In addition, the Tribunal considers that, even though the Licensing Authority, on its face, complied with the procedure set out in rules 48(4) and (5) of the 2002 BM Rules pursuant to which the applicant must be notified of the reasons for the intended refusal and be afforded the

[1376] **Exhibit RE-15**, p. 10.
[1377] **Exhibit C-31**, p. 19.

opportunity to make representations and/or proposals thereon, which in turn must be given due consideration by the Licensing Authority, the Notice of Intent to Reject and the subsequent denial letter did not fulfill the actual purpose of these requirements.

1227. In particular, the Tribunal agrees with Claimant that the reasons set out in the Notice were "*not commensurate with the size of the investment*" because they remained at a very general level and further included several allegations that were false, even on a superficial review. In addition, the Licensing Authority refused, despite Claimant's repeated requests,[1378] to provide any further clarifications on the stated reasons or to meet with Claimant prior to the expiry of the 30-day deadline, which it also refused to extend.[1379]

1228. Finally, the Licensing Authority rejected the Mining Lease Application on 15 November 2011 with a single sentence of reasoning: "*You are hereby informed that your reply was found unsatisfactory under Rules 10, 29 (2) (c) (iii) 47, 48, 52 etc of Balochistan Mining Rules 2002*."[1380] This sentence does not convey the impression that the Licensing Authority took into consideration the arguments raised by TCCP in its 22-page response to the Notice of Intent to Reject, which already set out several of the arguments that were raised and subject to an intense debate in this arbitration.[1381]

1229. As to the administrative appeal that TCCP submitted to the Secretary of the MMDD on 28 November 2011, the Tribunal notes that, following an order of the Supreme Court[1382] and against TCCP's protest,[1383] the Secretary advanced the hearing date on two days' notice.[1384] As a result of this antedating, TCCP could not submit a written rejoinder to the submission of the Licensing Authority and TCCP's CEO could not be present during the hearing.[1385] In addition, Respondent does not dispute that the hearing and TCCP's opportunity to present its arguments was cut short by the Secretary of the MMDD's announcement that he had to leave and travel abroad.[1386] Finally, again following the order of the Supreme Court, the Secretary of the MMDD rendered his decision

[1378] *Cf.* **Exhibits CE-274** and **CE-29**.
[1379] **Exhibits CE-28** and **CE-30**.
[1380] **Exhibit CE-11**.
[1381] *Cf.* **Exhibit CE-8**.
[1382] **Exhibit CE-131**.
[1383] **Exhibit CE-136**.
[1384] **Exhibits CE-132**.
[1385] Claimant also claims that due to the antedating, TCCP's senior counsel could not arrive at the hearing in time. According to Claimant's letter dated 2 March 2012, its senior counsel could not arrive in Quetta before 2.40 p.m. that day. Given that Claimant's witness Mr. Livesey states in his witness statement that the hearing started only at 7 p.m., the Tribunal is of the view that Claimant's submission is not supported by the evidence in the record. *See* **Exhibit CE-136**; Livesey IV, ¶ 112.
[1386] Livesey IV, ¶ 112.

immediately after the hearing and without officially communicating such decision to TCCP.[1387]

1230. As stated above, the Tribunal does not consider it sufficient that the requirements set out under rules 48(4) and (5) of the 2002 BM Rules were complied with from a formal point of view and that the appeal procedure was conducted. In the Tribunal's view, the real question is whether the underlying purpose of these provisions, *i.e.*, to afford the applicant the fundamental right to be heard, was fulfilled. In this regard, the Tribunal considers that the conduct of the Licensing Authority and the Secretary of the MMDD as appellate authority does not correspond to the treatment that Claimant could legitimately expect under the circumstances, *i.e.*, in light of the contractual and regulatory framework as well as the direct assurances given by Government officials on the basis of which it decided to invest more than US$ 240 million and many years of work into the project. Consequently, the Tribunal finds that that the manner in which the application and appeal procedure were carried out amounts to a further violation of the FET obligation.

(b) The Additional Grounds Invoked by Respondent in This Arbitration

1231. As a last step, the Tribunal will assess whether Respondent can rely on additional reasons that were not raised in the Notice of Intent to Reject and whether they provide a justification for the Licensing Authority's decision to deny the Mining Lease Application. Respondent claims that Claimant failed to demonstrate in the Feasibility Study that (i) its project would be profitable; and that (ii) it would have or obtain the financial resources required to carry out the mining operations in an efficient manner. In addition, Respondent alleges that (iii) the security risks of transporting the ore via pipeline to the port of Gwadar had not been adequately addressed; and (iv) the water source for its project had not been fully assessed.

1232. In the Tribunal's view, Respondent should not be allowed to rely on reasons additional to those invoked in the Notice of Intent to Reject because Respondent would thereby be allowed to ignore the procedural requirements set out in rule 48(4) and (5) of the 2002 BM Rules and, more generally, this would violate Claimant's right to be heard both during the procedure before the Licensing Authority and the appeal before the Secretary of the MMDD. Even though Respondent claims that in particular the first additional reason was in fact included in the Licensing Authority's ground no. 7 (iv), the Tribunal further considers that Respondent should not be allowed to benefit from the fact that the language used by the Licensing Authority was very broad and could have been interpreted in many

[1387] **Exhibit CE-137**.

ways. The Tribunal also takes into account that, as noted above, the Licensing Authority refused to provide clarifications on the reasons, despite Claimant's repeated requests in this regard.

1233. In any event, the Tribunal is of the view that none of the additional reasons invoked by Respondent would justify the denial of the Mining Lease Application in the present case.

(i) The First Additional Reason: TCCP Failed to Prove that the Mine Could Be Profitably Developed and Operated

1234. As to the first reason, *i.e.*, that Claimant failed to demonstrate in the Feasibility Study "*that the mine can be profitably developed and operated*" as required under rule 48(3)(a)(i) of the 2002 BM Rules, the Tribunal recalls the oral testimony of Claimant's witness Mr. Luksic who explained that "[e]*ven if you have a start that is tight, your expansions are going to be extremely, extremely profitable*."[1388] In light of this undisputed testimony and further taking into account the fact that two of the world's largest mining companies were willing to invest large amounts of equity into this project, the Tribunal considers it sufficiently established that the mining project as envisaged by Claimant, *i.e.*, consisting of the initial mine development set out in the Feasibility Study and the expansions set out in the Pre-Feasibility Expansion Study, could be "*profitably developed and operated*" as required under rule 48(3)(a)(i) of the 2002 BM Rules.

1235. However, the Tribunal is aware that, contrary to the Feasibility Study, the Pre-Feasibility Expansion Study that Claimant completed in July 2010 was not part of the documents that supported TCCP's Mining Lease Application. While the Feasibility Study contains a few references to an "*Expansion Study*" or a "*second phase feasibility study*" that it expected to be completed in the second quarter of 2010,[1389] such references were not made in the context of increasing the profitability of the mine; thus, the Licensing Authority was not made aware, through the documents submitted together with the Application, of the economics as described by Mr. Luksic.

1236. The Tribunal thus considers it essential whether the Licensing Authority nevertheless had knowledge of the fact that the anticipated expansions in the future would considerably improve the profitability of the mine over its 56-year life span. In this regard, the Tribunal notes that on 19 January 2011, Dr. Mubarakmand submitted to the Supreme Court that "*the Feasibility Study submitted by TCC is just the tip of the ice berg in the EL-5 area*" and added that the GOB's project would yield a net profit of US$ 131.824 billion during

[1388] Transcript (Day 3), p. 695 lines 13-17.
[1389] *Cf.* **Exhibits CE-97**, p. 1-1; **CE-98**, p. 2-1; **CE-99**, p. 4-3.

the life of the mine.[1390] Together with the above mentioned fact that Claimant's shareholders, two highly experienced mining companies, were willing to contribute their equity into the project, this strongly indicated that the project would indeed yield considerable profits over its life span.

1237. In this regard, the Tribunal further notes that, if the Licensing Authority had observed the procedure set out in rule 48(4) of the 2002 BM Rules in this respect, Claimant would have had the opportunity to clarify its concept and explain the increasing profitability of the project through its expansions. The Licensing Authority's failure to (clearly) mention this ground in its Notice of Intent to Reject and to clarify its reasons must not go to the detriment of Claimant.

1238. In any event, the Tribunal is not convinced by Respondent's argument that the initial mine development as presented in the Feasibility Study would have been unprofitable. While Respondent focused its argument primarily on the allegation that Claimant made wrong assumptions with regard to the tax and royalty regime, Claimant's witness Mr. Livesey explained during the Hearing that the profitability was much more sensitive to the prices of fuel and metals, in particular copper, and further stated that in light of the subsequent rise of the copper prices after the completion of the Feasibility Study, the profitability had increased "*into high teens to twenties IRR even in the normal tax regime.*"[1391] This is reflected in the sensitivity analysis on metal prices conducted in Chapters 28.3.1 and 28.3.2 of the Feasibility Study, which further includes the statement that a "*conservative base copper price*" was selected for this analysis.[1392]

1239. Finally, with regard to Respondent's argument that Claimant made wrong assumptions as to the tax and royalty regime, the Tribunal notes that the applicable tax and royalty rates were still subject to the Mineral Agreement negotiations. While such negotiations had apparently stalled before the Mining Lease Application was filed, the parties may well have decided to revive them after the grant of the mining lease, given that Claimant would then have been the only one allowed to conduct mining operations in the area. There would thus have been a mutual interest to achieve agreement on the remaining issues. In the Tribunal's view, Claimant would have been in a far better bargaining position as holder of the mining lease over the area than it was before, in particular once it became clear that the Governments considered that Claimant did not have a right to convert its

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[1390] **Exhibit C-111**, pp. 6-8.
[1391] Transcript (Day 5), p. 1398 lines 12-22. *See* also pp. 1410-1422.
[1392] **Exhibit RE-133**, pp. 28-20 to 28-26. Specifically with regard to Table 28.20 entitled "*Impact of Price on IRR*," Mr. Livesey further explained that "*if you were to take today's prices on copper and gold, you would actually be off the chart another block to the right, down on that bottom line, and your IRR would be somewhat close to 20 percent.*" Transcript (Day 5), p. 1415 lines 16-19.

exploration license into a mining lease. Therefore, the Tribunal is not convinced that Claimant made unrealistic assumptions in the absence of which the project would have been unprofitable without any future expansions.

(ii) The Second Additional Reason: TCCP Failed to Establish That It Had or Could Obtain the Resources to Carry Out the Mining Operations Effectively

1240. As to the second additional reason, *i.e.*, that TCCP failed to demonstrate that it had or could obtain the "*technical and financial resources and experience to carry out mining operations effectively*" as required under rule 48(3)(a)(iii) of the 2002 BM Rules, Respondent claims that TCCP addressed third-party financing in the Feasibility Study only in the "*vaguest and most incomplete and unsatisfactory of terms*."[1393]

1241. As part of its Introduction, the Feasibility Study sets out Claimant's Financing Strategy as follows:

> "*TCC's Financing Plan for the project is to finance the development and commissioning of the project with a combination of Senior Debt advanced by a group of lenders and Shareholder Equity and subordinated Shareholder Loans provided by the project sponsors.*
>
> *The Senior Debt will be a traditional* 'Project Financing' *structure, similar to the structure that the sponsors have successfully put in place for other projects. Project Financing is typically sourced via consortiums consisting primarily of large international financial institutions (IFIs), governmental Export Credit Agencies (ECAs) and commercial banks.*
>
> *Given the large capital requirement for Reko Diq the funding approach to be undertaken will involve discussions with a large number of ECAs, IFIs, and commercial banks. Additional funding sources, including the potential for an Islamic tranche or funding tied to off-take will be evaluated. Finally, the potential to fund particular items that make up the overall capital number is being evaluated, particularly in connection with the power solution for Reko Diq and the port.*"[1394]

1242. It is further noted in the Introduction that it is important for the investment decision of each stakeholder whether the required contribution of equity and corporate guarantees is affordable and whether conventional financial institutions will fund the project, "*particularly given the challenging aspects of the project.*" However, it is further noted

[1393] Respondent's Post-Hearing Brief, ¶ 129.
[1394] **Exhibit CE-98**, p. 2-10.

that "[w]*hile certain preliminary work has been undertaken during the FS stage in relation to both* 'fundability' *and* 'affordability'*, it is generally not deemed appropriate to attend too much to these aspects of the project until completion of the FS and, wherein, there is a well defined project and well defined financial requirements.*" Finally, the Feasibility Study expressly refers to the 2002 BM Rules that "*require that the anticipated source of funding is addressed within the FS*" and concludes that the above quoted information about the Financing Strategy "*satisfies that requirement*."[1395]

1243. The Tribunal further recalls that during the Hearing, Claimant's witness Mr. Luksic referred to meetings that Claimant's shareholders had with the World Bank, which supported a program for developing mining in Balochistan, the Asian Development Bank and "*a few others, agencies that were very, very interested*" in financing or being part of the financing of the project.[1396] In response to the question why no documents were on the records that could support that statement, Mr. Luksic explained: "*I don't think we ever got to that stage. We had lots of meetings, lots of previous meetings. We prepared, and you need to have a fully approved project before you get the financing.*"[1397]

1244. Finally, in response to Respondent's suggestion that "*without a Mineral Agreement … it would have been impossible or at least very difficult to obtain external funding for this project,*" Mr. Luksic stated: "*I'm not so sure. I mean, the World Bank seemed very committed. …* [T]*hey were very committed to Pakistan developing mining. It had a special man in charge of a mining program, and they were very committed*."[1398]

1245. In light of this testimony and again taking into account that Antofagasta and Barrick Gold as two of the world's largest mining companies were willing to contribute large amounts of equity to the project, it appears improbable that they would not have been able to obtain third-party financing from financial institutions, such as the World Bank and/or the Asian Development Bank. In the Tribunal's view, the absence of a Mineral Agreement might have made such financing more challenging, but there was no indication that it would have been impossible.

1246. In addition and apart from the above mentioned fact that the parties might have decided to resume the negotiations on the Mineral Agreement after the grant of a mining lease, the Tribunal considers that the requirement that Respondent tries to impose on Claimant with regard to the financing details is not realistic. Mr. Luksic confirmed what is stated in the Feasibility Study, *i.e.*, that it is premature to have more than general discussions on

[1395] **Exhibit CE-98**, p. 2-9.
[1396] Transcript (Day 3), p. 635 lines 5-10.
[1397] Transcript (Day 3), p. 635 lines 15-18.
[1398] Transcript (Day 3), p. 675 lines 6-17.

financing before the project is approved and its financial requirements are determined. This applies in particular when, as in the present case, the third-party financing is meant to be based on a project-financing structure, which naturally requires that the basic parameters of the project are fixed before a financing institution will enter into any commitment or even make a binding offer as to the financing conditions.

1247. Therefore, the Tribunal considers that the information given in the Feasibility Study satisfied the requirement under rule 48(3)(a)(iii) of the 2002 BM Rules in the present context and the Licensing Authority therefore could not deny the Mining Lease Application on this basis.

(iii) The Third Additional Reason: TCCP Failed to Adequately Address the Security Risks of the Pipeline

1248. As to the third additional reason that Respondent invokes, *i.e.*, that TCCP failed to adequately address the security risks associated with transporting the concentrate via pipeline to the port of Gwadar, Respondent refers in particular to the following statement made in the Bankable Feasibility Report on the pipeline prepared by the pipeline construction company PSI:

> "*The safety and security only includes minor support for the offices. No safety and security has been included in the estimate due to the unknown issues related to Pakistan. These issues need to be understood to provide a better cost estimate for this important task.*"[1399]

1249. The Tribunal notes that the security risks were subject to an extensive discussion with Claimant's witness Mr. Livesey during the Hearing. Specifically with regard to this statement, Mr. Livesey explained that PSI is "*not a pipeline security company, so the security risk issues are transferred across to security which, primarily for this project was handled by Barrick's global security VP and his team in Toronto. And it was input from them that added security into the CAPEX and OPEX in the Feasibility Study under G&A.*"[1400]

1250. Mr. Livesey further explained that, contrary to Respondent's allegation, Claimant did recognize the security risks and dedicated a separate section to this matter; specifically with regard to the pipeline, it had a mitigation strategy to avoid business disruption, which would involve "*security along the pipeline using the local communities*."[1401] The Tribunal notes that this strategy is reflected in the section entitled "*Business Strategy*," which sets

[1399] **Exhibit RE-119**, p. 71.
[1400] Transcript (Day 5), p. 1262 lines 7-13.
[1401] Transcript (Day 5), p. 1254 lines 12-19.

out three levels of strategic partnerships intended to reduce project risk: (i) the joint venture of Antofagasta and Barrick Gold, the partnership with the GOB and the "*network of relationships with service and infrastructure providers and the socio-economic participants*."[1402] The security chapter of the Feasibility Study further includes the following statement:

> "*The concentrate pipeline route, choke and valve stations, and Panjgur drivers' rest stop will be patrolled by a light truck, a driver, and a guard on 24 h/d, 7 d/w basis. The three stations will be monitored by CCTV and access control and alarm systems.*"[1403]

1251. When asked about the Sui gas pipeline, which has been subject to various attacks and therefore has an extensive security concept implemented, Mr. Livesey explained:

> "[T]*he Sui has pipeline and the rest of the gas infrastructure in Balochistan does not pay any royalty or revenue to Balochistan itself, so it's naturally a target because it's seen by the Balochis as being a non-Balochi project. It's being seen as something that is not adding value to them necessarily.*
>
> *The Sui gas pipeline is, I think, I would guess, 800 kilometers away from us, and it's a very easy target for exactly that reason. We would be paying royalty and we would have, we assumed, an equity stakeholder from the government, and we would be engaging with the local community to provide ongoing support for the project. So we felt our level of risk was much lower than in the gas pipelines, and that was our position.*"[1404]

1252. Mr. Livesey further explained why they considered that the pipeline was a safer option than using trucks or railway:

> "*When we did the analysis of the trade-off studies for the transport routes, we found that the chances of serious incidents on the roads were extremely high. It was another reason why we weren't keen on using the roadways, and we knew that on the rail the costs would be high and we wouldn't have access to it. And the rail itself is also subject to a lot of interruption from attacks. I think there has been probably half as many attacks on the rail as there has in the gas pipelines in the last ten years.*
>
> *… So, the pipeline option to us offered the safest and the cheapest option. We're talking about an 8-inch pipeline buried here in the ground*

[1402] **Exhibit CE-98**, p. 2-9.
[1403] **Exhibit CE-255**, p. 19-40.
[1404] Transcript (Day 5), p. 1255 line 10 to p. 1256 line 3.

> *with roving patrols along that pipeline made up of people from the local communities who benefit from that pipeline and that route staying in existence.*"[1405]
>
> …
>
> "[Y]*ou've got an issue there with community relations by bringing in outsiders. And this is one of the risks that we looked at with trucking. If you bring in a trucking fleet to provide transport, there is no existing Balochistan company that can provide a contract trucking fleet with the 600, 700, 800 trucks required for the project.*
>
> *So, that likelihood is that that trucking firm will be tendered out to somebody from Karachi or from Sindh or Punjab. You would immediately bring into conflict that entire trucking route with the people of Balochistan, and this is exactly the sort of thing we're trying to avoid. We are trying to build this as Balochi-centric project. That's one of the reasons we moved away from Port Qasim and Port Karachi as our preferred port of operation because by moving to Gwadar you keep the entire project in Balochistan. It gives you a better chance to build that relationship with your partner, Balochistan, the 25 percent equity stakeholder in the project, potentially 25 percent stakeholder in the project.*"[1406]

1253. The Tribunal is of the view that Mr. Livesey's testimony is supported by the fact that the Feasibility Study contained separate sections on both security and risks, which identified certain issues and set out the strategies to address them.[1407] While it is true that it is also stated in the chapter on asset evaluation that certain "*residual risks*," including security risks, were identified the value of which was not included in the economic evaluation of the project,[1408] the Tribunal does not agree with Respondent that TCCP therefore failed to adequately address security risks. The same section cited by Respondent states that such risks "*will require further mitigation attention during the subsequent stages*." In the Tribunal's view, it is plausible that not all risks can be fully assessed and quantified at such an early stage of the project and that the risk mitigation strategy evolves over time and the further development of the project. Therefore, the Tribunal sees no reason to assume a failure on the part of TCCP to adequately address security risks in the Feasibility Study.

[1405] Transcript (Day 5), p. 1264 line 18 to p. 1265 line 12.
[1406] Transcript (Day 5), p. 1274 line 11 to p. 1275 line 9.
[1407] *Cf.* **Exhibits RE-132** and **RE-134**.
[1408] **Exhibit RE-133**, p. 28-30.

1254. Finally, Mr. Livesey emphasized that at no point until the rejection of the Mining Lease Application did the GOB raise any concerns and that, in fact, the pipeline was not even mentioned in the Notice of Intent to Reject. He concluded that "*I don't see why this is all of a sudden become a significant issue.*"[1409]

1255. At this point, the Tribunal notes that the GOB had known about the option to transport the concentrate by means of a slurry pipeline since December 2007 when Claimant presented the transport options as part of its Mineral Agreement Proposals to the Governments in Dubai.[1410] While the GOB did express its interest in having built a road to Gwadar in order to improve the infrastructure of the region, there is no indication in the record that it ever raised any security concerns with regard to the pipeline option. Respondent's witness Mr. Yaqoob confirmed during the Hearing that "*there was no official discussion with the Government of Balochistan on security issues*" and further that, to his knowledge, there was also no internal discussion between the Licensing Authority and the GOB.[1411]

1256. Further taking into account the fact that the pipeline as such, let alone the allegedly ignored security risks, were not mentioned in the Notice of Intent to Reject, the Tribunal is therefore not convinced that this additional reason invoked by Respondent in this arbitration played any role in the decision-making process of the Licensing Authority at the relevant time.

(iv) The Fourth Additional Reason: TCCP Failed to Fully Assess the Water Source for its Project

1257. As to the fourth additional reason, *i.e.*, that TCCP failed to assess the water source that it intended to use for its project to full feasibility level, Respondent relies in particular on the statement made in the Final Report on the Water Resource Assessment that "[a]*ll Preferred Groundwater Source acquifers span international borders,*" *i.e.*, Iran or Afghanistan; however,

> "*Hydrogeological assessment has been restricted to specific localities in Pakistan as permission from the Client to assess the adjacent groundwater resources by visiting Iran and Afghanistan was not received. Thus hydrogeological assessment of these areas to Feasibility level has not been carried out*."[1412]

[1409] Transcript (Day 5), p. 1281 line 16 to p. 1282 line 13.
[1410] *Cf.* **Exhibit CE-219**, pp. 41, 46.
[1411] Transcript (Day 7), p. 1925 lines 5-12.
[1412] **Exhibit CE-410**, pp. 1-1 to 1-2.

1258. It thus appears that, as far as the Pakistani side of the acquifer is concerned, it is undisputed that Claimant did make a full feasibility assessment of the groundwater source that it intended to use for the project, *i.e.*, the Baghicha Bore Field.[1413] The dispute between the Parties rather relates to the question whether it was inadequate for TCCP not to make the same assessment for the Afghan side of the acquifer because this would result in a substantial uncertainty for the project's water supply.

1259. The Tribunal notes that, as emphasized by Claimant's witness Mr. Livesey during the Hearing,[1414] the section quoted by Respondent above continues as follows:

> "*Although most aquifers appear regionally extensive and the confidence level of hydrogeological extrapolation appears reasonable, there is a risk of hydrogeological misinterpretation as a large percentage of some aquifers cannot be physically assessed and tested.*"[1415]

1260. Mr. Livesey explained that the statement relied on by Respondent related primarily to the other groundwater sources that were assessed in the Final Report because "*the bulk of the Tahlab and the Patangaz head waters are in Iran,*" and they feed the Tahlab valley, the Tahlab River and the Saindak river; by contrast, "*in the case of the fan sediments which was our selected area, the water flow was from Pakistan into Afghanistan, so, the feasibility of the water quantities in Afghanistan doesn't impact – it's not flowing back into Pakistan, it's flowing the other way.*"[1416]

1261. In addition, Mr. Livesey laid out that in order to mitigate the risk of not receiving the required quantities from the Baghicha source, Claimant maintained licenses to the other areas, which gave them extraction rights with regard to the other water sources, if needed.[1417]

1262. In addition to Mr. Livesey's convincing testimony on this issue, the Tribunal notes that, according to its own Feasibility Study for the Supply of Water submitted on 7 September 2012, the GOB chose the same water source for its own mining project, citing the following advantages over other potential groundwater sources: "*No other groundwater user*"; "*Large volume of groundwater storage*"; "*Easy accessibility of pipe line route*"; and "*Most of area of resource is in Pakistan*."[1418]

[1413] *Cf.* **Exhibit CE-410**, pp. ES-12 and 1-1.
[1414] Transcript (Day 5), p. 1328 lines 4-8.
[1415] **Exhibit CE-410**, p. 1-2.
[1416] Transcript (Day 5), p. 1329 line 16 to p. 1331 line 1.
[1417] Transcript (Day 5), p. 1331 lines 5-13.
[1418] **Exhibit CE-372**, pp. 12-13.

1263. Based on this record, the Tribunal is convinced that Claimant did in fact make an adequate assessment of the groundwater source it intended to use for its project so that Respondent's fourth additional reason also does not present a justifiable basis for denying TCCP's Mining Lease Application.

iii. Conclusion

1264. In conclusion, the Tribunal finds that none of the reasons invoked in the Notice of Intent to Reject and/or in this arbitration justified the Licensing Authority's decision to deny TCCP's Mining Lease Application. The Tribunal is convinced that the real motive for the denial was the fact that the GOB had decided to develop and implement its own mining project rather than to collaborate with Claimant pursuant to the CHEJVA and that the grounds invoked by the Licensing Authority served only as a pretext to conceal this motive. The Tribunal recalls that Respondent had created legitimate expectations on Claimant's part that it would be entitled to convert its exploration license into a mining lease "*subject only to compliance with routine Government requirements*." Given that Claimant in fact fulfilled all of the requirements under rule 48 of the 2002 BM Rules in its Mining Lease Application, Respondent's denial, motivated by its desire to mine the area on its own, violated Claimant's legitimate expectations and thereby breached the FET obligation under Article 3(2) of the Treaty.

1265. As a result of this finding, the Tribunal does not have to express an opinion as to whether this conduct, together with the Governments' conduct in the Mineral Agreement negotiations and/or the Supreme Court proceedings amounted to a composite breach of the FET standard.

D. DID PAKISTAN BREACH ARTICLE 7(1) OF THE TREATY?

1266. There is no dispute between the Parties as regards the applicable expropriation standard, which is contained in Article 7(1) of the Treaty:

> "*Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') the investments of investors of the other Party unless the following conditions are complied with:*
>
> *(a) the expropriation is for a public purpose related to the internal needs of that Party and under due process of law;*
>
> *(b) the expropriation is non-discriminatory; and*

> *(c) the expropriation is accompanied by the payment of prompt, adequate and effective compensation*."[1419]

1. Summary of Claimant's Position

1267. Claimant alleges that Pakistan breached Article 7(1) of the Treaty by, without payment of any compensation, (a) arbitrarily depriving TCCA of its right to mine Reko Diq; and (b) appropriating information and data from TCC's exploration work and studies in order to use them in Balochistan's own project.[1420] According to Claimant, Respondent deprived Claimant of its investment "*precisely in order take over the project for itself*"; therefore, the Governments' conduct amounts to an expropriation pursuant to either a "*pure* 'effects' *test or a more motivation-centered test.*"[1421]

a. Pakistan Unlawfully Expropriated TCCA's Right to Mine Reko Diq

i. The Right to Mine Reko Diq Is a Protected Investment Under the Treaty

1268. Claimant submits that "*TCCA's right to mine Reko Diq subject only to compliance with certain routine requirements*" qualifies as an investment within the meaning of Article 1(1) of the Treaty and is thus protected by the expropriation provision under Article 7(1).[1422]

1269. Claimant refers to the tribunal in *Siemens v. Argentina*, which observed that the State parties to an investment treaty have confirmed that contractual rights can be expropriated where a contract "*falls under the definition of* 'investment' *under the treaty*" and the expropriation provision of the treaty refers to "*expropriation or nationalization of investments.*"[1423] Claimant also cites the tribunal in *Vivendi v. Argentina (III)*, which confirmed that:

> "*the taking away or destruction of rights acquired, transmitted and defined by contract is as much a wrong entitling the sufferer to redress as the taking away or destruction of a tangible property*."[1424]

1270. Claimant claims that its right to mine Reko Diq arises under Article 11.8.2 of the CHEJVA as well as under rule 48(1)(b) of the 2002 BM Rules, both of which provide for the grant of a mining lease subject to the satisfaction of "*routine requirements*" (*i.e.*, those

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[1419] **Exhibit CE-4**. Article 7(1).
[1420] Memorial, ¶ 505; Reply, ¶ 452.
[1421] Claimant's Post-Hearing Brief, ¶ 216.
[1422] Memorial, ¶ 507. **Exhibit CE-4,** Article 1(1).
[1423] Memorial, ¶ 508. *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007 ("*Siemens* v. Argentina") [CA-58], ¶ 267.
[1424] Memorial, ¶ 508; *Vivendi II v. Argentina* [CA-52], ¶¶ 7.5.4, 7.5.18-7.5.19.

specified in rule 48).[1425] In Claimant's view, TCCP's Mining Lease Application "*by far exceeded*" those "*routine Government requirements*."[1426]

1271. In relation to Pakistan's argument that the scope of Article 7(1) is limited to specific property rights, Claimant maintains that the provision protects TCCA's investment "*as a whole*," *i.e.*, the mining business that it developed in Pakistan, which included, but was not limited to, the right to mine Reko Diq and the data and information contained in the Feasibility Study.[1427]

ii. Balochistan's Rejection of the Mining Lease Application Constitutes an Expropriation

1272. Claimant submits that Balochistan's rejection of the Mining Lease Application in pursuit of its scheme to take over TCC's project deprived TCC of its right to mine Reko Diq and therefore constitutes a measure "*having effect equivalent to nationalisation or expropriation*" under Article 7(1) of the Treaty.[1428]

1273. Claimant claims that Balochistan acknowledged that its measures constitute a taking and refers to the following documents:[1429]

(i) the 24 December 2009 Cabinet decision to "*tak*[e] *over Rekodiq Copper & Gold Project from TCCP*";[1430]

(ii) the 31 December 2009 memorandum to the Chief Secretary in which the MMDD stated that "*the Government of Balochistan has decided to* ***take over the project from TCCP****";* [1431]

(iii) the 11 February 2010 Working Paper in which the MMDD referred to the Cabinet's decision "*to take over the Reko-Diq Project from Tethyan Copper Company Pakistan (TCCP)*" and considered it "*necessary to engage Legal Advisor / Consultant for advi*[c]*e before issuing legal notice to TCC for cancellation of Exploration Agreement*";[1432] and

(iv) the 22 May 2010 press release in which Balochistan's Directorate of Public Relations referred to an "*official handout*" issued the day before stating that "*the*

[1425] Memorial, ¶ 509. **Exhibit CE-1**, clause 11.8.2; **Exhibit RE-1**, rule 48(1)(b).
[1426] Memorial, ¶ 510.
[1427] Reply, ¶¶ 456-457.
[1428] Memorial, ¶ 511.
[1429] Memorial, ¶ 512; Reply, ¶ 454.
[1430] **Exhibit CE-31**, p. 16.
[1431] **Exhibit CE-31**, p. 20 (emphasis added by Claimant).
[1432] **Exhibit CE-31**, p. 21.

> *foremost objective of the provincial government would be to* ***take full control of Reko-Diq Copper and Gold Project from its present operators*** *. . . and thereafter . . . run the project itself.*"[1433]

1274. Claimant submits that a measure has "*effect equivalent to expropriation*" if it results in "*substantial deprivation, or effectively neutralizes the enjoyment, of an investment*." Claimant refers to the tribunal in *AIG Capital Partners v Kazakhstan*, which held that such measures include

> "*covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part of the use or reasonably to be expected benefit of property even if not necessarily to the obvious benefit of the host State.*"[1434]

1275. Claimant further cites the tribunal in *Alpha Projectholding GmbH v. Ukraine*, which in turn referred to the Iran-United States Claims Tribunal stating in the *Starrett Housing* case:

> "[I]*t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.*"[1435]

1276. Claimant argues that, by rejecting TCCP's Mining Lease Application, Balochistan deprived TCCA of the full value of its investment, on which TCCA had spent more than US$ 240 million and has not yet received anything in exchange, and transferred this value to itself. According to Claimant, Pakistan and Balochistan were fully aware of this value when they took TCCA's contractual and statutory right to mine Reko Diq and thereby rendered TCCA's property rights useless.[1436]

1277. With regard to Respondent's argument that the rejection of the Mining Lease Application was an "*exercise of regulatory power*," which does not amount to expropriation, Claimant argues that TCC did not lose its investment as a result of "*non-discriminatory*" and "bona fide *regulations that aimed at the general welfare*" passed by the Licensing Authority or any other organ of the GOP. Claimant emphasizes that it alleges an expropriation

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[1433] **Exhibit CE-89**, p. 2 (emphasis added by Claimant).
[1434] Memorial, ¶ 513. *AIG Capital Partners Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award of 7 October 2003 ("*AIG v. Kazakhstan*") [CA 75], ¶ 10.3.1.
[1435] Memorial, ¶ 513. *Alpha Projektholding GmbH v. Ukraine AS*, ICSID Case No. ARB/07/16, Award of 8 November 2010 ("Alpha Projektholding *v. Ukraine*")[CA 72], ¶ 408.
[1436] Memorial, ¶¶ 515-519.

resulting from the passage of the 2002 BM Rules or other Pakistani legislation, but that it contends that Pakistan expropriated TCCA's investment by arbitrarily denying TCCP's Mining Lease Application, taking over TCC's project and using the information and data that TCCA had obtained as a result of its exploration and feasibility work.[1437] In Claimant's view, the Licensing Authority and the Secretary of the MMDD acted *mala fide*, and in an arbitrary and discriminatory manner when they denied the Mining Lease Application to implement the preordained decision that the Application be "*dispose*[d] *of*" so that Balochistan could then take over the Reko Diq Project from TCCP and use the data and information from the Feasibility Study to mine the valuable deposits that TCC had identified[1438]

1278. Claimant submits that this conduct amounts to an expropriation under Article 7(1) of the Treaty, despite the fact the Licensing Authority pretended to apply the criteria of rule 48(3) of the 2002 BM Rules.[1439] Claimant refers to the tribunal in *Vivendi v. Argentina (III)*, which commented that "*international tribunals, jurists and scholars have consistently appreciated that* state*s may accomplish expropriations in ways . . . that may seek to cloak expropriative conduct with a veneer of legitimacy.*"[1440]

1279. Claimant further argues that "*tribunals have recognized that where a government body acts outside the proper bounds of its authority, with the purpose and effect of destroying the value of an investment, the line between ordinary regulatory measures and expropriatory regulatory measures has been crossed*." Therefore, Claimant claims that Respondent cannot defeat its expropriation claim by relying on any exercise of authority under the 2002 BM Rules.[1441]

iii. Pakistan Failed to Pay Prompt, Full and Effective Compensation

1280. Claimant submits that TCCA undisputedly has not received any compensation from Pakistan or Balochistan in connection with the rejection of the Application and argues that this is sufficient, by itself, to render the expropriation of TCCA's investment unlawful and in violation of Article 7(1) of the Treaty, regardless of whether the measures served a public purpose and were non-discriminatory.[1442]

1281. Claimant claims that, as a result, the Tribunal does not need to establish that the expropriation also failed to meet the other requirements of Article 7(1), *i.e.*, whether it (a)

[1437] Reply, ¶¶ 459-460.
[1438] Reply, ¶ 461
[1439] Memorial, ¶ 519; Reply, ¶ 462.
[1440] Reply, ¶ 462. *Vivendi v. Argentina II* [**CA-52**], ¶ 7.5.20.
[1441] Reply, ¶¶ 462-463.
[1442] Memorial, ¶¶ 520-521.

served a public purpose, (b) was not discriminatory and (c) complied with basic notions of due process. In any event, Claimant asserts that Balochistan failed to meet those requirements as well and refers to its argument that the Government ousted TCC from Reko Diq in order to develop its own project.[1443]

b. Pakistan Unlawfully Expropriated the Data and Information from TCC's Feasibility Study

i. The Content of the Feasibility Study Is a Protected Investment Under the Treaty

1282. Claimant submits that TCC's rights to the content of the Feasibility Study as well as other studies that TCC prepared as part of its exploration work qualify as an investment within the definition of Article 1 of the Treaty; in particular, they constitute "*intangible rights*" and "*intellectual and industrial property rights*."[1444]

1283. Claimant notes that, TCC prepared the Feasibility Study and other exploration studies pursuant to Clause 3.2 of the CHEJVA "*at its sole cost.*"[1445] According to Claimant, the Feasibility Study consists of "*nearly 18,000 pages . . . reflect*[ing] *nearly 200 component studies, with 300,000 hours of analysis, review and drafting*"; it "*contains commercially sensitive, highly valuable conclusions that are the culmination of a decade of exploration work at Reko Diq*"; it "*provides detailed guidance for a massive undertaking tailored to Reko Diq's unique characteristics and contains industry secrets and commercially sensitive proprietary information*"; and it "*includes improved processing methods, developed specifically for Reko Diq, which are currently the subject of a patent application in the United States*."[1446]

1284. Claimant refers to Clause 18 of the CHEJVA, pursuant to which "*all Mining Information flowing to a Party by reason of the operation of this Agreement shall be confidential*" and shall not be disclosed "*without the consent of each party . . . to any third person,*" subject only to certain narrow standard exceptions; in addition, the parties agreed to "*take all steps necessary to ensure that the contents of . . . Mining Information . . . shall be known only to such persons as must necessarily acquire such knowledge in the course of their duties*."[1447] In Claimant's view, by agreeing to Clause 18, Pakistan and Balochistan

[1443] Memorial, ¶ 522.
[1444] Memorial, ¶ 524. **Exhibit CE-4,** Art. 1(1)(a)(i) and (iv).
[1445] Memorial, ¶ 525.
[1446] Memorial, ¶ 525 referring to Livesey IV, ¶¶ 46-71.
[1447] Memorial, ¶¶ 526-527. **Exhibit CE-1**, Article 18. Claimant also cites the definition of "*Mining Information*" in Clause 1 of the CHEJVA: "*such information obtained as a result of Joint Venture activities in respect of the Exploration Area as is available including: all surveys, maps, mosaics, aerial photographs, electro-magnetic*

recognized TCC's property rights over the data and information contained in the Feasibility Study and other studies.[1448]

1285. Claimant further notes that the first page of the Feasibility Study expressly reminds Balochistan that the information contained therein is confidential and that the CHEJVA parties had agreed to "*cause their directors, officers, employees and representatives to use the information herein contained only for purposes specified in the CHEJVA and for no other purpose*."[1449]

ii. Pakistan's Use of the Information from the Feasibility Study for Its Own Project Constitutes an Expropriation

1286. Claimant submits that by making unauthorized use of the data and information contained in the Feasibility Study and other studies for Balochistan's project, Pakistan and Balochistan have appropriated TCCA's intellectual rights, commercially sensitive proprietary information and industry secrets. In Claimant's view, TCCA was thereby deprived of the value of its investment, which constitutes a measure "*having effect equivalent to nationalisation or expropriation*" under Article 7(1) of the Treaty.[1450]

1287. According to Claimant, Balochistan's intention to use TCC's exploration data for its own project was acknowledged by Dr. Mubarakmand in a December 2010 TV interview:

> "Now *when we work we will have the results of exploration in front of us which will help us and we will be able to benefit from those results*."[1451]

1288. Claimant argues that Dr. Mubarakmand's statement is confirmed by the fact that Balochistan has:

(i) adopted for its project a mining area, which is identical in size, shape and location to the area that TCC presented at the 25 August 2010 OC meeting when it introduced the Feasibility Study and TCCP outlined in its Mining Lease Application;[1452] and

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tapes, sketches, drawings, memoranda, drill cores, logs of such drill cores, geophysical, geological drill maps, sampling and assay reports, notes."

[1448] Memorial, ¶ 526.

[1449] Memorial, ¶ 528. **Exhibit CE-96**.

[1450] Memorial, ¶¶ 529, 532.

[1451] Memorial, ¶ 530. **Exhibit CE-108**, p. 6.

[1452] Memorial, ¶ 531; Reply, 465. *Compare* **Exhibit CE-283**, p. 15 *with* **Exhibit CE-272**, p. 17. Claimant refers to the mining area identified in Balochistan's draft mining lease application of 25 April 2012 and notes that, even though Balochistan ultimately decided that it was not necessary to apply for a mining lease for the Government's

(ii) used for its water supply project data and information about the Baghicha water source that TCC discovered in 2008 and identified in its Feasibility Study as the best water source for mining operations at Reko Diq.[1453]

1289. With regard to the water source, Claimant claims that the Government could not have chosen the Baghicha water source on any basis other than TCC's Feasibility Study, given that Balochistan's water supply proposal of 20 May 2012 does not indicate that the Government had undertaken any independent work to select this source, which is approximately 80 meters underground and cannot be detected from the surface.[1454] Claimant further submits that on 7 September 2012 Balochistan submitted a "[r]*evised feasibility*" study for the water project, which contained information that was in substance identical to that in the Feasibility Study, and notes that, despite TCCA's requests, Respondent has not produced evidence that it independently undertook any feasibility work for its project.[1455]

1290. In relation to Respondent's argument that the data and information contained in the Feasibility Study and other studies prepared by TCC do not belong to TCCA, but rather to the Government, Claimant submits that neither the CHEJVA nor the 2002 BM Rules permit the Governments to appropriate this data for Balochistan's own project.[1456]

1291. According to Claimant, the fact that the CHEJVA classifies the data as "*Joint Venture Property*" does not grant Balochistan the right to use it to TCC's exclusion because the Mining Information was intended to be used only for the Joint Venture's mining plans and was to remain "*strictly confidential*." Claimant argues that Balochistan would have been entitled to use the data to undertake its own project only if it had been the sole Participating Party and had paid a fair value for TCCA's interest in the Joint Venture, including "*the amount of exploration expense*." However, Claimant claims that by failing to elect to proceed in this manner, Balochistan forfeited any right under the CHEJVA to the Mining Information.[1457]

1292. Claimant also refers to sub-clause 5.3.3 of the CHEJVA pursuant to which Balochistan was permitted to use the Mining Information and explore any area over which "*the Joint*

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project, it nevertheless sought to secure all the land within the area of TCC's previous exploration licenses. Reply, ¶ 465. **Exhibit CE-283**, p. 4.

[1453] Memorial, ¶ 531; Reply, ¶ 466. *Compare* **Exhibit CE- 282**, p. 3 with **Exhibit CE-371**.

[1454] Memorial, ¶ 531; Reply, ¶ 466. **Exhibit CE-371**. Livesey IV, ¶ 150.

[1455] Reply, ¶¶ 467-468. *Compare* **Exhibit CE-251** *with* **Exhibit CE-372**. Claimant submits that the drilling data from the GSP that Respondent relies on could not support Balochistan's planned mining operations, as the documents total only six pages in length and cannot support full-scale mining operations. Reply, ¶ 469. *See* **Exhibits CE-392** and **CE-393**.

[1456] Reply, ¶ 470.

[1457] Reply, ¶ 471. **Exhibit CE-1**, Article 18, sub-clause 11.6.1.

Venture relinquishes any Prospecting License," but "*in dealing with third parties with respect to the relinquished area*, [had to] *maintain strict confidentiality in accordance with the requirements of Article 18.*" Claimant argues that this provision would have been superfluous if Balochistan had been free to use Mining Information in any event.[1458]

1293. Finally, Claimant refers to Respondent's argument that the Governments' use of TCCA's information for Balochistan's own project was permitted under rule 71(1) of the 2002 BM Rules, which provides the Provincial Government with the right to "*data . . . and other information in respect of exploration or mining operations*" and submits that any regulatory action must still comply with the "*fundamental requirements*" of Pakistani law. Claimant refers to Pakistani courts stating that "*if power confer[ed] on an Authority is exercised in bad faith or for any purpose against the concept of law, it is an abuse of power and fraud on the Statute*."[1459]

1294. Claimant notes that the Director General of the MMDD stated in the foreword of the 2002 BM Rules that their purpose was to "*attract the interest of investors on such matters as transparency, . . . security of tenure, . . . independent resolution mechanism etc., and to equitably meet the objectives of investors as well as aspirations of the Government.*" In Claimant's view, the Governments' conduct cannot be reconciled with this purpose, as this would allow a government to become a competitor of the investor without prior disclosure of its intentions or subsequent compensation.[1460]

iii. Pakistan Failed to Pay Prompt, Full and Effective Compensation

1295. Claimant submits that TCCA has undisputedly not received any compensation for Balochistan's unauthorized use of the data and information contained in the Feasibility Study and other studies for purposes of Balochistan's own project and claims that, as a result, Pakistan's expropriation of this data is unlawful and constitutes a violation of Article 7(1) of the Treaty. In relation to the other criteria in Article 7(1), Claimant refers to its argument that the denial of the Mining Lease Application was arbitrary and contends that the expropriation was therefore also carried out without a valid public purpose, without due process and in a discriminatory manner.[1461]

[1458] Reply, ¶ 472. **Exhibit CE-1**, sub-clause 5.3.3 as amended by **Exhibit CE-2**, clause 2.1.
[1459] Reply, ¶ 473. **Exhibit RE-1**, rule 71(1). *Maple Leaf Cement Factory Limited v. Pakistan*, 2001 MLD 500 ("*Maple Leaf v. Pakistan*") [**CA-159**], p. 512A.
[1460] Reply, ¶ 474, **Exhibit RE-1**, p. 7.
[1461] Memorial, ¶¶ 533-534.

2. Summary of Respondent's Position

a. Claimant Never Had the "*Right to Mine Reko Diq*"

1296. Respondent refers to the definition of expropriation used by the tribunal in *Tradex v. Albania*, *i.e.*, a "*compulsory transfer of property rights*,"[1462] and submits that the question whether Claimant has acquired such property rights is determined by Pakistani law. Respondent claims that, contrary to Claimant's allegation, neither the CHEJVA nor the 2002 BM Rules conferred a guaranteed "*right to mine*" Reko Diq upon Claimant.[1463]

1297. Respondent argues that, besides the fact that the CHEJVA was illegal, void and *non-est*, Claimant never complied with the contractual provisions regulating when a joint venture party could apply for a mining lease in relation to an Exploration Area that belonged to the Joint Venture.[1464]

1298. Respondent refers to sub-clause 11.4.2 of the CHEJVA, which provides that "*where the BDA is a Non-participating Party, then subject both to BHPM obtaining all routine Government approvals required and to compliance with Clause 11.6, BHPM shall be entitled to undertake sole risk investment (or form a consortium to undertake such investment in a mining area)*" and claims that Claimant never sought, nor was granted any such Government approval.[1465]

1299. In addition, Respondent submits that Claimant did not satisfy the condition precedent of acquiring its joint venture partner's "*percentage interest pertaining to the proposed Mining Area*" for a price to be agreed by means of negotiations or expert-determination, as set out in Clause 11.6 of the CHEJVA.[1466] Respondent claims that Claimant acknowledges its failure to comply with this provision by stating in its letter to the Secretary of Mines dated 29 April 2011 that the parties had been unable to reach a mutually acceptable decision pursuant to Clause 11.5 within 120 days of the Election Date, referring to its invitation to the GOB to negotiate of 3 March 2011, and, further,

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[1462] *Tradex Hellas SA v Albania*, ICSID Case No. ARB/94/2, Award of 29 April 1999 ("*Tradex v. Albania*") [RLA-102], ¶ 177.
[1463] Counter-Memorial, ¶¶ 584-586; Respondent's Rejoinder, ¶ 482.
[1464] Counter-Memorial, ¶ 587. Respondent also reiterates its argument that neither Respondent nor the GOB was party to the CHEJVA and that a contractual right arising out of it therefore cannot be invoked against either of them. Respondent's Rejoinder, ¶ 482.
[1465] Counter-Memorial, ¶ 588. **Exhibit CE-1**, clause 11.4.
[1466] Counter-Memorial, ¶ 589. Respondent notes that Claimant did not offer to purchase the interest prior to its letter of 3 March 2011, *i.e.*, after the Mining Lease Application had been filed. Counter-Memorial, note 626.

giving notice of its intent to submit the matter to an independent expert and accordingly proposing the name of an expert to determine the fair value of the interest.[1467]

1300. Respondent emphasizes that Claimant did not refer the matter to expert determination, and claims that Claimant's alleged right to apply for a mining lease under Article 11.8.2 thus never arose, before TCCP filed its Mining Lease Application on 15 February 2011.[1468] Respondent further notes that the potential for such right to arise was coterminous with the expiry of Exploration License EL-5 on 19 February 2011.[1469]

1301. In addition, Respondent asserts that, even if the pre-condition was satisfied, Claimant's Mining Lease Application was for 99.473 square kilometers of the area covered by Exploration License EL-5, whereas Claimant's election as a Participating Party was the less than six square kilometers covered by the Feasibility Study. Thus, the question of any entitlement to the remaining 93 or more square kilometers of the area covered by Exploration License EL-5 does not even arise under Article 11.8.2. That sub-clause applies to a Participating Party's right to "*develop a mine*" in the Mining Area whose parameters are determined by the Feasibility Study. Respondent refers to the fact that the Feasibility Study notes that Claimant has the "*right to apply for a mining lease*." [1470]

1302. Respondent further argues that any right under sub-clause 11.8.2 to convert an exploration license into a mining lease was subject to compliance with the routine Government requirements set out in rules 47 and 48 of the 2002 BM Rules and alleges that many of the requirements in rule 48(3) were not satisfied by the Mining Lease Application.[1471] Respondent refers in particular to TCCP's alleged lack of standing to file the Mining Lease Application on its own, given that it had not acquired its joint venture partner's interest pursuant to Clause 11.4 before filing the Application, but only approached its partner to commence negotiations nearly one month later, despite the fact that it had undertaken to comply with the CHEJVA in its 2006 Undertaking.[1472]

1303. Respondent submits that in the absence of a guarantee that Claimant would obtain a right to mine Reko Diq, the right to apply for a mining lease under the CHEJVA does not meet the threshold of an "*investment.*"[1473]

[1467] Counter-Memorial, ¶ 590. **Exhibit CE-115**.
[1468] Counter-Memorial, ¶ 591. The Mining Lease Application was dated 8 February 2011; it was filed 15 February 2011; *see* **Exhibit CE-6**.
[1469] Counter-Memorial, ¶¶ 396, 591; Respondent's Post-Hearing Brief, ¶ 189.
[1470] Counter-Memorial, ¶ 592.
[1471] Counter-Memorial, ¶¶ 593-594.
[1472] Counter-Memorial, ¶¶ 595-597. **Exhibit RE-25**.
[1473] Counter-Memorial, ¶ 599. Respondent refers to the case of *Nagel v. The Czech Republic*, in which the tribunal stated: "*There was not, and could not be, a guarantee that a licence would in fact be obtained. That would depend*

b. Claimant's Case on Expropriation Remains Unclear

1304. With regard to the alleged expropriation of a "*right to mine*," Respondent argues that Claimant does not fulfil the requirements for establishing a breach of Article 7(1) of the Treaty, as it does not specify (i) the precise scope of its alleged guaranteed "*right to mine*"; (ii) when precisely such right was taken; and (iii) whether it was taken other than for a public purpose, discriminatorily and without due process. According to Respondent, the same applies to Claimant's "*claim to performance of the CHEJVA.*"[1474]

1305. In relation to Claimant's claim that "*the mining Business* [it purportedly] *developed in Pakistan*" was expropriated, Respondent contends that Claimant has not defined what is meant by this phrase and has failed to link this alleged investment to an expropriatory act. Similarly, Respondent argues that Claimant refers to undefined "*property rights*" without specifying their nature, scope or source and the wrongful conduct alleged to have amounted to an expropriation.[1475]

c. The Licensing Authority's Exercise of Regulatory Powers Over Mineral Resources Does Not Amount to an Expropriation

1306. Respondent submits that, in refusing TCCP's Mining Lease Application, the Licensing Authority duly exercised its regulatory powers with regard to the grant or refusal of mineral titles in Balochistan in accordance with the 2002 BM Rules.[1476] Respondent claims that the exercise of a state's "*police powers*" will not give rise to a right of compensation under international law, as *bona fide* regulatory measures fall outside the

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on the Government, and the Government had made no undertaking in this regard. Mr Nagel could do no more than hope that his cooperation with the State-owned Czech company SRA would increase his chances to become involved in the operation of GSM in the Czech Republic, but he could not be certain of getting a licence. Although he may have been encouraged by various remarks from Ministers or Government officials or by the general interest they demonstrated in his plans, this was not sufficient, in the Arbitral Tribunal's view, to raise his prospects based on the Cooperation Agreement to the level of a 'legitimate expectation' *with a financial value." Nagel v. The Czech Republic* [RLA-104], ¶ 326. Respondent also refers to the case of *Generation Ukraine v. Ukraine*, in which the tribunal considered it "*important first to identify the object of the alleged expropriation*" and found that "*the Claimant had a very limited bundle of rights arising under the Order on Land Allocation, Lease Agreements, Foundation Agreement and Construction Permit. Thus, if the Kyiv City State Administration's omission on 31 October 1997 did constitute an expropriation, it could only have deprived the Claimant of these legal interests and them alone.*" Counter-Memorial, ¶¶ 604-605. *Generation Ukraine v. Ukraine* [RLA-105], ¶ 20.7. Respondent claims that in the present case, Claimant did not even have a limited bundle of rights in relation to the Mining Lease Application, as its purported rights did not exist. Counter-Memorial, ¶ 606.

[1474] Respondent's Rejoinder, ¶¶ 483-484.

[1475] Respondent's Rejoinder, ¶¶ 485-486.

[1476] Counter-Memorial, ¶ 607; Respondent's Rejoinder, ¶ 479.

scope of the expropriation provisions found in investment treaties.[1477] Respondent refers to the tribunal in *Saluka v. Czech Republic*, which held:

> "*It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.*
>
> . . .
>
> *[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today.*" [1478]

1307. Respondent also cites the tribunal in *Methanex v. USA*, which stated:

> "[A]*s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alios (sic), a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."*[1479]

1308. Finally, Respondent refers to Article 3 of the 1967 OECD Draft Convention on the Protection of Foreign Property, which states that "*no Party shall take any measures depriving, directly or indirectly, of his property a national of another Party*"; however, Respondent emphasizes that pursuant to subsequent notes, "***the concept of 'taking' is not intended to apply to normal and lawful regulatory measures short of direct taking of property rights.***"[1480]

1309. Respondent argues that the Licensing Authority did not cancel a mineral title, but rather refused TCCP's Mining Lease Application because it did not satisfy the requirements under rule 48(3), including the requirement that it be in the best interests for the

[1477] Counter-Memorial, ¶ 608.
[1478] Counter-Memorial, ¶¶ 608, 610. *Saluka v. Czech Republic* [RLA-106], ¶ 262.
[1479] Counter-Memorial, ¶ 609. *Methanex v. USA* [RLA-107]. Respondent further refers to the case of *Genin v. Estonia* in which the Central Bank of Estonia had cancelled an operating license held by a financial institute. Respondent claims that the tribunal in that case found that in light of the political and economic transition prevailing in the country at the time, the State had been acting, through the Central Bank, as a prudent and concerned supervisor in the banking sector. Counter-Memorial, ¶ 611. *Genin v. Estonia* [RLA-93].
[1480] Counter-Memorial, ¶ 612. OECD [RLA-108], p. 8 (emphasis added by Respondent).

development of minerals in Balochistan. According to Respondent, there is no evidence that the refusal was not *bona fide* and not a legitimate exercise of the state's police powers.[1481]

d. The Claim that the Government of Pakistan Expropriated Information and Data in Relation to the Exploration of Reko Diq Fails as a Matter of Law and Fact

1310. Respondent rejects Claimant's allegation that it expropriated "*intellectual and industrial property rights in the Feasibility Study and other works (scoping study, pre-feasibility study, expansion study)*."[1482]

1311. Respondent claims that pursuant to the CHEJVA, the information and data arising from the exploration of the area covered by Exploration License EL-5 is Joint Venture Property; thus, Claimant cannot assume ownership of this information and data without having sought a transfer of its joint venture partner's rights in the Joint Venture Property.[1483] Referring to Claimant's reliance on the confidentiality provision in Clause 18 of the CHEJVA in support of its argument that Balochistan may not use the information to TCC's exclusion, Respondent emphasizes that the CHEJVA does not contain an exclusivity requirement and argues that Claimant therefore cannot be the sole owner of the information.[1484]

1312. Respondent also refers to Claimant's allegation that, by failing to elect to undertake its own project upon payment of a fair value for TCCA's interest in the Joint Venture pursuant to Clause 11.6.1 of the CHEJVA, Balochistan "*forfeited any right under the CHEJVA*." Respondent argues that, to the contrary, only upon payment by Claimant of fair market value for Balochistan's interest would Balochistan have transferred its rights to Joint Venture Property; however, given that this never happened, Balochistan retained its right in the Joint Venture's data and information.[1485]

1313. Respondent further claims that, pursuant to the rule 71 of the 2002 BM Rules, which Claimant undertook to abide by, the Government has exclusive ownership and rights over the data produced during the exploration.[1486] Rule 71 provides:

> *"71. Rights over data - (1)* ***Subject to sub-rule (2), the Government shall have the exclusive right to all data including geological,***

[1481] Counter-Memorial, ¶¶ 613-614.
[1482] Respondent's Rejoinder, ¶ 487.
[1483] Counter-Memorial, ¶ 616; Respondent's Rejoinder, ¶ 489.
[1484] Respondent's Rejoinder, ¶ 489.
[1485] Respondent's Rejoinder, ¶¶ 490-491. **Exhibit CE-1**, clause 11.6.1.
[1486] Counter-Memorial, ¶ 617; Respondent's Rejoinder, ¶ 488.

> ***geophysical, geochemical, petrophysical, engineering, pit logs, maps, magnetic tapes, cores and production data, as well as all interpretative and derivative data including reports, studies, analyses, interpretations, bulk sampling results, assaying results, evaluations and other information in respect of exploration or mining operations.***
>
> *(2) Subject to sub-rule (3) the holder of a mineral tile or mineral concession shall have the right to make use of the data referred to in sub-rule (1), free of costs, for the purpose of exploration or mining operations and to retain copies or samples of material or information constituting the data."*[1487]

1314. Respondent also cites the 1995 NMP, which provides in relevant part:

> *"Proprietary Rights over Data*
>
> *All geodata obtained by a licensee/lessee shall be a property of the Licensing Authority and shall be deposited at such offices and at such intervals as are specified in the Rules."*[1488]

1315. In Respondent's view, Claimant was aware that it did not have any right to the data under rule 71, given that the minutes of the OC Meeting held on 24 February 2007 record that:

> "*Mr Hargreaves noted that GOB had expressed concern at the lack of submission of reports for the previous Tanjeel Feasibility Study. He stated that the full suite of engineering reports, all of which were in draft form at the point of suspension, had been delivered to BDA in early 2006.* ***He added that it could be misleading to submit the draft reports to GOB since these would effectively become public documents*** *containing outdated information, there was risk of extracts of information causing further confusion."*[1489]

1316. Respondent also notes that Claimant's witness Mr. Williams confirmed during the Hearing that Respondent had a right to, and thus owned, the data generated during the exploration of Reko Diq.[1490]

1317. In relation to Claimant's argument that rule 71 may not be read "*in a vacuum*," Respondent argues that (i) rule 71 does not contain a qualifier, but simply grants the Government with "*the exclusive right to all data . . . in respect of exploration or mining operations*"; and

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[1487] Counter-Memorial, ¶ 617. **Exhibit RE-1**, rule 71(1) and (2) (emphasis added by Respondent).
[1488] Counter-Memorial, ¶ 618. **Exhibit CE-190**, ¶ 8.18.
[1489] Counter-Memorial, ¶¶ 619-620. **Exhibit CE-60** (emphasis added by Respondent).
[1490] Respondent's Post-Hearing Brief, ¶ 189. Mr. Williams stated: "*That's the nature of mining around the world that it's reported—the information as it's gathered is regularly reported to the relevant Government authority and that information belongs to the Government as the mineral right.*" Transcript (Day 3), p. 531 lines 2-6.

(ii) the Licensing Authority has not breached any applicable law, but rather its actions have been entirely consistent with its mandate under the 2002 BM Rules.[1491]

1318. Finally, Respondent rejects Claimant's allegation that Balochistan "*used*" the exploration data and information for its own project. Respondent emphasizes that Balochistan's project has not progressed and therefore, by definition, any data from the Feasibility Study cannot have been used for that purpose.[1492]

3. The Tribunal's Analysis

1319. Article 7(1) of the Treaty provides:

> "*Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') the investments of investors of the other Party unless the following conditions are complied with:*
>
> *(a) the expropriation is for a public purpose related to the internal needs of that Party and under due process of law;*
>
> *(b) the expropriation is non-discriminatory; and*
>
> *(c) the expropriation is accompanied by the payment of prompt, adequate and effective compensation.*"[1493]

1320. The Tribunal is aware that Claimant separates its expropriation claim as follows: (i) Respondent arbitrarily deprived Claimant of its right to mine Reko Diq; and (ii) Respondent appropriated information and data from Claimant's exploration work and studies and used them for Balochistan's own project. In the Tribunal's view, however, the second claim is in fact contained within the first claim because the data and information that Claimant collected over the course of its exploration work and processed in its studies, in particular the Feasibility Study, as well as the costs that it incurred in this regard, form part of Claimant's investment at Reko Diq.

a. Claimant's Investment Within the Meaning of Article 7(1) of the Treaty

1321. The Tribunal recalls that it determined above that Claimant's investment is primarily based on two pillars: (i) TCCA's interest in the CHEJVA and the Joint Venture, including in particular the right under Clause 11.8.2; and (ii) its interest in TCCP, which was established for the exclusive purpose of carrying out Claimant's activities in Pakistan and which held all further rights in the Reko Diq project that were not held by the Joint

[1491] Respondent's Rejoinder, ¶ 488.
[1492] Counter-Memorial, ¶ 619; Respondent's Rejoinder, ¶ 492.
[1493] **Exhibit CE-4**, Article 7(1).

Venture. Claimant's interest in the CHEJVA includes a 75% interest in the Joint Venture Property, which is a protected investment under Article 1(1)(a) Treaty because it includes "*tangible and intangible property*" (Article 1(1)(a)(i) of the Treaty); "*intellectual and industrial property rights*" (Article 1(1)(a)(iv) of the Treaty); and "*business concessions and other rights required to conduct economic activity and having economic value*" (Article 1(1)(a)(v) of the Treaty). The information and data that Claimant collected and processed throughout its exploration work forms part of this protected Joint Venture Property.

1322. At this point, the Tribunal notes that it does not follow Claimant's argument that the GOB forfeited its right to the Joint Venture Property by failing to elect to participate in the mining development pursuant to Clause 11.3 of the CHEJVA. Rather, the Tribunal agrees with Respondent that the GOB would have lost its right only upon transferring its interest to TCCA against payment of the fair value of its interest. However, the absence of such transfer does not exclude that Claimant's 75% interest in the Joint Venture Property, and in particular the information and data from Claimant's exploration work and studies, nevertheless formed an important part of its investment, without which the project could not have been implemented.

1323. The Tribunal is further aware of Respondent's argument that the right under Clause 11.8.2 to convert the exploration license into a mining lease "*subject only to compliance with routine Government requirements*" in fact never arose because the procedure under Clauses 11.4 through 11.6 was not completed. However, the Tribunal refers to its finding above that it cannot have been the common intention of the contracting parties that the GOB would be in a position to block TCCP from making a Mining Lease Application on its own by refusing to participate in this procedure. The same must apply to the most essential right of the Joint Venture (or TCCA as the Sole Participating Party) under Clause 11.8.2 to make use of the information and data collected during the exploration period by applying for, and being granted, a mining lease that would allow it to actually mine the area. Consequently, the Tribunal is of the view that Claimant's investment did include the right to convert Exploration License EL-5 into a mining lease upon submission of an application that met all routine regulatory requirements.

b. Respondent's Measure Having an Effect Equivalent to an Expropriation

1324. As a next step, the Tribunal will analyze whether Claimant's investment as determined above was expropriated or made subject to a measure having an equivalent effect and, if so, whether any of the conditions set out in Article 7(1) of the Treaty was not complied with. If that was indeed the case, there is no need for the Tribunal to conduct a separate analysis on Claimant's second expropriation claim.

1325. In its analysis of whether Respondent breached Article 7(1) of the Treaty, the Tribunal will first assess whether Claimant's investment was expropriated or made subject to a measure having an effect equivalent to expropriation. Given that Claimant still has its 75% interest in the CHEJVA and the Joint Venture and still owns 100% of the shares in TCCP, there has been no direct taking of Claimant's investment and it is thus undisputed between the Parties that Respondent has not (directly) expropriated such investment. However, the Parties are in dispute as to whether Respondent's conduct, in particular the denial of the Mining Lease Application but also the GOB's alleged use of the information and data, constituted measures having an effect equivalent to expropriation.

1326. Respondent does not contest Claimant's submission that a measure has an "*effect equivalent to expropriation*" if it results in "*substantial deprivation, or effectively neutralizes the enjoyment of an investment*."[1494] The same is true for Claimant's reference to a statement made by Iran-United States Claims Tribunal in the *Starrett Housing* case that property rights "*must be deemed to have been expropriated*," even though the legal title formally remained with its owner, if the "*State interfere*[d] *with* [the] *property rights to such an extent that these rights are rendered … useless*."[1495]

1327. Therefore, the Tribunal must determine whether Claimant's investment was substantially deprived of its value and/or rendered useless by Respondent's conduct, in particular by the Licensing Authority's decision to deny TCCP's Mining Lease Application.

1328. In this regard, the Tribunal notes that the sole purpose of the Joint Venture under the CHEJVA and, likewise, of TCCP was to carry out the exploration and eventual mining operations at Reko Diq. After Claimant had spent more than US$ 240 million on its exploration work and had completed its Feasibility Study on the Initial Mine Development of the area, TCCP filed an application for a mining lease, which would have allowed Claimant to amortize the expenditures it had incurred during the exploration period. By denying TCCP's Mining Lease Application, however, the Licensing Authority rendered it impossible for Claimant to make use of the information and data it had collected and thereby also rendered Claimant's interest in both the CHEJVA and in TCCP useless. Without a mining lease, neither of them could any longer fulfill their exclusive purpose, after the exploration had been completed; thus, following the denial of TCCP's Application, the value of both the CHEJVA and TCCP was effectively neutralized.

1329. Consequently, the Tribunal finds that the denial of TCCP's Mining Lease Application was a measure having an effect equivalent to expropriation. While the Tribunal is aware of, and agrees with, Respondent's argument that a *bona fide* regulatory measure of the State

[1494] Memorial, ¶ 513.
[1495] Memorial, ¶ 513. The statement is quoted in *Alpha Projektholding GmbH v. Ukraine AS*. [CA 72], ¶ 408.

cannot amount to an expropriation, the Tribunal recalls its finding above that the decision of the Licensing Authority was not justified by any of the grounds invoked in the Notice of Intent to Reject and/or in this arbitration. Rather, it was motivated by the GOB's decision to implement its own project, instead of continuing its collaboration with Claimant, and therefore amounted to a violation of Respondent's FET obligation. At the same time, the Tribunal considers that such a motivation excludes the classification of the denial as a *bona fide* regulatory measure; despite its "*disguise*" as an exercise of regulatory power under rule 48(3) of the 2002 BM Rules, the denial amounts to abuse of sovereign power that can also constitute a measure with expropriatory effect.

1330. Finally, the Tribunal's finding on the motive for denying the Mining Lease Application makes it superfluous to decide whether the expropriatory measure must further satisfy a motivation-centered test (in addition to a pure "*effects*" test) because the denial not only had an expropriatory effect, but it was also based on the GOB's motive to take the value of Claimant's investment for itself and therefore satisfied both tests.

1331. As a result, the Tribunal considers that it does not have to make a separate finding as to whether the GOB's use of the information and data from Claimant's exploration work and studies for its own project amounted to a further expropriatory measure. While it indeed appears from the evidentiary record that the GOB intended to, and did, use information from Claimant's Feasibility Study, in particular with regard to the proposed Mining Area[1496] and the groundwater source,[1497] during the planning phase of its own project,[1498] the Tribunal notes that the GOB did have a right to this information and data both as a Joint Venture partner under the CHEJVA and as the Government under rule 71(1) of the 2002 BM Rules. While the provisions of the CHEJVA may not have granted the GOB a right to use the information and data to Claimant's exclusion but only for the purpose of the project of the Joint Venture (except for information relating to "*relinquished areas*" under Clause 5.3.3, which does not apply in the present case), rule 71(1) of the 2002 BM Rules expressly grants the GOB the "*exclusive right to all data … as well as all interpretative and derivative data including reports, studies … and other information in respect of exploration or mining operations*."[1499]

[1496] The coordinates of the mining area over which Balochistan intended to seek a mining lease is identical to the ones of the proposed Mining Area that TCCP applied for in its Mining Lease Application. *Cf.* **Exhibits CE-283**, p. 15 and **CE-272**, p. 17.
[1497] The information contained in Balochistan's revised feasibility study on the water source for its project is very similar to the information contained in Claimant's Feasibility Study. *Cf.* **Exhibits CE-251** and **CE-372**.
[1498] This is confirmed by Dr. Mubarakmand's statement during an interview that he gave on 15 December 2010: "*Now when we work we will have the results of the exploration in front of us which will help us and we will be able to benefit from those results*." **Exhibit CE-108**, p. 6.
[1499] **Exhibit RE-1**, rule 71(1).

1332. The Tribunal further notes that Claimant's witness Mr. Williams confirmed during the Hearing that it corresponds to "*the nature of mining around the world, that … the information as it's gathered is regularly reported to the relevant Government authority and that information belongs to the Government as the mineral rights*."[1500] However, in response to the suggestion that the Government may thus use the information "*any way they like*," Mr. Williams stated that this was not customary practice but that the information provided to the Government would rather remain confidential between the parties and not be used by the Government.[1501]

1333. In light of the above, the Tribunal does not need to make a separate finding as to whether the use of the data and information from Claimant's exploration work amounts to a further expropriatory measure under Article 7(1) of the Treaty.

c. Non-Compliance with the Legality Requirements for an Expropriatory Measure under Article 7(1) of the Treaty

1334. Having determined that the Licensing Authority's denial of TCCP's Mining Lease Application constituted a measure having an effect equivalent to an expropriation, the Tribunal must now analyze whether this measure complied with the requirements for a lawful expropriation as set out in Article 7(1) of the Treaty. Pursuant to this provision, the expropriatory measure must (i) serve a "*public purpose related to the internal needs of* [Pakistan]"; (ii) be carried out under due process of law; (iii) be non-discriminatory; and (iv) be accompanied by the payment of "*prompt, adequate and effective*" compensation.

1335. While both Parties focused their submissions on the existence (or non-existence) of Claimant's investment and of an expropriatory measure, they are also in dispute as to whether the denial, if considered as an expropriatory measure, complied with the further requirements of Article 7(1) of the Treaty. However, given that Respondent does not allege that Claimant has received any amount of compensation from either Pakistan or Balochistan, it can be considered common ground that the expropriation was not accompanied by the payment of "*prompt, adequate and effective*" compensation.

1336. In addition, the Tribunal has found above that the denial was not based on justified grounds but rather motivated by the GOB's desire to implement its own project instead of collaborating with Claimant under the CHEJVA. Apart from the fact that this finding renders it questionable whether the expropriatory measure served a public purpose, the Tribunal in any event considers that the denial was discriminatory because it favored the

[1500] Transcript (Day 3), p. 531 lines 2-6.
[1501] Transcript (Day 3), p. 531 line 13 to p. 532 line 3.

GOB's local project over the project of a foreign company. While the Tribunal has further found that the procedure by means of which TCCP's Application and its subsequent appeal were denied amounts to a violation of Claimant's legitimate expectations, it does not need to make a finding as to whether this also amounts to a breach of the due process requirement. In any event, Respondent has not complied with (at least) two out of four Treaty requirements and therefore breached Article 7(1) of the Treaty.

E. DID PAKISTAN BREACH ARTICLE 3(3) OF THE TREATY?

1337. Article 3(3) of the Treaty provides as follows:

> *"Each Party shall, subject to its laws, accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments."*[1502]

1. Summary of Claimant's Position

a. The Legal Standard of Non-Impairment Under Article 3(3) of the Treaty

1338. Claimant refers to the tribunal in *Saluka v. Czech Republic* for a definition of the legal standard of impairment. The *Saluka* tribunal stated that the term "*impairment*" includes "*any negative impact or effect caused by measures taken by*" the host State. In addition, the Saluka tribunal held that the term "*enjoyment*" means "*the exercise of a right which includes the beneficial use, interest and purpose to which property may be put, and implies* [the] *right to profits and income therefrom*."[1503]

1339. Claimant emphasizes that Article 3(3) does not require that the impairment be caused by "*arbitrary, unreasonable or discriminatory measures*" in order to constitute a Treaty breach and argues that it is therefore irrelevant in this context whether or not Pakistan's conduct is also unfair and inequitable, within the meaning of Article 3(2) of the Treaty, or arbitrary and discriminatory, within the meaning of Article 7(1)(b) of the Treaty.[1504]

1340. With regard to Pakistan's argument that Article 3(3) has been violated only if Claimant can "*prove*[] *that the measures allegedly constituting such impairment were in breach of Pakistani law*," Claimant claims that the qualifier "*subject to its laws*," on which Respondent relies, does not apply to the non-impairment obligation. Claimant argues that the repetition of the word "*shall*" indicates that Article 3(3) imposes two distinct

[1502] Counter-Memorial, ¶ 570.
[1503] Memorial, ¶ 539; *Saluka v Czech Republic* Partial Award [CA-44], ¶ 458.
[1504] Memorial, ¶¶ 540-541.

obligations on the Contracting States: (i) the full protection and security obligation, which is qualified by the condition that the host State's conduct be "*subject to its laws*"; and (ii) the non-impairment obligation, which is not subject to that condition.[1505]

1341. In any event, even if the qualifier "*subject to its laws*" applied to the non-impairment obligation, Claimant refers to the tribunal in *White Industries v. India*, which held that such a reference does "*not mean that national laws* 'trump' *international laws, or that the content of national law affects the interpretation to be given to obligations freely given by the State*" in an investment treaty.[1506] Claimant submits that the standard by which this Tribunal will determine whether Article 3(3) has been breached is not to be found in the 2002 BM Rules or any other aspect of Pakistani law, but rather in the terms of the Treaty and general international law.[1507]

b. Respondent Breached Its Obligation Not to Impair Claimant's Investment

1342. Claimant submits that Pakistan has breached Article 3(3) of the Treaty because Pakistan and Balochistan have not only impaired but altogether prevented TCCA from managing, maintaining, using, enjoying and disposing of its investment in Reko Diq.[1508]

1343. Claimant argues that Article 3(3) protects TCCA's ability to use the rights and plans it possessed in relation to its investment in Reko Diq (including, *inter alia*, rights under the CHEJVA, the 2002 BM Rules, its Exploration Licenses, its Surface Rights Lease and the "*comprehensive plan to mine Reko Diq*") as an investor would use them in the normal course, *i.e.*, if not impaired by the host State's conduct.[1509]

1344. Claimant claims that Balochistan has impaired TCCA's use of those rights and plans by, for example, (i) taking various measures that prevented TCC from carrying out the plans for a mine at Reko Diq laid out in the Feasibility Study; (ii) trying to undermine the CHEJVA in the Supreme Court proceedings by attacking its validity; (iii) breaking the promises it made in the CHEJVA to support TCC's Mining Lease Application; (iv) unlawfully denying TCC a mining lease; (v) denying TCC's expatriate staff full and

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[1505] Reply, ¶ 481. Claimant's Post-Hearing Brief, ¶ 217.
[1506] Reply, ¶ 482. *White Industries Australia Limited v. Republic of India* (UNCITRAL), Final Award of 30 November 2011 ("*White Industries v. India*") [CA-160], ¶ 11.2.6.
[1507] Reply, ¶ 483. In relation to Pakistan's further arguments that (i) there was no "*promise in the CHEJVA that requires* [TCCA's] *joint venture partner to support its Mining Lease Application*"; (ii) TCCA had "*at best a right to apply for, not receive a mining lease*"; (iii) "[t]*here was no interference with* [TCCA's] *purported right to apply*"; and (iv) "*TCCP's application was duly considered under the 2002 BM Rules*," Claimant submits that these arguments are based on the same assertions that Respondent raises as a defense against TCCA's other claims, which are rebutted in the context of these claims. Reply, ¶ 485.
[1508] Memorial, ¶ 536. In this section, Claimant generally refers to these five specific rights as "*use*."
[1509] Memorial, ¶ 537.

effective access to the Reko Diq site by delaying and denying administrative clearances, which had previously been granted "*as a matter of course*"; (vi) starting to use TCC's plans as the foundation for its own mining project; and (vii) "*purposely hindering and eventually halting*" the Mineral Agreement and Project Agreement negotiations.[1510]

1345. Claimant submits that these acts qualify as an "*impairment*" within the meaning of Article 3(3) of the Treaty. According to Claimant, there can be little question that Balochistan's various measures negatively impacted TCCA and its beneficial use of its investment. Claimant further claims that, even if the impairment were required to be "*arbitrary, unreasonable, or discriminatory,*" Respondent's conduct would satisfy this standard in the present case.[1511]

1346. Claimant concludes that, if ever there was a case of the State impairing the "*management, maintenance, use, enjoyment or disposal of investments*" as set out in Article 3(3) of the Treaty, it would be the wrongful conduct of Pakistan's organs and officials, which prevented TCCA from mining Reko Diq or making any other beneficial use of the work that TCC performed over a decade or enjoying any return on its investment of more than US$ 240 million.[1512]

2. Summary of Respondent's Position

a. The Legal Standard of Non-Impairment Under Article 3(3) of the Treaty

1347. Respondent submits that pursuant to Article 3(3) of the Treaty, any obligation "*not to impair*" is subject to Pakistani law.[1513] According to Respondent, the ordinary meaning of Article 3(3) makes clear that the qualifier "*subject to* [the host State's] *laws*" applies to the non-impairment obligation set out therein; therefore, the application of those laws cannot result in a violation of the Treaty, even if they result in an impairment.[1514]

1348. In relation to Claimant's reliance on the case of *White Industries v. India*, Respondent claims that this case concerned a most-favored nation clause, which was not qualified by

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[1510] Memorial, ¶ 538; ¶ Reply, ¶ 477; Claimant's Post-Hearing Brief, ¶¶ 218-219. Claimant notes that the first denial of a security clearance occurred in December 2009, on the same day that the MMDD replaced the BDA as TCC's Joint Venture partner and three days after the GOB submitted the third and final version of the PC-1 for its own project. **Exhibits CE-94**, **CE-163** and **CE-242**.
[1511] Memorial, ¶¶ 539, 541.
[1512] Reply, ¶ 484; Claimant's Post-Hearing Brief, ¶ 217.
[1513] Counter-Memorial, ¶¶ 570-571.
[1514] Respondent's Rejoinder, ¶ 497; Respondent's Post-Hearing Brief, ¶ 190. In Respondent's view, Claimant's interpretation of Article 3(3) that the qualifier applies only to the full protection and security obligation in the same paragraph, would have been arguable if the provision had been worded as follows: "*Each Party shall not impair the management, maintenance, use, enjoyment or disposal of investments and shall, subject to its laws, accord within its territory protection and security to investments.*" Respondent's Rejoinder, ¶ 497

a comparable phrase; therefore, it cannot provide any guidance as to the statutory interpretation of the non-impairment obligation in the present case.[1515]

1349. Respondent also refers to Claimant's reliance on the case of *Saluka v Czech Republic*, and the tribunal's definition of the term "*impairment*" in that case as "*any negative impact or effect caused by measures taken by*" the host State. Respondent notes that the non-impairment standard in that case was qualified by a requirement of "*reasonableness*," as explained by the tribunal:

> "*The standard of* 'reasonableness' *has no different meaning in this context than in the context of the* 'fair and equitable treatment' *standard with which it is associated; and the same is true with regard to the standard of* 'non-discrimination'. *The standard of* 'reasonableness' *therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of* 'non-discrimination' *requires a rational justification of any differential treatment of a foreign investor.*
>
> . . .
>
> *Insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the* 'fair and equitable treatment' *standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor.*"[1516]

1350. In Respondent's view, this statement contradicts Claimant's assertion that, in the present case, Respondent's measures do not have to be "*arbitrary, unreasonable or discriminatory*" in order to give rise to a breach of Article 3(3).[1517]

b. Respondent Did Not Breach Its Obligation Not to Impair Claimant's Investment

1351. Respondent submits that Claimant has not established any breach of Pakistani law in relation to the management, maintenance, use, enjoyment or disposal of its alleged investments.[1518]

[1515] Respondent's Rejoinder, ¶ 500. *White Industries v. India* [CA-160], ¶ 11.1.4.
[1516] Respondent's Rejoinder, ¶¶ 494-495. *Saluka v. Czech Republic* [**CA-44**], ¶¶ 460-461.
[1517] Respondent's Rejoinder, ¶ 496.
[1518] Counter-Memorial, ¶ 571.

1352. As regards Claimant's plans to mine Reko Diq, Respondent argues that, besides failing to explain how those plans constitute an investment, Claimant cannot show how the alleged unspecified "*various measures*" have impaired its plans in breach of Pakistani law. According to Respondent, the Licensing Authority refused to grant the Mining Lease Application in accordance with its powers under rule 48 of the 2002 BM Rules and TCC's joint venture partner refused to participate in the mining venture in compliance with Article 11.3 of the CHEJVA.[1519]

1353. In relation to Balochistan's conduct in the Supreme Court proceedings, Respondent claims that Balochistan had a duty to the Court to provide the entire record relating to the CHEJVA and took the position that the Court should decide the matter on the merits. According to Respondent, "*Pakistani law permits a party to change or modify its position in court upon the receipt of additional information or documentation.*"[1520]

1354. Referring to Claimant's allegation that Balochistan broke the "*promises it made in the CHEJVA to support TCC's Mining Lease Application,*" Respondent claims that there is no provision in the CHEJVA that requires the joint venture partner to do so. Respondent emphasizes that pursuant to the CHEJVA, the BDA was expressly allowed not to participate in the mining venture, in which event Claimant could make an application at its sole risk, subject to the satisfaction of the required Government regulations and the conditions precedent concerning the acquisition of the BDA's interest pursuant to Article 11.6.[1521]

1355. As for the Licensing Authority's rejection of Claimant's Mining Lease Application, Respondent contends that the decision was made pursuant to the 2002 Mining Rules and does not constitute an impairment. Respondent contends that Claimant did not have a right to receive, but at best a right to apply for, a mining lease, and claims that this right was not interfered with, as TCCP's Application was duly considered under the 2002 BM Rules.[1522] In Respondent's view, the rejection of the Mining Lease Application on "*proper, or at least not unreasonable, grounds*" cannot be considered an impairment of the right to apply for a mining lease.[1523]

[1519] Counter-Memorial, ¶ 575.
[1520] Counter-Memorial, ¶ 576.
[1521] Counter-Memorial, ¶ 577. **Exhibit CE-1**, clause 11.4.2. Respondent maintains that in light of Claimant's failure to fulfill this condition precedent, any right to apply for a mining lease did not arise. Respondent's Post-Hearing Brief, ¶ 190.
[1522] Counter-Memorial, ¶ 578.
[1523] Respondent's Post Hearing Brief, ¶ 190.

1356. Finally, as to the denial of security clearances by the Governments for certain members of Claimant's staff, Respondent contends that Claimant has not established how this conduct constitutes an impairment of its investment.[1524]

3. The Tribunal's Analysis

1357. The Parties are in disagreement as to (a) the applicable standard of non-impairment under Article 3(3) of the Treaty, in particular whether the standard is qualified by the words "*subject to its laws*"; and (b) whether Respondent's conduct, *i.e.*, the denial of the Mining Lease Application but also further individual actions, amounts to a violation of the non-impairment obligation. The Tribunal will therefore first determine the standard applicable to Respondent's obligation to refrain from impairing Claimant's investment in its territory pursuant to Article 3(3) of the Treaty before assessing in a second step whether Respondent's conduct amounts to a violation of this obligation.

a. The Applicable Standard of Non-Impairment

1358. With regard to the applicable standard, the Parties agree that Respondent's non-impairment obligation is provided for in Article 3(3) of the Treaty, which may be quoted again at this point:

> *"Each Party shall, subject to its laws, accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments.*"[1525]

1359. The Parties are in dispute as to (i) whether the qualifier "*subject to its laws*" applies only to the Contracting Parties' obligation to accord protection and security to investments (first part) or also to the obligation to refrain from impairing investments (second part); and (ii) whether an impairment amounts to a violation of the Treaty only if it is caused by "*arbitrary, unreasonable or discriminatory measures.*"

1360. The Tribunal will interpret Article 3(3) of the Treaty pursuant to Article 31(1) of the Vienna Convention, *i.e.*, "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose.*"[1526] The Tribunal agrees with Claimant that the decision to place the qualifier "*subject to its laws*" after the word "*shall*" before the first part of the provision and to repeat the word "*shall*" before the second part of the provision indicates that the Contracting States

[1524] Respondent's Post Hearing Brief, ¶ 190.
[1525] **Exhibit CE-4**, Article 3(3).
[1526] Vienna Convention [CA-141], Article 31(1).

intended to make a distinction between the two obligations contained in this provision – to the effect that only the first obligation is qualified by the term "*subject to its laws*."

1361. In the Tribunal's view, this interpretation is supported by the differing quality of the two obligations: While the obligation to accord protection and security to an investment requires the State to take proactive measures in order to protect the investment, the non-impairment obligation requires the State to refrain from taking measures against the investment. In the context of the obligation to accord protection and security, the Contracting Parties intended to clarify that the State can be expected to take proactive measures only within the framework of its own laws. However, if the qualifier were to be applied literally to the non-impairment obligation, the State would be obliged to refrain from taking measures "*subject to its laws*," to the effect that it would not be prohibited to take measures outside the framework of its laws. It is apparent that this was not the intention of the Contracting Parties.

1362. Respondent's interpretation, on the other hand, would allow the State to impair the investment as long as it would be entitled to do so under its own laws. This interpretation would be contrary to the fundamental principle that a State cannot rely on its domestic law to determine the scope of, and thus to escape its liability under, international law. Therefore, the Tribunal considers that it corresponds to both the ordinary meaning of the provision and the object and purpose of the Treaty that the non-impairment obligation is not qualified by the term "*subject to its laws*."

1363. With regard to the second question whether the impairment must be caused by "*arbitrary, unreasonable or discriminatory measures*," the Tribunal notes that, unlike other treaties (*e.g.*, Article 2(2) of the Australia-Hong Kong BIT[1527] or Article 3(2) of the Australia-Chile BIT[1528]), Article 3(3) of the Australia-Pakistan Treaty does not qualify the non-impairment obligation by reference to arbitrary, discriminatory or unreasonable measures, thus raising the question of whether it prohibits *any* measure that impairs the investment. However, the Tribunal does not have to make a finding on this question if it finds that the impairment of Claimant's investment was in any event arbitrary,

[1527] Article 2(2) of the Australia-Hong Kong BIT provides in relevant part: "[…] *Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, or disposal of investments in its area of investors of the other Contracting Party.* […]" (emphasis added)

[1528] Article 3(2) of the Australia-Chile BIT provides: "*Each Contracting Party shall, subject to its laws, regulations and investment policies, protect within its territory investments by investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment, sale and liquidation of such investments.*" (emphasis added)

unreasonable and discriminatory and thus fulfills even the stricter standard advanced by Respondent.

b. Did Respondent's Conduct Amount to a Violation of Article 3(3) of the Treaty?

1364. As stated above, the same conduct that amounts to a violation of the FET obligation, in this case, the denial of TCCP's Mining Lease Application, can at the same time amount to a violation of the non-impairment obligation if such conduct has one or more of the effects set out in Article 3(3) of the Treaty, *i.e.*, if it "*impair*[s] *the management, maintenance, use, enjoyment or disposal of* [Claimant's] *investment*."[1529] In addition to the denial of the Application, Claimant invokes the following actions of Respondent as conduct that impaired the use of its investment: (i) Balochistan's attacks on the validity of the CHEJVA in the Supreme Court proceedings; (ii) Balochistan's violation of its promises under the CHEJVA to support TCCP's Mining Lease Application; (iii) Balochistan's denial of the administrative clearances, and thus access to Reko Diq, for TCC's expatriate staff; (iv) Balochistan's use of TCC's plans for its own project; and (v) the Governments' conduct in the negotiations on the Mineral Agreement and the Project Agreement by which they "*purposely*" hindered and halted the negotiations.

1365. In the Tribunal's view, it is not necessary to assess whether each of these actions by itself would amount to a violation of Respondent's non-impairment obligation because, if considered together with the denial of the Mining Lease Application, Respondent's conduct clearly impaired, if not prevented altogether, the use of Claimant's investment. By denying TCCP's Mining Lease Application, Respondent prevented Claimant from making any use of its exploration work and of any possibility to amortize its expenditures – much less to realize the benefit of its investment. Given that both the Joint Venture in which Claimant had a 75% interest and Claimant's subsidiary TCCP were established for the sole purpose of carrying out the exploration and, ultimately, the mining operations at Reko Diq, Claimant's investment was rendered useless when the Mining Lease Application was denied.

1366. The Tribunal further refers to its findings above that (i) the denial was motivated by the GOB's desire to implement its own project rather than to continue its collaboration with TCCA; and that (ii) the Licensing Authority did not have any justified grounds for denying the Application. In light of these findings, the Tribunal considered it questionable whether the denial served a public purpose, but in any event found that it was

[1529] For the sake of easier reading, the Tribunal will refer to these various means in which an investment can be impaired as "*use*" of the investment.

"*discriminatory*" because Respondent thereby favored the GOB's local project over that of Claimant or the Joint Venture.

1367. Respondent's further actions that Claimant invokes confirm this finding – except for the alleged violation of specific provisions under the CHEJVA, which is a question to be decided by the ICC Tribunal and on which this Tribunal will therefore not express an opinion. In the Tribunal's view, all of these actions contributed to the impairment effect on Claimant's investment and/or demonstrate that the GOB's true motive behind the denial was its desire to implement its own project.

1368. First, Balochistan's change of position in the Supreme Court proceedings in early 2011 was aimed at obtaining a declaration from the Supreme Court that the CHEJVA and thus Claimant's right to convert its exploration license into a mining lease was null and void. While this conduct did not have an immediate effect on Claimant's investment, it contributed to the fact that the security of tenure conferred to Claimant by means of Clause 11.8.2 was called into question.

1369. Second, the Tribunal considers it (at least) curious that the GOB started to deny administrative clearances for TCC's expatriate staff on 12 December 2009, *i.e.*, three days after its own project had been approved by the ECNEC and on the very same day that the MMDD took over as the GOB's representative on the Operating Committee.[1530] The denial of access for experienced staff impaired the use of Claimant's investment and the timing indicates that this conduct was motivated by the GOB's intention to "*take over*" Claimant's project as decided by the Balochistan Cabinet in its meeting a few days later.[1531]

1370. Third, Balochistan's use of TCC's exploration data for its own project confirms that the purported insufficiencies of Claimant's Feasibility Study did not have any justified basis. While the use of the data in itself does not impair Claimant's investment, it demonstrates that Balochistan intended to develop its own project in the exact same area and thus in a manner that would not be compatible with the simultaneous implementation of Claimant's project.

1371. Finally, as regards the negotiations on the Mineral and Project Agreements, the Tribunal considers that the decision of the Balochistan Cabinet on 24 December 2009 "*not to go ahead with the proposed Mineral and Shareholder agreements with TCCP*,"[1532] together with the Tribunal's impression from the record that no actual negotiations took place after

[1530] **Exhibit CE-94**. *Cf.* **Exhibits CE-163** and **CE-242**.
[1531] *Cf.* **Exhibit CE-31**, p. 16.
[1532] **Exhibit CE-31**, p. 16.

this decision,[1533] further support the Tribunal's finding that the decision against Claimant's project was related to Balochistan's plans to develop its own project.

1372. As a result, the Tribunal finds that, as confirmed by the above mentioned actions, the denial of the Mining Lease Application impaired the use of Claimant's investment. The Tribunal is further convinced that Respondent's measures were motivated by the desire to implement its own project – without having a justified ground for denying the Mining Lease Application. Therefore, the measures were also "*arbitrary, unreasonable and discriminatory*" and thus fulfill even the stricter standard of protection that has been advanced by Respondent. Consequently, the Tribunal does not have to make a finding as to the exact scope of the non-impairment obligation, since the denial of the Mining Lease Application in any event amounts to a violation of Article 3(3) of the Treaty.

F. CONCLUSION ON CLAIMANT'S CLAIMS

1373. In conclusion, the Tribunal finds that, by denying TCCP's Mining Lease Application in order to allow the GOB to implement its own project instead, Respondent breached its obligation to accord Claimant fair and equitable treatment under Article 3(2) of the Treaty, carried out a measure having effect equivalent to expropriation that did not comply with the requirements for a lawful expropriation under Article 7(1) of the Treaty, and impaired the use of Claimant's investment in violation of Article 3(3) of the Treaty.

1374. While the Tribunal is aware that Respondent has further raised the argument that Claimant's claim must fail *in limine* because it has failed to address causation, the Tribunal considers it sufficient to state at this point that Respondent's conduct deprived Claimant of the value of its investment and thereby directly caused a loss that is to be quantified at a later stage of the proceedings. In the Tribunal's view, any specific questions on whether Respondent's conduct was causal for individual parts of Claimant's – yet unquantified – claim cannot be dealt with in the abstract but will be addressed as part of the *quantum* phase of the proceedings.

VII. RESPONDENT'S COUNTERCLAIMS

1375. Respondent claims that (i) Claimant's alleged "*investment*" was not made "*in accordance with* [Pakistan's] *laws and investment policies*" as set out in Article 1(1)(a) of the Treaty; (ii) Claimant breached Clauses 11, 15 and 24.6 of the CHEJVA because it did not even

[1533] As to the meetings referred to by Respondent that TCC had with Balochistan's Chief Minister in January 2010, with Balochistan's Chief Secretary in March and June 2010, with Pakistan's Prime Minister in July 2010, with the MPNW in September 2010 and officials from both Governments in July 2011, it appears from the record that these were high-level meetings, which did not include any actual negotiations on the terms of the Mineral and/or Project Agreement. *Cf.* **Exhibits CE-84**, **CE-85**, **CE-90**, **RE-79** and **RE-80**.

attempt to comply with the contractual pre-conditions set out in the CHEJVA before filing its Mining Lease Application, and because it prepared a "*secret*" Expansion Pre-Feasibility Study; and (iii) Claimant violated rule 29(2)(c)(iii) of the 2002 BM Rules because it failed to complete "*a full feasibility study of the discovered deposits*" in the area covered by Exploration License EL-5, despite the fact that it had undertaken to do so in its application for a second renewal of EL-5.[1534]

1376. Respondent emphasizes that it raises its counterclaims without prejudice to its objections to jurisdiction and admissibility and its arguments on attribution;[1535] therefore, it pursues its counterclaims only "*if and to the extent that the Tribunal finds that Claimant made a qualifying* 'investment' *and upholds the relevant premises of jurisdiction for the purposes of the BIT.*"[1536]

A. JURISDICTION

1. Summary of Respondent's Position

1377. Respondent submits that pursuant to the ICSID Convention and Arbitration Rules, counterclaims are admissible. Respondent refers to Article 46 of the ICSID Convention, which states:

> "*Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any . . . counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre*."[1537]

1378. Respondent further quotes Rule 40(1) of the ICSID Arbitration Rules:

> "*Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.*"

1379. Respondent notes that it timely filed its counterclaims under Rule 40(2) of the ICSID Arbitration Rules, which provides that a counterclaim is timely if presented "*no later than in the Counter-Memorial*."[1538]

[1534] Counter-Memorial, ¶ 624.
[1535] Counter-Memorial, ¶ 623; Respondent's Rejoinder, ¶ 531.
[1536] Counter-Memorial, ¶ 623.
[1537] Counter-Memorial, ¶626.
[1538] Counter-Memorial, ¶ 629.

1380. Respondent submits that its counterclaims further meet all other jurisdictional requirements under Article 46 of the ICSID Convention and Rule 40(1) of the ICSID Arbitration Rules, as they (a) arise directly out of the subject matter of the dispute; (b) are within the scope of the consent of the parties; and (c) are otherwise within the jurisdiction of the Centre.[1539]

a. Respondent's Counterclaims Arise Directly out of the Subject-Matter of the Dispute

1381. In the context of the first requirement, Respondent refers to Note B (a) to Rule 40 of the ICSID Arbitration Rules:

> "*The test to satisfy* [whether a counter-claim arises directly out of the subject-matter of the dispute] *is whether the factual connection between the original and ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose of all grounds of dispute arising out of the same subject-matter*."[1540]

1382. Respondent claims that there is a close factual connection between Claimant's claims and Respondent's counterclaims, which requires that they are adjudicated in the same proceedings, because the counterclaims are "*the flip side*" of Pakistan's defenses against Claimant's claims, and arise primarily from the same provisions of the CHEJVA and the 2002 BM Rules; therefore, a final settlement of the dispute between Claimant and Respondent requires that Respondent's counterclaims be considered as well.[1541]

1383. In relation to Claimant's argument that the admission requirement in Article 1(1)(a) of the Treaty can only result in a rejection of its claim for lack of jurisdiction, but not give rise to a counterclaim for a violation of the Treaty, Respondent argues that Article 1(1)(a) imposes an obligation on the investor, which Claimant has failed to fulfil, and therefore it can give rise to a counterclaim by Respondent.[1542]

1384. With regard to Claimant's argument that the Tribunal does not have jurisdiction to decide Respondent's counterclaims to the extent they are based on alleged breaches of the CHEJVA because of the exclusive arbitration clause contained therein, Respondent argues that the only question to be considered by this Tribunal is whether the

[1539] Counter-Memorial, ¶ 630.
[1540] Counter-Memorial, ¶ 631.
[1541] Counter-Memorial, ¶ 632.
[1542] Respondent's Rejoinder, ¶ 554.

counterclaims have a sufficient nexus with Claimant's claim under the Treaty and thus satisfy the requirements of Article 46 of the ICSID Convention.[1543]

1385. Finally, Respondent refers to Claimant's argument that the Tribunal lacks jurisdiction over Respondent's counterclaims that are based on to the 2002 BM Rules and notes that the tribunal in the case of *Paushok v. Mongolia*, which Claimant relies on, had to consider Article 19 of the UNCITRAL Rules, which specifically limit counterclaims to issues "*arising out of the same contract.*"[1544] In addition, Respondent claims that the present case can be distinguished from *Paushok v. Mongolia* because, unlike the relevant treaty in that case, Article 13 of the Treaty makes provision for counterclaims as well as for claims under both domestic law and the Treaty. As a result, Respondent claims that the Tribunal has jurisdiction to hear Respondent's counterclaims based on the 2002 BM Rules and the laws or investment policies of Pakistan.[1545]

b. Respondent's Counterclaims Are Within the Scope of Consent of the Parties

1386. Respondent refers to the tribunal in *Roussalis v. Romania*, which held that the question whether a claimant's consent to arbitrate extended to counterclaims "*must be determined in the first place by reference to the dispute resolution clause in the BIT.*"[1546]

1387. Respondent submits that, contrary to other treaties such as the Greece-Romania BIT, which limit the class of claimants to investors only,[1547] Article 13(2) of the Treaty provides that "*either party*" may submit "*the dispute*" to ICSID arbitration. In addition, Respondent notes that Article 13(5) refers to "*counter-claim*[s]" being asserted by a Contracting Party to the Treaty against an investor and argues that the Treaty thus clearly anticipates that a State may advance claims or counterclaims against an investor.[1548] Respondent rejects Claimant's argument that this reference to counterclaims in Article

[1543] Respondent's Rejoinder, ¶ 557.
[1544] Respondent's Rejoinder, ¶ 558.
[1545] Respondent's Rejoinder, ¶ 559.
[1546] Respondent's Rejoinder, ¶ 535. *Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011 ("*Roussalis v. Romania*") [RLA-110], ¶ 866.
[1547] Respondent notes that the dispute resolution clause in *Roussalis v. Romania* (Article 9 of the Greece-Romania BIT) states: "*Disputes between an investor of a Contracting Party and the other Contracting Party* ***concerning an obligation of the latter*** *under this Agreement, in relation to investment of former, shall, if possible, be settled by the disputing parties in an amicable way…*
If such disputes cannot be settled within six months from the date either party requested amicable settlement, ***the investor concerned may submit the dispute*** *either to the competent courts of the Contracting Party in the territory of which the investment has been made or* ***to international arbitration***." Respondent's Rejoinder, ¶ 539. *Roussalis v. Romania* [RLA-110], ¶ 869 (emphasis added by Respondent).
[1548] Counter-Memorial, ¶ 634; Respondent's Rejoinder, ¶¶ 536-537, 541.

13(5) is limited to domestic proceedings as being contrary to the ordinary meaning of the phrase "*any proceeding*."[1549]

1388. As a result, Respondent claims that, by initiating these proceedings pursuant to Article 13 of the Treaty, Claimant also consented to counterclaims being raised by Respondent.[1550]

1389. Respondent further claims that, by resorting to ICSID arbitration, Claimant consented to be bound by Article 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules.[1551] According to Respondent, Article 46, if interpreted in accordance with Article 31(1) of the Vienna Convention, clearly envisages that, subject to certain conditions, a State respondent may bring counterclaims. According to Respondent, this is confirmed by Article 36(1) of the ICSID Convention, which refers to institution of arbitration proceedings either by a national of a Contracting State or by a Contracting State itself.[1552] Respondent refers to *Kendra* in relation to the *travaux preparatoires* of the ICSID Convention:

> "*It was therefore the expressed intention of the authors of the Convention that ICSID arbitration should not be a one-way street and that claims and therefore counterclaims could be brought by host states.*"[1553]

1390. Respondent also quotes Professor Reisman in *Roussalis v Romania*:

> "[W]*hen the State Parties to a BIT contingently consent, inter alia, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is ipso facto imported into any ICSID arbitration which an investor then elects to pursue. It is important to bear in mind that such counterclaim jurisdiction is not only a concession to the State Party: Article 46 works to the benefit of both respondent state and investor.*"[1554]

1391. In addition, Respondent refers to the tribunal in *Goetz v. Burundi*, which held that, by accepting Burundi's offer in the treaty to go to ICSID arbitration, the claimants had provided a "*twofold consent*," which included their consent that counterclaims would be considered by the tribunal, provided that the conditions laid down by Article 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules were met.[1555]

[1549] Respondent's Rejoinder, ¶ 538.
[1550] Counter-Memorial, ¶ 634.
[1551] Respondent's Rejoinder, ¶¶ 532, 542.
[1552] Respondent's Rejoinder, ¶¶ 544-545.
[1553] Respondent's Rejoinder, ¶ 546. T. Kendra, 'State Counterclaims in Investment Arbitration A New Lease of Life', (2013) 29(4) *Arbitration International* 575-606 ("*Kendra*") [RLA-189], p. 577.
[1554] Counter-Memorial, ¶ 635; Respondent's Rejoinder, ¶ 548. *Roussalis v. Romania* [RLA-110].
[1555] Respondent's Rejoinder, ¶ 549. *Antoine Goetz and others v Republic of Burundi*, ICSID Case No. ARB/01/2, Award of 21 June 2012 ("*Goetz v. Burundi*") [RLA-193], ¶ 278.

c. Respondent's Counterclaims Are Otherwise Within the Jurisdiction of the Centre

1392. Respondent submits that its counterclaims also meet the five jurisdictional requirements of Article 25(1) of the ICSID Convention: (1) there is a "*legal dispute*" between the Parties; (2) the dispute relates to an "*investment*"; (3) it "*arises directly*" out of that investment; (4) it is between a Contracting State to the ICSID Convention and a national of another Contracting State; and (5) the Parties consented in writing to submit the dispute to the jurisdiction of this Tribunal.[1556]

1393. Respondent submits that there is a "*legal dispute*" between the Parties because Respondent's counterclaims arise out of Claimant's breach of the Treaty, in particular its failure to comply with the requirement that the investment be "*admitted by* [Respondent] *subject to its laws*," its breach of the CHEJVA as the underlying investment agreement in this case, and its breach of the 2002 BM Rules.[1557]

1394. Respondent claims that, in case the Tribunal dismisses Respondent's objections to jurisdiction and admissibility, the dispute also "*arises directly*" out of Claimant's "*investment*," as the counterclaims relate to and arise out of the same contractual instruments (the CHEJVA and related agreements), and the same regulatory instrument (the 2002 BM Rules), which Claimant relies on as constituting its investment.[1558]

1395. Respondent further notes that it is a Contracting State to the ICSID Convention and that Claimant is a national of another Contracting State to the ICSID Convention (namely, Australia).[1559]

1396. Finally, Respondent claims that both Parties have consented in writing to submit this dispute to the jurisdiction of this ICSID Tribunal: Respondent provided its written consent in Article 13 of the Treaty; and Claimant provided its written consent in paragraph 16 of its Request for Arbitration.[1560]

2. Summary of Claimant's Position

1397. Claimant refers to the requirements under Article 46 of the Convention and submits that the tribunal in *Saluka v. Czech Republic* held that a counterclaim is not admissible unless its subject matter is "*intimately connected with the subject-matter of the primary*

[1556] Counter-Memorial, ¶ 639.
[1557] Counter-Memorial, ¶ 640.
[1558] Counter-Memorial, ¶¶ 641, 642.
[1559] Counter-Memorial, ¶ 643.
[1560] Counter-Memorial, ¶ 644.

claim."[1561] Claimant claims that the claims and counterclaims must be "*indivisible*" and "*interdependent*."[1562]

a. There Is No Basis on Which the Tribunal Could Hear the Sole Counterclaim Alleging a Treaty Breach

1398. In relation to Respondent's first counterclaim alleging that TCCA violated Article 1(1)(a) of the Treaty, Claimant submits that none of the provisions of the Treaty impose an obligation on the investor. According to Claimant, Article 1(1)(a) is only a definition, which establishes a jurisdictional requirement that an investor must satisfy in order to be protected by the Treaty; it does not impose a substantive obligation on the investor and therefore cannot give rise to a claim by the State for a violation of the Treaty.[1563]

1399. Claimant relies on the tribunal in *Spyridon Roussalis v. Romania*, which found that where a treaty "*imposes no obligations on investors, only on contracting States . . . counterclaims fall outside the tribunal's jurisdiction*," unless the treaty specifies otherwise.[1564] Claimant argues that, contrary to Respondent's allegations, Article 13(5) of the Treaty does not provide authority for the host State to bring counterclaims against the investor for breach of the Treaty. Article 13(5) states:

> *"In any proceeding involving a dispute relating to an investment, a Party shall not assert, as a defence, counterclaim, right of set-off or otherwise, that the investor concerned has received or will receive pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss."*[1565]

1400. Claimant argues that the term "*any proceeding*" refers not only to ICSID proceedings (initiated pursuant to Article 13(2)(b)), but also to domestic judicial or administrative proceedings (initiated under Article 13(2)(a)).[1566] In addition, Claimant emphasizes that Article 13(5) does not authorize the filing of counterclaims based on the Treaty, but rather denies the right to assert defenses or counterclaims based on the investor's recovery from third parties.[1567] In Claimant's view, Article 13(5) therefore only refers to counterclaims

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[1561] Reply, ¶¶ 488-489. *Saluka v. Czech Republic* Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004 ("*Saluka v Czech Republic Decision over Counterclaim*") [CA-161], ¶ 66.
[1562] Reply, ¶ 489.
[1563] Reply, ¶¶ 490-492; Claimant's Rejoinder, ¶ 63.
[1564] Reply, ¶ 493. *Roussalis v. Romania* [CA-162], ¶ 871.
[1565] Reply, ¶ 493. **Exhibit CE-4**. Article 13(5).
[1566] Claimant emphasizes that it does not deny that Respondent could have initiated ICSID proceeding pursuant to Article 13(2)(b) in order to obtain an arbitral decision on TCCA's claims, but according to Claimant, Respondent attempts to obtain a decision on matters unrelated to the Treaty. Claimant's Rejoinder, ¶ 65.
[1567] Reply, ¶ 494; Claimant's Rejoinder, ¶ 65.

that may be filed in domestic proceedings, but it does not constitute the Contracting States' consent to arbitration of counterclaims against an investor in ICSID proceedings.[1568]

b. The Tribunal Lacks Jurisdiction over Pakistan's Non-Treaty Counterclaims

1401. With regard to Respondent's second counterclaim alleging that TCCA breached the CHEJVA, Claimant notes that it is undisputed that the Government of Pakistan is not a party to the CHEJVA; therefore, Respondent has no standing to bring a claim under the CHEJVA.[1569] Claimant emphasizes that, while Balochistan's acts are attributable to Respondent under international law, Balochistan remains a separate entity under Pakistani law, which is juridically distinct from Respondent and has the authority to enter into and enforce its own contracts.[1570]

1402. Claimant further submits that even if Respondent did have standing to assert contractual claims against TCCA, this Tribunal would not have jurisdiction to hear them, given that Treaty does not contain an umbrella clause (the only possible source of jurisdiction over contractual disputes) and there is no satisfactory nexus with TCCA's Treaty-based claims.[1571]

1403. Claimant also refers to the exclusive arbitration provision contained in the CHEJVA, pursuant to which all disputes concerning the CHEJVA must be submitted to ICC arbitration, and emphasizes that Balochistan has brought identical counterclaims (as regards the alleged breaches of the CHEJVA and the 2002 BM Rules) in the pending ICC Proceedings, which is the proper forum for these claims.[1572] Claimant refers to the tribunal in *Saluka v. Czech Republic*, which held that "[t]*he Tribunal thus cannot in this arbitration entertain a counterclaim based on a dispute arising out of or in connection with, or the alleged breach of, an agreement which . . . contains its own mandatory arbitration provision*" and which is already the subject of separate proceedings.[1573]

1404. As to Respondent's third counterclaim alleging that TCCA breached the 2002 BM Rules, Claimant similarly argues that the Treaty does not provide any basis for jurisdiction over claims which are based on an alleged breach of Pakistani law, and that there is no satisfactory nexus to TCCA's Treaty claims.[1574] Claimant refers to the UNCITRAL

[1568] Reply, ¶ 494.
[1569] Reply, ¶¶ 496-497; Claimant's Rejoinder, ¶ 68.
[1570] Claimant's Rejoinder, ¶ 68.
[1571] Reply, ¶ 498.
[1572] Reply, ¶¶ 499, 502. **Exhibit CE-381**, ¶¶ 458-463 and ¶¶ 464-472.
[1573] Reply, ¶ 499. *Saluka v Czech Republic Decision over Counterclaim* [CA-161], ¶¶ 52-58.
[1574] Reply, ¶¶ 500, 501.

tribunal in *Paushok v. Mongolia*, which held that "*an arbitral tribunal exclusively vested with jurisdiction under the BIT*" does not have jurisdiction over counterclaims that "*exclusively raise issues of non-compliance with* [Respondent's] *public law*," because such claims "*cannot be considered as constituting an indivisible part of the Claimants' claims based on the BIT and international law or as creating a reasonable nexus between the Claimants' claims and the Counterclaims*."[1575]

1405. According to Claimant, Pakistan acknowledges that its primary counterclaims do not arise under the Treaty, but only as a matter of contract (the CHEJVA) or under Pakistani law (the 2002 BM Rules), and merely asserts that the Tribunal's jurisdiction over them follows from its jurisdiction over Claimant's claims (in the alternative, that its objections to jurisdiction and admissibility should fail). Claimant submits that Respondent's argument is based on the "*fallacy*" that TCCA asserts non-Treaty claims over which this Tribunal has jurisdiction. Claimant emphasizes that, to the contrary, TCCA's claims arise under the Treaty, which is why Pakistan's argument that it should likewise be entitled to assert non-Treaty claims must fail.[1576]

1406. With regard to Respondent's reliance on Article 46 of the ICSID Convention, Claimant claims that this provision is irrelevant in the present case because it is only of a procedural nature and cannot provide the source of the Tribunal's jurisdiction, as the dispute must be "*within the scope of the consent of the Parties and . . otherwise within the jurisdiction of the Centre*."[1577] Claimant argues that neither of those two requirements is met with regard to Respondent's contract claims; in particular, the scope of consent as defined by the Treaty does not extend to non-Treaty claims, which are, as Respondent itself argues, within the exclusive jurisdiction of the ICC Tribunal.[1578]

3. The Tribunal's Analysis

1407. Respondent raises its counterclaims in the alternative, *i.e.*, in the event that the Tribunal finds that Claimant made an "*investment*" within the meaning of Article 1(1)(a) of the Treaty and dismisses Respondent's further objections to jurisdiction and admissibility. As set out above, the Tribunal affirmed its jurisdiction to hear Claimant's claims and found them to be admissible. Therefore, the Tribunal is called to make a decision on Respondent's counterclaims and must first determine whether it has jurisdiction to hear them.

[1575] Reply, ¶ 501. *Sergei Paushok, CJSC Golden East Company, and CJSC Vostoknetegaz Company v.Mongolia* (UNCITRAL), Award on Jurisdiction and Liability of 28 April 2011 ("*Paushok v. Mongolia*") [CA-164], ¶ 694.
[1576] Claimant's Rejoinder, ¶¶ 61-62, 64.
[1577] Claimant's Rejoinder, ¶ 66.
[1578] Claimant's Rejoinder, ¶ 67, referring to Respondent's Rejoinder, ¶¶ 356-357.

1408. In its analysis, the Tribunal will have to take into account that Respondent invokes three bases of a different legal quality for its counterclaims: (i) Article 1(1)(a) of the Treaty; (ii) Clauses 11, 15 and 24 of the CHEJVA, *i.e.*, provisions of the investment agreement concluded between Claimant and the GOB, representing the Province of Balochistan; and (iii) rule 29(2)(c)(iii) of the 2002 BM Rules, *i.e.*, a provision of the provincial regulatory framework enacted by Balochistan. The Tribunal will therefore assess whether it has jurisdiction to hear any or all of Respondent's counterclaims on these legal bases.

1409. Even though Claimant emphasizes that Article 46 of the ICSID Convention cannot in itself be the source of the Tribunal's jurisdiction, the Parties agree that the relevant jurisdictional requirements for raising counterclaims in ICSID proceedings can be derived from this provision as well as from Rule 40(1) of the ICSID Arbitration Rules.

1410. Article 46 of the ICSID Convention reads:

> "*Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of consent of the parties and are otherwise within the jurisdiction of the Centre.*"

1411. Rule 40(1) of the ICSID Arbitration Rules reads:

> "*Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.*"

1412. Both provisions provide for the same three requirements: (a) the counterclaims must arise directly out of the subject matter of the dispute; (b) they must be within the scope of consent of the Parties; and (c) they must otherwise be within the jurisdiction of ICSID. The Tribunal will address these requirements in turn.

a. Do the Counterclaims Arise Directly Out of the Subject Matter of the Dispute?

1413. As to the first requirement that the counterclaims must arise directly out of the subject matter of the dispute, Respondent refers to Note B (a) to Rule 40 of the ICSID Arbitration Rules pursuant to which it has to be determined "*whether the factual connection between the original and ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute*."[1579] Claimant relies on the

[1579] Counter-Memorial, ¶ 631.

interpretation given by the tribunal in *Saluka v. Czech Republic*, which held that the subject matter of the counterclaim must be "*intimately connected with the subject-matter of the primary claim*."[1580] In the Tribunal's view, these interpretations are not very far apart from one another but the dispute between the Parties rather focuses on whether there is a sufficient nexus between Claimant's Treaty claims and Respondent's counterclaims, insofar as the latter are based on breaches of the CHEJVA and the 2002 BM Rules, as to constitute the required "*close*" or "*intimate*" connection.

1414. The Tribunal is of the view that, irrespective of the question whether Article 13 of the Treaty extends to non-Treaty claims in the present case (to be answered as part of the analysis of the second requirement of consent), there is no general rule pursuant to which there cannot be a sufficient nexus within the meaning of Article 46(1) of the ICSID Convention and Rule 40(1) of the ICSID Arbitration Rules between an investor's treaty claims and a host State's non-treaty counterclaims. To the contrary, the Tribunal considers that there indeed can be such a close or intimate connection if the analysis of the investor's Treaty claims necessarily includes the examination of the contractual and regulatory instruments on which the counterclaims are based.

1415. In the present case, the Tribunal had to take into account in its analysis of Claimant's Treaty claims not only the CHEJVA and the 2002 BM Rules in general, but very specifically several of the provisions on which Respondent relies as a basis for its counterclaims, in particular Clauses 11.3 and 11.4 of the CHEJVA and rule 29(2)(c)(iii) of the 2002 BM Rules. In addition, Respondent submits and Claimant in fact acknowledges that Respondent's counterclaims are the "*flipside*" of its defenses against Claimant's claims; therefore, the Tribunal considers that all three of Respondent's counterclaims arise directly out of the subject matter of the dispute and therefore satisfy the first jurisdictional requirement.

b. Are the Counterclaims Within the Scope of Consent of the Parties?

1416. As to the second requirement of whether Respondent's counterclaims are within the scope of consent of the Parties to arbitrate, the Parties agree that the question of whether their consent extends to counterclaims in general and to non-Treaty claims in particular is determined by reference to the Treaty's dispute resolution clause in Article 13. The Tribunal will interpret Article 13 of the Treaty pursuant to Article 31(1) of the Vienna Convention "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose*."[1581]

[1580] Reply, ¶¶ 488-489. *Saluka v. Czech Republic Decision over Counterclaim* [CA-161], ¶ 66.
[1581] Vienna Convention [CA-141], Article 31(1).

1417. Article 13(1) of the Treaty refers to "*dispute*[s] *between a Party and an investor of the other Party relating to an investment*." Article 13(2)(b) states that "*either party to the dispute may … refer the dispute to the International Centre for Settlement of Investment Disputes*." Finally, Article 13(5) provides that "[i]*n any proceeding involving a dispute relating to an investment, a Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the investor concerned has received or will receive*" any form of compensation for its alleged loss from third parties.[1582]

1418. The language used in Article 13(1) and (2) of the Treaty makes clear that both sides, *i.e.*, the investor and the host State, may initiate ICSID proceedings with regard to disputes relating to an investment. In the Tribunal's view, there is no indication for Claimant's allegation that the host State may do so only in order to obtain a decision on claims of the investor. To the contrary, while the Tribunal agrees with Claimant that Article 13(5) does not explicitly authorize a State to raise counterclaims, the provision is nevertheless premised on the assumption that the State may in fact do so and the Tribunal is not convinced by Claimant's argument that counterclaims are mentioned only because the term "*any proceeding*" also refers to domestic proceedings initiated pursuant to Article 13(2)(a) of the Treaty.

1419. In the Tribunal's view, not only the language used in Article 13 itself, but also the expressed intention of the authors of the ICSID Convention not to provide for a "*one-way street*" for investors,[1583] together with the absence of any indication that the Contracting Parties intended to provide otherwise in their dispute resolution clause, support and confirm an interpretation of Article 13 that allows the host State to raise counterclaims against the claims of the investor.

1420. As to the further question whether the scope of consent extends to counterclaims that are not based on violations of the Treaty, the Tribunal considers that the language used in Article 13(1) of the Treaty, *i.e.*, "*dispute … relating to an investment*," indicates that the scope of consent is not limited to disputes based on Treaty violations but rather extends to disputes based on the investment agreement (in this case, the CHEJVA and related agreements) and/or the regulatory framework for the investment (in this case, in particular the 2002 BM Rules). Therefore, the fact that Respondent's counterclaims, insofar as they are based on a breach of the CHEJVA and the 2002 BM Rules, are not Treaty claims, does not exclude them from the scope of Article 13.

1421. However, the Tribunal notes that in the present case, Respondent did not become party to the CHEJVA and its related agreements and Respondent further did not enact the 2002

[1582] **Exhibit CE-4**, Article 13.
[1583] *Cf. Kendra* [RLA-189], p. 577.

BM Rules, but in both cases, its autonomous province Balochistan did so. While Balochistan's actions can be attributed to Respondent pursuant to the ILC Articles for the purposes of Treaty claims, *i.e.*, claims under international law, such attribution does not apply for non-Treaty claims under domestic law. In the context of Respondent's claims based on the CHEJVA and the 2002 BM Rules, the Tribunal must therefore give effect to the juridical distinction between the Islamic Republic of Pakistan and the Province of Balochistan under Pakistani law.

1422. As a result, the Tribunal considers that Respondent lacks standing to raise non-Treaty claims based on the alleged breach of a contract that Claimant entered into with, and that can be enforced by, Balochistan. The same applies to Respondent's claim based on domestic law that was enacted, and can again be enforced, by Balochistan. In this regard, the Tribunal also notes that Balochistan has in fact raised very similar counterclaims, based on an alleged breach of Clauses 11, 15 and 24 of the CHEJVA as well as rule 29(2)(c)(iii) of the 2002 BM Rules, in the parallel ICC Proceedings that Claimant has initiated against Balochistan on the basis of the dispute resolution clause in Clause 15.4 of the CHEJVA.[1584] It is thus apparent that Balochistan not only has the means to enforce such claims against Claimant, but it is in fact doing so before the ICC Tribunal.

1423. Therefore, the Tribunal considers that Respondent lacks standing to raise counterclaims on the basis of alleged breaches of the CHEJVA and/or the 2002 BM Rules because these claims are for Balochistan to raise, as it has in fact done in the parallel ICC Proceedings. As a result, the Tribunal finds that it does not have jurisdiction to hear Respondent's counterclaims insofar as they are based on the CHEJVA and the 2002 BM Rules.

1424. As to Respondent's counterclaim based on Claimant's alleged violation of Article 1(1)(a) of the Treaty, the Tribunal finds that this claim is within the scope of consent as provided for in Article 13 of the Treaty. While Article 13 (directly) defines only the scope of Respondent's consent, which is contained in this very provision, the Tribunal is of the view that it is also (indirectly) relevant to the scope of Claimant's consent as provided in its Request for Arbitration. In this submission, Claimant stated:

> "*TCCA hereby consents to submit to the Centre the dispute that is the subject of this Request for Arbitration.*"[1585]

1425. While this statement in isolation could be read as limiting Claimant's consent to its own claims because Respondent's counterclaims were not "*subject of* [its] *Request for Arbitration*," Claimant also referred in its Request for Arbitration to Article 13 of the

[1584] *Cf.* Exhibit CE-381, ¶¶ 458-463 and ¶¶ 464-472.
[1585] RfA, ¶ 16.

Treaty as constituting Respondent's consent and did not indicate that the scope of its own consent differed from that under Article 13 of the Treaty. In addition, the Tribunal is of the view that, if the dispute resolution clause in a treaty allows for counterclaims, it is not for the investor to decide that such counterclaims shall not be part of its arbitration with the host State. This would contradict the intention of both the authors of the ICSID Convention and the Contracting Parties to the Treaty that the arbitration initiated by the investor should not be a "*one-way street*."

1426. In conclusion, the Tribunal finds that the second jurisdictional requirement is satisfied for Respondent's counterclaim based on Article 1(1)(a) of the Treaty, but the Tribunal does not have jurisdiction to hear the counterclaims based on the CHEJVA and the 2002 BM Rules. Therefore, the Tribunal will limit its analysis of the third jurisdictional requirement to Respondent's counterclaim based on the Treaty.

c. Are the Counterclaims Otherwise Within the Jurisdiction of the Centre?

1427. As to the third jurisdiction requirement that the counterclaims are otherwise within the jurisdiction of the Centre, the Tribunal considers that this is a reference to the general jurisdiction requirements under Article 25(1) of the ICSID Convention, which partially overlap with those explicitly mentioned in Article 46.

1428. Article 25(1) of the ICSID Convention reads:

> "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.*"

1429. First, Respondent's counterclaim arises out of Claimant's alleged breach of Article 1(1)(a) of the Treaty and therefore constitutes a legal dispute between the Parties.

1430. Second, the Tribunal has found above that Claimant had a qualifying investment within the meaning of Article 1(1)(a) of the Treaty and that Respondent's counterclaim arises directly out of the subject matter of the dispute on Claimant's claim. Therefore, the counterclaim can also be considered as arising directly out of Claimant's investment.

1431. Third, Pakistan is a Contracting State to the ICSID Convention because Pakistan has ratified the ICSID Convention on 15 September 1966 and the Convention entered into force for Pakistan on 15 October 1966. Claimant is a national of another Contracting State to the ICSID Convention because it is a company incorporated under Australian law and Australia has ratified the ICSID Convention on 2 May 1991, and the Convention came into force for Australia on 1 June 1991.

1432. Finally, as found above, Respondent's consent to submit the dispute on its counterclaim to the jurisdiction of this Tribunal is contained in Article 13 of the Treaty and Claimant's written consent that it provided in paragraph 16 of its Request for Arbitration likewise extends to an arbitration on Respondent's counterclaim.

1433. As a result, the general jurisdictional requirements under Article 25(1) and thus all three of the specific requirements under Article 46 of the ICSID Convention and Rule 40(1) of the ICSID Arbitration Rules are fulfilled for Respondent's counterclaim based on Claimant's alleged breach of Article 1(1)(a) of the Treaty. The Tribunal therefore has jurisdiction to hear this counterclaim, but it does not have jurisdiction to hear Respondent's counterclaims based on the CHEJVA and the 2002 BM Rules.

1434. The Tribunal is aware that Claimant also argues that the Tribunal lacks jurisdiction to hear Respondent's counterclaim based on the Treaty because, in Claimant's view, Article 1(1)(a) of the Treaty does not impose an obligation on the investor and therefore cannot give rise to any claim of the host State. However, the Tribunal considers that this is a question for the merits and will thus be addressed as part of its analysis of the merits.

B. LIABILITY

1. Summary of Respondent's Position[1586]

1435. On the merits, Respondent submits that Claimant's alleged investment was admitted in violation of Pakistani law and investment policies and thus unlawful under Article 1(1)(a) of the Treaty.[1587]

1436. Respondent refers to the definition of the term "*investment*" in Article 1(a) of the Treaty, which requires that the asset must be "*admitted by the other Party subject to its law and investment policies applicable from time to time*" and also to the Preamble to the Treaty, which "[a]*cknowledg*[es] *that investments of investors of one Party in the territory of the other Party would be made within the framework of the laws of that other Party*."[1588] Respondent claims that Claimant's alleged investment is unlawful and therefore does not meet the admission requirement in Article 1(1)(a) of the Treaty.[1589]

1437. Respondent states that the illegality of Claimant's alleged investment has been determined conclusively by the Supreme Court and claims that it was also known to BHP by 2000,

[1586] In light of the Tribunal's finding that it has jurisdiction to hear only one of Respondent's counterclaims, the following summaries of the Parties' positions do not include their arguments on the other two counterclaims.
[1587] Counter-Memorial, ¶¶ 646-647; Respondent's Rejoinder, ¶ 560.
[1588] Counter-Memorial, ¶ 647. **Exhibit CE-4**. Article 1(1)(a) and Preamble.
[1589] Counter-Memorial, ¶ 647; Respondent's Rejoinder, ¶ 562.

when it received advice from its Pakistani lawyers on the contemplated 2000 Addendum that was only to BHP's benefit.[1590] According to Respondent, Claimant built on the illegality of BHP's initial investment when it executed the 2006 Novation Agreement, which relied on the existence of the CHEJVA and the 2000 Addendum for its operation and was therefore predicated on the same unlawfulness.[1591]

1438. Respondent contends that, for the purpose of this arbitration, the unlawfulness of Claimant's investment as determined by the Supreme Court is a matter of fact under Pakistani law, which cannot be adjudicated afresh by this Tribunal.[1592]

2. Summary of Claimant's Position

1439. Claimant submits that, even if the Tribunal were to find that it has jurisdiction to hear Respondent's counterclaims, those claims would fail on the merits. Claimant quotes Respondent's submission that its counterclaims "*represent the flipside of* [its] *defences to* [TCCA's] *claims in this arbitration*" and therefore merely refers to its arguments on Respondent's liability in relation to Claimant's Treaty claims.[1593]

1440. Claimant emphasizes that it contests all of Respondent's counterclaims, but submits that all of them are addressed in the context of Claimant's claims, as each of the counterclaims "*mirrors one of Pakistan's affirmative defenses*." Claimant argues that if it succeeds in defeating those defenses, it will also succeed in defeating Pakistan's counterclaims.[1594]

3. The Tribunal's Analysis

1441. Respondent's counterclaim is based on an alleged violation of Pakistani laws and investment policies and thus a lack of fulfilling the admission requirement in Article 1(1)(a) of the Treaty. In the Tribunal's view, this raises two separate questions: (a) whether Article 1(1)(a) of the Treaty can, in principle, give rise to a claim of the host State against the investor if the admission requirement was not satisfied; and if so, (ii) whether Claimant's investment was in fact admitted in violation of Pakistani laws and investment policies.

1442. As to the second question, the Tribunal refers to its finding above that the admission requirement in Article 1(1)(a) does not impose a strict legality requirement on the investment but is rather met if the investment was accepted by the host State at the time the investment was made. The Tribunal further found that, at the time Claimant entered

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[1590] Counter-Memorial, ¶ 648. **Exhibits RE-56** and **RE-57**.
[1591] Counter-Memorial, ¶¶ 648-649.
[1592] Counter-Memorial, ¶ 650.
[1593] Reply, ¶¶ 503, 504.
[1594] Claimant's Rejoinder, ¶¶ 70, 71.

into the 2006 Novation Agreement with the GOB and thereby became party to the CHEJVA, its investment was not only accepted but highly welcomed and encouraged on every level of the Provincial and Federal Governments and therefore satisfied the admission requirement in Article 1(1)(a).

1443. In particular with regard to the Supreme Court judgment that was rendered seven years after the conclusion of the 2006 Novation Agreement, the Tribunal held that the reasons for which the Supreme Court declared the CHEJVA and its related agreements invalid did not concern any illegal conduct on the part of Claimant. Therefore, the Tribunal considers that this judgment does not support Respondent's allegation that any violation of Pakistani laws and investment policies was predicated on Claimant's conduct.

1444. In addition, the Tribunal agrees with Claimant that Article 1(1)(a) of the Treaty cannot give rise to an obligation and a corresponding liability of the investor *vis-à-vis* the host State. Article 1 is entitled "*Definitions*" and states in relevant part:

> "1. *For the purposes of this Agreement:*
>
> *(a)* 'investment' *means every kind of asset, owned or controlled by investors of one Party and admitted by the other Party subject to its laws and investment policies applicable from time to time.*"[1595]

1445. As per its lead-in, Article 1(1)(a) defines the term "*investment*" for the purposes of the Treaty, but such definition in itself does not give rise to an obligation of either the Contracting Parties or the investor. An investment that violates the host State's laws and investment policies and thus does not fulfill the admission requirement is not an "*investment*" for the purposes of the Treaty and is thus not subject to the standards of protection under the Treaty. Therefore, the non-fulfillment can be invoked by the host State as a defense against claims of the investor based on a violation of any standard of protection; however, it cannot give rise to a liability of the investor for a loss of opportunity as Respondent claims. In any event, an agreement between the Contracting Parties on a liability of the investor would constitute an impermissible agreement at the expense of a third party to the Treaty, *i.e.*, the investor in the present case.

1446. As a result, Respondent's counterclaim based on Claimant's alleged breach of Article 1(1)(a) of the Treaty is dismissed because this provision cannot give rise to a liability of the investor and, in any event, Claimant's investment was admitted in accordance with Pakistani laws and investment policies at the time the investment was made in 2006.

[1595] **Exhibit CE-4**, Article 1(1)(a).

VIII. THE TRIBUNAL'S DECISION ON COSTS

1447. The Tribunal is aware that, further to the Tribunal's invitation of 4 February 2015, both Parties submitted their statements of costs on 2 March 2015, reflecting the costs, fees and expenses they incurred up to that date. However, the Tribunal also recalls that it clarified in its e-mail of 16 February 2015 that its request for the Parties' statements of costs was without prejudice to whether the Tribunal's Decision on Jurisdiction and Liability would include a decision on the costs of this phase of the proceedings or whether such decision would be reserved for the Final Award.

1448. Pursuant to Article 61(2) of the ICSID Convention, the decision on the costs of the arbitration, *i.e.*, the expenses incurred by the parties in connection with the proceedings as well as the fees and expenses of the members of the Tribunal, shall form part of the Award. In light of the Tribunal's finding that Respondent has breached Articles 3(2), 7(1) and 3(3) of the Treaty and is therefore liable for the losses that Claimant incurred as a result of these breaches, there will be a further phase of the proceedings in which Claimant's losses are to be quantified. The present decision is therefore not an award within the meaning of Article 61(2) of the ICSID Convention and the Tribunal has thus decided to reserve its decision on the costs of this phase of the arbitration for its Award.

IX. DECISION

1449. The Tribunal therefore decides as follows:

I. The Tribunal has jurisdiction to hear the claims submitted to it by Claimant.

II. Claimant's claims are admissible.

III. By denying TCCP's Mining Lease Application, Respondent has breached Articles 3(2), 7(1) and 3(3) of the Treaty.

IV. Claimant is entitled to be compensated for all damages and losses resulting from Respondent's breaches of the Treaty, in an amount to be determined in a later phase of this proceeding.

V. The Tribunal has jurisdiction to hear Respondent's counterclaim based on the alleged violation of Article 1(1)(a) of the Treaty. The Tribunal does not have jurisdiction to hear Respondent's further counterclaims.

VI. Respondent's counterclaim based on the alleged violation of Article 1(1)(a) of the Treaty is dismissed.

VII. The Tribunal's decision on the costs of this phase of the proceeding is reserved for the Award.

Professor Dr. Klaus Sachs
President of the Tribunal

Rt. Hon. Lord Leonard Hoffmann
Co-Arbitrator

Dr. Stanimir A. Alexandrov
Co-Arbitrator