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 RESPONDENT'S APPLICATION TO DISMISS THE CLAIMS (WITH REASONS)

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

Secretary of the Tribunal
Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: 10 November 2017

Representation of the Parties

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I. INTRODUCTION AND PARTIES

1. This Decision addresses an Application to Dismiss the Claims submitted by Respondent on 2 September 2015, after the Hearing on Jurisdiction and the Merits had been held in October 2014 and the Parties had filed their Post-Hearing Briefs on 15 January 2015. On 20 March 2017, the Tribunal issued its Decision on Respondent's Application to Dismiss the Claims (with reasons to follow), dismissing Respondent's Application in its entirety. The Tribunal now provides the reasoning for its Decision on Respondent's Application to Dismiss the Claims of 20 March 2017.

A. Claimant

2. **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

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

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

II. THE ARBITRAL TRIBUNAL

5. 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)
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III. SUMMARY OF THE PROCEDURAL HISTORY

6. By letter of 22 June 2015, Allen & Overy LLP (Allen & Overy) informed the Tribunal that Pakistan had appointed Allen & Overy as counsel to act in the quantum phase of these proceedings and for all other matters going forwards. In its letter Allen & Overy further noted that cogent new evidence of corruption on the part of TCC had very recently been brought to their attention by Pakistan, requesting the Tribunal to cease in the meantime all efforts towards finalizing its award.

7. By letter of 23 June 2015, Claimant objected to Pakistan's attempt to introduce new evidence, particularly of alleged "*corruption*" "*nearly four and a half years after submission of the Mining Lease Application, more than three and a half years after the commencement of this arbitration, and more than eight months after the liability hearing (which,* [they] *note, was followed by the submission of post-hearing briefs).*" Claimant further requested the Tribunal to reject Pakistan's improper request to halt its work on the decision.

8. On 25 June 2017, the Tribunal acknowledged receipt of Allen & Overy's communication of 22 June 2015, and of Claimant's letter of 23 June 2015, noting that the Tribunal saw no reason to discontinue its still ongoing deliberations on this case.

9. On 21 July 2015, Respondent filed a request for the Tribunal to decide on the admissibility of five witness statements signed by Mr Shehbaz Mandokhail, Sheikh Asmatullah, Mr. Abdul Aziz, Mr. Muhammad Tahir, and Mr. Masood Malik, that it submitted together with its request, and to adopt a new timetable for addressing the new evidence. A copy of Power of Attorney authorizing Allen & Overy to represent the Government of Pakistan in this matter was also attached.

10. On 11 August 2015, Claimant filed observations on Respondent's request of 21 July 2015, requesting the Tribunal to rule that the additional evidence should not be admitted.

11. On 17 August 2015, Respondent filed a response to Claimant's observations of 11 August 2015.

12. On 20 August 2015, the Tribunal fixed a procedural schedule for the Parties' subsequent submissions on Respondent's request for admissibility of new evidence of 21 July 2015, as follows:

> "*Upon careful review of Respondent's letter dated 21 July 2015, Claimant's letter dated 11 August 2015 and Respondent's letter dated 17 August 2015, the Tribunal has decided to grant Respondent leave to file a full submission by 2 September 2015. Claimant will then have the opportunity to reply to Respondent's submission by 7 October 2015; therefore, the Tribunal asks Claimant to reserve its reply to Respondent's letter dated 17 August 2015, as requested by e-mail dated 19 August 2015, for the time being and include any comments that it wishes to make in its reply. The Tribunal reserves all further decisions on the admissibility of the new evidence as well as on any adjustment of the further proceedings until it has received the Parties' submissions.*"

13. By letter of 25 August 2015, addressed to Respondent and copying in the members of the Tribunal, Claimant requested that Respondent provide certain information as to the circumstances under which any of the witness statements that Respondent sought to submit to the Tribunal were obtained. In addition, Claimant requested an "*unequivocal assurance that the confidentiality of communications, in the form of e-mails, phone calls, in-person conversations, or otherwise, between and among its personnel and 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.*"

14. By letter of 28 August, 2015, addressed to Claimant and copying in the members of 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 **r**egard, it should do so; absent such an application, its statement had no place in international arbitration proceedings.

15. On 31 August 2015, Claimant filed a request for the Tribunal to decide on confidentiality of communications. In its letter, Claimant requested the Tribunal to direct Pakistan "*to provide unequivocal assurances that the confidentiality of communications, in the form of e-mails, phone calls, in person conversations, or otherwise, between and among TCC's personnel and its attorneys, 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 in the event that Pakistan continued to refuse to provide such assurances, Claimant further requested that the Tribunal direct Pakistan "*to identify when, how, and which communications between and among TCC's personnel and its attorneys, both within and without Pakistan, had been monitored, recorded, intercepted, or otherwise compromised.*"

16. On 2 September 2015, Respondent filed an Application to Dismiss the Claims ("**Respondent's Application**"), together with the following accompanying documentation: (i) Judge Schwebel's Expert Opinion ("**Schwebel Opinion**") with Exhibits SS-01 to SS-23, (ii) Exhibits RE-170 to RE-204, and (iii) eight Witness Statements (from seven witnesses) of Abdul Aziz, Masood Malik, Shehbaz Khan Mandokhail, Muhammad Tahir, Sheikh Asmatullah, Abid Mustikhan, Bari Dad (first and second).

17. Upon invitation of the Tribunal, on 8 September 2015, Respondent filed observations on Claimant's request of 31 August 2015, and concluded by stating that "*the NAB has requested that counsel for Pakistan 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).

18. On 10 September 2015, the Tribunal acknowledged receipt of Respondent's letter of 8 September 2015, noting Respondent's statement quoted in the previous paragraph, and invited Claimant to clarify by 15 September 2015, whether it wished to maintain its request as set out in its letter of 31 August 2015.

19. On 15 September 2015, Claimant filed a response to the Respondent's further observations of 8 September 2015.

20. On 18 September 2015, Respondent noted that Claimant, in its letter of 15 September 2015, had raised arguments in relation to Respondent's Application to Dismiss the Claims 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.

21. On 21 September 2015, the Tribunal acknowledged receipt of the Parties' respective communications of 15 September 2015 and 18 September 2015, and informed the Parties that the Tribunal would shortly issue a Procedural Order on Claimant's request, and that in the meantime it did not require further submissions from the Parties on that matter.

22. On 24 September 2015, the Tribunal issued Procedural Order No. 5 concerning confidentiality of communications. The Tribunal ordered 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.*"

23. On 5 October 2015, Respondent supplemented its Application to Dismiss the Claims of 2 September 2015, with two Witness Statements signed by Col. Sher Khan and Mr Muhammad Farooq and certain accompanying documents referred to in those statements.

24. On 6 October 2015, Claimant requested that the Tribunal grant an extension of the deadline to file its response until 16 October 2015, to permit Claimant to consider the two new Witness Statements filed by Respondent on 5 October 2015. By e-mail of the same date, the Tribunal granted Claimant's extension request.

25. By letter of 6 October 2015, Mr. Makhdoom Ali Khan informed the Tribunal that he had withdrawn as TCCA's counsel in this case, noting that his withdrawal was not prompted by any doubts about TCCA's integrity.

26. On 16 October 2015, Claimant filed its (first) Opposition to Respondent's Application for Dismiss Claims, together with updated indices of Claimant's Exhibits and Authorities, and a courtesy copy of Claimant's simultaneous filing in the ICC arbitration. Claimant primarily requested that Respondent's Application be rejected in its entirety. In the alternative, it requested that the Tribunal: (i) bar Respondent from raising any additional allegations; (ii) proceed to issue its Decision on Jurisdiction and Liability on the basis of the extensive evidence and arguments already presented by the Parties through and including the Post-Hearing Briefs filed in January 2015; (iii) defer further proceedings and a decision on Respondent's Application pending issuance of its Decision and the conclusion of Claimant's investigation into Respondent's allegations; and (iv) issue the orders sought be Claimant to protect the integrity of the arbitration and reduce the manifest unfairness Respondent's conduct has caused.

27. By letter of 27 October 2015, the Tribunal conveyed the following directions to the Parties:

> "*The Tribunal has duly considered Respondent's Application to Dismiss the Claims dated 2 September 2015 ('Respondent's Application') and Claimant's Opposition to Respondent's Application to Dismiss Claims dated 16 October 2015 ('Claimant's Opposition') and has come to the following decision for the time being:*
>
> 1. *Respondent is invited to comment on Claimant's alternative claims, as set out under Sections III.B.2 through III.B.4. (paras. 130-151) of its Opposition, by* ***Tuesday, 10 November 2015****.*
> 2. *The Parties are requested to agree on a time schedule in order to address the new issues raised in Respondent's Application, and to submit and agreed proposal by* ***Tuesday, 17 November 2015****.*
> 3. *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."

28. On 10 November 2015, Respondent filed its first Reply to Claimant's Opposition to Respondent's Application to Dismiss Claims. Together with its submission Respondent provided a copy of Respondent's simultaneous filing in the ICC proceedings, for the Tribunal's information.

29. By letter of 12 November 2015, the Tribunal conveyed the following directions to the Parties:

"*Upon review of Respondent's Reply to Claimant's Opposition to Respondent's Application to Dismiss Claims ('Respondent's Reply'), the Tribunal gives the following directions:*

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.*

On this basis, the Tribunal asks the Parties to try reaching an agreement on the further time schedule to address the new issues addressed in Respondent's

> *Application. The time limit for reaching such agreement is extended until Tuesday, 24 November 2015.*
>
> *In case the Parties are unable to agree on a time schedule, the Tribunal would be available for a procedural hearing to be held by telephone conference, unless both Parties prefer to have a hearing in person, and then fix the time schedule thereafter.*"

30. By e-mail of 24 November 2015, Respondent informed the Tribunal that the Parties had agreed on all but two issues concerning the time schedule and submitted the Parties' respective proposals. By e-mail of the same day, Claimant commented on Respondent's e-mail and submitted an alternative proposal regarding the time schedule. By e-mail of 25 November 2015, Respondent commented on Claimant's alternative proposal and submitted an alternative counter-proposal. Claimant responded on the same day, noting that any schedule depended on the Tribunal's actual availability, and requested that the Tribunal advise the Parties on its availabilities for a one-week/two-week hearing during the fall of 2016.

31. By e-mail of 27 November 2015, the Tribunal informed the Parties that it had no availability for a one-week hearing in November or December 2016. The Tribunal proposed to hold the hearing either from 10 to 14 October 2016 (with 15 October held in reserve) or from 24 to 28 October 2016 (with 29 October held in reserve). The Parties were invited the Parties to agree on a mutually acceptable timetable leading up to either of those hearing dates and to inform the Tribunal about their agreement or to present their proposals to the Tribunal by Friday, 4 December 2015.

32. By e-mail of 3 December 2015, Respondent informed the Tribunal that the Parties had conferred but had been unable to reach agreement, and submitted the Parties' respective positions regarding the procedural calendar for the remaining proceeding, including a hearing on the new evidence.

33. On 7 December 2015, Claimant replied to Respondent's e-mail of 3 December 2015, concerning the procedural calendar.

34. By e-mail of 11 December 2015, the Tribunal informed the Parties that it had decided on the procedural timetable as set out in the table included in its e-mail.

35. On 12 January 2016, Respondent filed, for the Tribunal's information, a copy of its submission before the ICC Tribunal of January 11, 2016 (Respondent's Supplementary Counter-Memorial), together with accompanying documents.

36. On 15 January 2016, the Tribunal informed the Parties: (i) that 14-18 November 2016 was to be held in reserve "*in case it turns out that one week will not be sufficient for the Hearing on the new evidence,*" and (ii) that the Tribunal was in the process of finalizing the draft Decision on Jurisdiction and Liability and would transmit it to the Parties, as announced, shortly.

37. 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 (the "**Draft Decision**") and invited them to provide comments on errors of fact, misprints, etc. within 60 days of the decision's transmission to the Parties. For the full procedural history of ICSID Case No. ARB/12/1 from Claimant's filing of the Request for Arbitration on 28 November 2011 to the Tribunal's issuing a procedural timetable to address the new issues in Respondent's Application on 11 December 2015, *see* paragraphs 5 to 212 of the Draft Decision.

38. On 11 March 2016, Claimant filed its second Opposition to Respondent's Application to Dismiss the Claims ("**Claimant's Opposition**"), together with: (i) Exhibits CE-428 to CE-491; (ii) Legal Authorities CA 201 to CA 260; (iii) updated indices reflecting the additional exhibits and authorities submitted since Claimant's Opposition of October 16, 2015; and (iv) Witness Statements of Timothy Hargreaves, Eduardo Flores, Hugh R. James, and Peter Jezek; the Third Witness Statement of Catherine "Cassie" Boggs; and the Sixth Witness Statement of Timothy Livesey.

39. Also on 11 March 2016, Claimant filed a request for the Tribunal to decide on confidentiality of evidence ("**Claimant's Application for a Protective Order**"), and a request for the Tribunal to decide on the admissibility of new evidence ("**Claimant's Application for a Ruling *in Limine***"), both dated 11 March 2016**.**

40. On 12 March 2016, the Tribunal acknowledged receipt of (i) Claimant's Application for a Protective Order, including its request for an interim order pending the Tribunal's final resolution of Claimant's Application; and (ii) Claimant's Application for a Ruling *in Limine*, both dated 11 March 2016.

    The Tribunal further noted that Claimant had asked the ICSID Secretariat not to transmit Claimant's Response to Respondent's Application to Dismiss the Claims to Respondent, pending the earlier of (i) the Tribunal's ruling on Claimant's request for an interim order; or (ii) confirmation from Respondent that it will comply with the terms of the requested Protective Order on an interim basis pending the Tribunal's decision on Claimant's Application for a Protective Order. The Tribunal invited Respondent to comment on Claimant's request for an interim order or a confirmation from Respondent with the above-mentioned content, by 16 March 2016.

41. On 16 March 2016, Respondent filed observations on Claimant's Application for a Ruling *in Limine*, including a request to extend the time limit for exchanging the Parties' disclosure requests.

42. On 17 March 2016, the Tribunal granted the extension request; requested Claimant "*to confirm that it no longer requests an interim order on its Application for a Protective Order because the Parties have agreed that, pending the Tribunal's decision on Claimant's Application for a Protective Order, Respondent will circulate Claimant's*

Response only to the Permitted Recipients as identified in Claimant's request for relief lit. a (ii), plus identified individuals/entities within the Government of Balochistan"; and invited the Parties to reach an agreement on the procedural timetable for the submissions on Claimant's Application for a Protective Order and its Application for a Ruling *in Limine.*

43. On 4 April 2016, the Tribunal issued its Procedural Order No. 6 with an Interim Order pending its final decision on Claimant's Application for a Protective Order.

44. On 4 April 2016, the Parties submitted their respective comments on the Tribunal's Draft Decision on Jurisdiction and Liability. Such comments, pursuant to the Tribunal's direction by letter of 3 February 2016, were to be limited to "*errors of fact, misprints, etc*."

45. On 6 April 2016, Respondent filed a response to Claimant's Application for a Protective Order and Claimant's Application for a Ruling *in Limine.*

46. On 12 April 2016, Claimant filed a Reply on Claimant's Application for a Protective Order, and a Reply on Claimant's Application for a Ruling *in Limine.*

47. On 14 April 2016, the Parties submitted a revised proposed schedule for disclosure/production of documents, which was approved on the same date by the Tribunal, as agreed by the Parties.

48. On 18 April 2016, Respondent filed a Rejoinder on the Application for a Protective Order and a Rejoinder on the Application for a Ruling *in Limine,* together with a consolidated index of authorities filed by Respondent in the arbitration.

49. On 21 April 2016, the Tribunal issued its Procedural Order No. 7 on Claimant's Applications for a Protective Order and a Ruling *in Limine*.

50. On 26 April 2016, following exchanges between the Parties, each Party filed a request for the Tribunal to decide on production of documents. Claimant additionally requested the Tribunal to amend the Protective Order in the Tribunal's Procedural Order No. 7 to also include: "*the documents disclosed by Claimant in response to Respondent's requests for production of documents*."

51. By e-mail of 29 April 2016, at the Tribunal's invitation, Respondent noted not having objections to Claimant's request of 26 April 2016 to amend the Protective Order in Procedural Order No. 7. As a result, on 2 May 2016, the Tribunal issued Procedural Order No. 8 concerning confidentiality of evidence, amending paragraph 1 of the Tribunal's Procedural Order No. 7.

52. On 12 May 2016, the Tribunal issued its Procedural Order No. 9 concerning production of documents.

53. On 16 May 2016, Respondent requested the Tribunal to revise its Procedural Order No. 9, so as to reflect that Respondent was agreeable to any documents produced during this phase of document disclosure being used in the relevant ICC proceedings.

54. On the same date, the Tribunal invited Claimant to confirm its agreement with the requested revision of Procedural Order No. 9.

55. On 17 May 2016, Claimant confirmed its agreement to Respondent's requested revision of Procedural Order No. 9, and requested a four-day extension of the deadline for completion of voluntary disclosure of documents set in Procedural Order No. 9. On the same date, Respondent confirmed its agreement to the requested extension, which was granted by the Tribunal on 18 May 2016.

56. On 19 May 2016, Respondent requested clarifications of certain points on Respondent's completed Redfern Schedule of Procedural Order No. 9.

57. On 20 May 2016, the Tribunal issued Procedural Order No. 10 confirming the requested revision of Procedural Order No. 9, with regard to the use of documents in the ICC proceedings, and an amended Respondent's Redfern Schedule containing the requested clarifications of the Tribunal's decision on document production.

58. On 1 June 2016, Claimant requested the modification of the Tribunal's order regarding Request 12(b)(i) of Respondent's document requests, which the Tribunal "*granted as requested*" in Annex 1 to its Procedural Order No. 9, but which Claimant believed was unduly burdensome to the extent that it involved review of Claimant's petty cash records in order to identify documents relating to expenses that were reimbursed to Col. Khan. By letter of 6 June 2016, Respondent responded to Claimant's letter of 1 June 2016.

59. On 8 June 2016, Claimant filed a Request for Modification of Tribunal's *in Limine* Order (Tribunal's Procedural Order No. 7 of 21 April 2016).

60. On 10 June 2016, (i) the Tribunal issued Procedural Order No. 11 concerning production of documents; (ii) Respondent was invited to comment on Claimant's Request for Modification of Tribunal's *in Limine* Order dated 8 June 2016; and (iii) Respondent filed a request regarding one aspect of Claimant's production of documents, which according to Respondent was a breach of the Tribunal's decision regarding Request No. 15 of Respondent's Completed Redfern Schedule. Respondent requested the Tribunal to order Claimant to produce non-privileged documents and to explain the extent of the body of privileged documents relevant to its recent internal investigation.

61. On 13 June 2016, Respondent filed a request for the Tribunal to decide on admissibility of new evidence, *i.e.*, a witness statement from Mr. Zafar Iqbal in support of its Reply submission.

62. On 14 June 2016, Respondent submitted its comments on Claimant's Request for Modification of Tribunal's *in Limine* Order.

63. On June 15, 2016, the Tribunal decided on the Request for Modification of Tribunal's *in Limine* Order. The Tribunal maintained its original decision.

64. Also on 15 June 2016, the Tribunal gave certain directions to the Parties regarding the procedural calendar leading up to the Hearing.

65. On 16 June 2016, at the Tribunal's invitation, Claimant filed its comments on Respondent's request of June 10, 2016 regarding production of documents.

66. On 20 June 2016, Claimant filed observations on Respondent's request of 13 June 2016 on the admissibility of new evidence.

67. On 21 June 2016, the Tribunal proposed a modified procedural schedule.

68. On 23 June 2016, Respondent filed a reply to Claimant's letter of 20 June 2016 on the admissibility of new evidence.

69. On 24 June 2016, each Party confirmed its availability on the dates in the Tribunal's proposed modified procedural calendar.

70. On 25 June 2016, the Tribunal confirmed that the Pre-Hearing Organizational Meeting would be held with the President of the Tribunal on 26 September 2016, as agreed by the Parties.

71. On 28 June 2016, Claimant filed a letter by which it maintained its objection and its request that the Tribunal deny Respondent's application for the admissibility of new evidence.

72. On 1 July 2016, Claimant filed a renewed request for the Tribunal to decide on production of documents, including a request for production of original documents for inspection by the forensic examiner retained by Claimant.

73. Also on 1 July 2016, the Tribunal decided on Respondent's request for admissibility of new evidence, granting leave to Respondent to file a witness statement from Mr. Zafar Iqbal together with its Reply due on 15 July 2016.

74. On 4 July 2016, the Tribunal decided on production of documents and on Claimant's request for production or original documents (including Mr. Aziz's diaries) for inspection by the forensic examiner retained by Claimant.

75. On 6 July 2016, Respondent filed a letter in response to Claimant's request of 1 July 2016 and the Tribunal's decision of 4 July 2016. In its letter, Respondent requested that the Tribunal refrained from making any further orders regarding the documents to be produced for inspection until Respondent had had an opportunity to report back the following week on the outcome of meetings with the National Accountability Bureau (the **NAB**), in whose custody Mr. Aziz's diaries resided in connection with an on-going criminal inquiry.

76. On 6 July 2016, the Tribunal acknowledged receipt of Respondent's letter of 6 July 2016, and informed the Parties that for the time being, the Tribunal maintained its decision of 4 July 2016. The Tribunal further noted the difficulties on the part of Respondent to meet the deadline of 11 July 2016, taking into account the Eid holiday which was being celebrated in Pakistan at the moment. The Tribunal therefore confirmed that it would not take a decision on whether to exclude any evidence already on the record related to the documents to be produced for inspection until Respondent had reverted to the Tribunal, at the latest by 15 July 2016.

77. On 15 July 2016, Respondent filed its second Reply to Claimant's Opposition to Respondent's Application to Dismiss the Claims ("**Respondent's Reply**"), dated 15 July 2016, including: (i) Second Witness Statement of Muhammad Farooq; (ii) Second Witness Statement of Col. Sher Khan; (iii) Second Witness Statement of Muhammad Tahir; (iv) Witness Statement of Zafar Iqbal; and (v) Exhibits R-58(VI)(an) to R-502.

78. Also on 15 July 2016, Respondent informed the Tribunal that Mr. Aziz's diaries could not leave Pakistan, but would be available in Pakistan for forensic examination. In such circumstances, Respondent requested the Tribunal to reconsider its decision of July 4, 2016, concerning the request for production of original documents for inspection, and instead direct the NAB to make the original documents responsive to Requests 20 and 21 available immediately for inspection in Islamabad. On 19 July 2016, Claimant filed observations in such regard.

79. On 20 July 2016, the Tribunal directed Respondent to provide to Claimant and the Tribunal, by 27 July 2016, a list of possible locations/institutions within Pakistan where a forensic examination of Mr. Aziz's diaries could be carried out under laboratory conditions. As directed, Respondent provided such information to Claimant and to Respondent by letter of 27 July 2016. Attached to Respondent's letter were the curricula vitae of three possible forensic experts.

80. On 28 July 2016, the Tribunal acknowledged receipt of Respondent's letter of 27 July 2016, and invited Claimant to comment thereon by 2 August 2016, in particular to state whether the method of examination proposed by Respondent; and/or the appointment of any of the experts identified by Respondent would be agreeable to Claimant. Claimant was further invited to comment on Respondent's preference for one expert to be appointed by the Tribunal instead of two Party-appointed experts.

81. On 2 August 2016, Claimant submitted a letter in response to Respondent's letter of 27 July 2016, concerning the request for production of original documents for inspection. In its letter, Claimant requested the Tribunal to reiterate its order of 4 July 2016 that Pakistan "*immediately produce*" Mr. Aziz's diaries to Claimant's forensic expert, Mr. Robert Radley. Claimant expressed its willingness to work with Pakistan to ensure that the documents are transported in a manner that did not compromise the chain of custody.

82. By e-mail of 4 August 2016, the President of the Tribunal requested Respondent to answer in particular the following questions, without prejudice to the Tribunal's decision:

> "*1) Would Respondent/the NAB be willing to accept that the diaries are transported to Mr. Radley's laboratory under the custody safeguards and the conditions for inspecting Mr. Radley's laboratory, including the restrictions regarding the presence of a NAB official during his examination, as described by Claimant in its letter of 2 August 2016 at pages 2-3?*
>
> *2). Please provide the fullest information available about the three laboratories within Pakistan that Respondent proposed in its letter of 27 July 2016, as regards their equipment, their technical capacity and specifications, their national or international certifications, and their compliance with international standards. In particular, please specify whether any of the laboratories contains an ESDA machine as described in Claimant's letter of 2 August 2016 at page 3. Provided that this is the case, the Tribunal notes that the diary submitted as Exhibit AA-1 is in fact a note pad. The Tribunal understands from Claimant's submission on pages 3-4 that ESDA machines are typically suitable only for the examination of single sheets of paper, which would require physical disassembly of the note pad. Would Respondent/the NAB allow that such disassembly take place in the course of an ESDA examination if this were technically necessary? Regarding the diary submitted as Exhibit AA-2, it appears to the Tribunal that this consists of loose sheets paper so that no physical disassembly would be required. It appears to the Tribunal that no other diaries or documents responsive to Claimant's Requests 20 and 21 have been submitted so far.*"

The Tribunal further noted that provided that the Tribunal considered the conditions for examination of the diaries in one of the laboratories identified by Respondent suitable for the present purposes and provided that there existed an ESDA machine in one of the laboratories in Pakistan, Claimant was requested to state whether Mr. Radley would be willing to travel to Pakistan within the next weeks and conduct an ESDA examination with the equipment available within the respective laboratory.

83. On 12 August 2016, each Party filed answers to the questions posed by the Tribunal on 4 August 2016. Attached to Claimant's letter was a letter from Robert Radley to Donald Francis Donovan dated 12 August 2016.

84. On 23 August 2016, the Tribunal informed the Parties that it was trying to identify a suitable expert to analyze the documents in question in Pakistan at the lab that had an ESDA equipment.

85. On 31 August 2016, Claimant filed a request for (i) a ruling on the sequence of witness testimony and opening statements in the then upcoming evidentiary hearing, and (ii) an extension of the deadline for the filing of Claimant's Rejoinder.

86. On 1 September 2016, Claimant filed a letter regarding the expert examination of Mr. Aziz's diaries. It its letter, Claimant referred to its explanations of 12 August 2016, and

in particular to those provided by its expert Robert Radley that he would not travel to Pakistan, because his ability to opine on the authenticity of the documents would be compromised if he could not examine them in his own laboratory. Claimant further ratified its request that the Tribunal reinstate its directions of 4 July 2016 that Pakistan deliver Mr. Aziz's diaries to Mr. Radley or be subject to an order that they be struck from the record; requested that certain requirements suggested by Mr. Radley be included in any terms of reference governing the expert's appointment, in the event that the Tribunal decided to appoint its own expert. Claimant also requested the Tribunal's advice on the expectations of a timetable regarding the eventual appointment process for a Tribunal-appointed expert.

87. On 2 September 2016, Respondent referred to Claimant's letter of 31 August 2016; (i) confirmed that it had agreed to its witnesses being examined during the October 2016 hearing in Paris, with Claimant's witnesses being examined during the December 2016 hearing in Hong Kong; (ii) expressed its disagreement over the timing of Claimant's opening statement; and (iii) objected to Claimant's requested extension of the deadline for the filing of its Rejoinder.

88. By letter of 2 September 2016, the Tribunal referred to two matters: (A) the examination of Mr. Aziz's diaries, including the appointment of an Independent Expert, and (B) Claimant's requests by letter of 31 August 2016. Regarding the examination of Mr. Aziz's diaries, the Tribunal informed the Parties that it had decided to appoint an independent forensic document/ink expert to analyze Mr. Aziz's diaries in one of the laboratories in Pakistan identified by Respondent. The Tribunal proposed the names, of three experts as suitable candidates to the Parties, who would be able to travel to Pakistan, and provided their *curricula vitae* and additional information. The Tribunal explained the appointment method for the selection of the Independent Expert; provided the Parties with a ballot for them to rank the candidates on the list in order of preference; invited the Parties to liaise and submit an agreed proposal for the terms of reference, and provided the Tribunal's expectation of a timetable. As to Claimant's requests of 31 August 2016, the Tribunal decided that following the standard practice, the opening statements would be heard at the beginning of the first week. The Tribunal also granted an extension until 15 September 2016 of the deadline for Claimant to file its Rejoinder.

89. On 5 September 2016, Respondent filed a renewed request for production of documents, including a request for production of unredacted version of documents.

90. On 13 September 2016, Claimant provided comments on the list of experts proposed by the Tribunal in its letter of 2 September 2016. Claimant requested that the Tribunal order Pakistan to make the originals of Mr. Aziz's diaries available in the Punjab Forensic Science Laboratory for the inspection by Mr. Radley during the week of 10 October 2016; on the Parties' consent, to appoint Dr. Agisnsky to conduct and ink-dating examination

of Mr. Aziz's diaries, and to provide the Parties with an extension of the deadline to submit an agreed proposal of the Terms of Reference for the ink-dating expert.

91. Also on 14 September 2016, Claimant requested a one-day extension of the deadline for the filing of its Rejoinder. Respondent objected to Claimant's extension request. On the same date, the Tribunal granted the further extension of the deadline to file Claimant's Rejoinder until 1 p.m. of 16 September 2016 (N.Y. time).

92. On 15 September 2016, Respondent filed a request for admissibility of new evidence, disclosed by Claimant on 12 September 2016, *i.e.*, 45 additional documents relating to (a) expenditure on the Chile trip and (b) the remuneration of Colonel Sher Khan, which the Tribunal had ordered Claimant to produce by 15 June 2016 pursuant to Procedural Order No. 9 (as amended by Procedural Order No.10). Respondent requested leave to file a supplemental submission addressing the new evidence in relation to the Chile trip by 30 September 2016.

93. On 15 September 2016, Claimant gave its consent to Respondent's requests of 15 September 2016, reserving the right to seek leave to file a short rejoinder if necessary.

94. On 16 September 2016, the Tribunal noting that Claimant had given its consent, granted Respondent's request to introduce the 45 documents as exhibits and to file a short supplemental submission limited to addressing the new evidence by 30 September 2016.

95. On September 16, 2016, Claimant filed its Rejoinder to Respondent's Application to Dismiss the Claims ("**Claimant's Rejoinder**"), enclosing: (i) Claimant's new exhibits: CE-492 to CE-740; (ii) Claimant's new legal authorities: CA 261 to CA 351; (iii) updated indices; (iv) Witness Statements of Gibson Pierce, Robert Skrzeczynski, David Moore, Barry Flew, and Mark Wall; the Second Witness Statements of Cory Williams, Timothy Hargreaves, Eduardo Flores, Hugh R. James, and Peter Jezek; the Fourth Witness Statement of Catherine "Cassie" Boggs; and the Seventh Witness Statement of Timothy Livesey; and (v) Expert Report of Ambassador Husain Haqqani.

96. On 19 September 2016, in response to Claimant's letter of 13 September 2016 and the Tribunal's communication of 14 September 2016 regarding the forensic examination of Mr. Aziz's diaries, Respondent requested the Tribunal to (i) reject Claimant's request for Pakistan to facilitate an examination of Mr. Aziz's diaries by Mr. Radley; (ii) appoint the expert it considers most appropriate; and (iii) provide a short background briefing (along with the relevant documents) sufficient to enable the expert to propose an appropriate methodology to resolve the matter.

97. On 20 September 2016, Claimant filed observations of Respondent's renewed request of 5 September 2016 for the Tribunal to decide on production of documents.

98. On 21 September 2016, Claimant filed further observations on Respondent's response of 19 September 2016.

99. Under cover of a letter of 21 September 2016, Claimant provided the Tribunal with a Corrected Rejoinder, seeking leave to file it in place of that filed on 16 September 2016.

100. On 23 September 2016, Respondent filed a request for the exclusion of evidence, *i.e.*, the Haqqani Report together with accompanying exhibits CE-741 to CE-812, arguing that it was not responsive to the Reply, and that Mr. Haqqani was not an independent expert.

101. On 25 September 2016, Respondent filed observations on Claimant's request of 21 September 2016 for leave to file a Corrected Rejoinder. In its letter, Respondent requested the Tribunal to seek certain clarifications from Claimant. On the same date, the Tribunal invited Claimant to clarify its position in light of Respondent's observations, by 26 September 2016.

102. On 26 September 2016, the President of the Tribunal held a Pre-Hearing Organizational Meeting with the Parties by telephone conference.

103. Also on 26 September 2016, the Tribunal issued Procedural Order No. 12 concerning production of documents.

104. On 27 September 2016, at the invitation of the Tribunal, Respondent responded to Claimant's letter of 21 September 2016, regarding the forensic examination of Mr. Aziz's diaries.

105. On 28 September 2016, Respondent filed observations on Claimant's request in its Rejoinder dated 16 September 2016 to strike from the record certain paragraphs of the witness statements of Bari Dad and Col. Sher Khan describing allegedly privileged conversations.

106. Also on 28 September 2016, Claimant filed a further request for the confidentiality of evidence, *i.e.*, requesting the Tribunal to amend the Protective Order set forth in Procedural Order No. 7, as amended by Procedural Order No. 8, and further requesting Respondent to provide certain information and documents regarding the individual to whom it had disclosed Protected Information.

107. By letter of 29 September 2016, the Parties were informed of the Tribunal's directions regarding certain pending matters, which had been jointly decided by the Tribunal following the Pre-Hearing Organizational Meeting held by the President of the Tribunal with the Parties on September 26, 2016, which addressed: (i) Issues on the Draft Agenda; (ii) the Expert Testimony of Former Ambassador Hussain Haqqani; (iii) Claimant's Corrected Rejoinder; (iv) Appointment of Forensic Expert(s); (v) Claimant's Requests Regarding Testimony of Respondent's Witnesses on Privileged Conversations; and (vi) Claimant's Request for an Amendment of the Protective Order.

108. Also on 29 September 2016, Claimant informed the Tribunal that Mr. Radley had advised that, while he was at that time unable to travel to Pakistan the week of 20 October 2016 due to prior casework obligations, he was attempting to rearrange his other work

commitments to permit travel to Pakistan a reasonable time before the hearing. Claimant requested the opportunity to respond to Respondent's letter of 27 September 2016 by 4 October 2016, to permit Mr. Radley to complete those discussions. This request was granted by the Tribunal on 30 September 2016.

109. On 30 September 2016, Respondent filed its Supplemental Reply on its Application to Dismiss Claims ("**Respondent's Supplemental Reply**").

110. On 3 October 2016, Respondent filed observations on Claimant's further request for the confidentiality of evidence of 28 September 2016.

111. Also on 3 October 2016, Claimant filed a response to Respondent's observations of 28 September 2016 on Claimant's request to strike from the record certain testimony of two of Respondent's witnesses on privileged conversations.

112. By letter of 4 October 2016, Claimant commented on the Tribunal's proposal in its directions of 29 September 2016, that the expert report of former Ambassador Haqqani be exempted from the Protective Order and that Pakistan be permitted to "*share and discuss the report with the NAB*" so that it can "*adequately address the statements made in Ambassador Haqqani's report*."

113. On October 5, 2016, Claimant filed its Supplemental Rejoinder on Respondent's Application to Dismiss Claims ("**Claimant's Supplemental Rejoinder**").

114. By letter of 5 October 2016, the Tribunal decided: (i) to deny Claimant's requests for exclusion of certain witness testimony of Mr. Bari Dad on his conversation with Claimant's former counsel Mr. Makhdoom Ali Khan on 28 July 2015. Claimant's alternative requests indicated therein were also denied; (ii) to deny Claimant's request for excluding paragraphs 58-59 of Col. Khan's second witness statement; (iii) to admit Claimant's alternative request that it be permitted to submit a witness statement from another of the counsel who participated in the calls with Col. Khan held on 27 August 2015 through 3 September 2015; and produce any other contemporaneous notes recounting those calls.

115. On the same date, Respondent filed a request for the Tribunal to decide on production of documents, *i.e.*, the disclosure of certain e-mails to determine the role and involvement of Chris Arndt in the Reko Diq project during the period of August 1999-June 2000.

116. On 5 October 2016, Claimant filed a renewed request for the Tribunal to decide on production of Mr. Aziz's diaries for inspection.

117. On 6 October 2016, Claimant filed observations on the Respondent's request of 5 October 2016, for the Tribunal to decide on the disclosure of certain e-mails.

118. On 7 October 2016, Respondent filed observations on Claimant's renewed request of 5 October 2016 for the Tribunal to decide on production of Mr. Aziz's diaries for inspection.

119. By letter of 7 October 2016, the Tribunal, for the reasons indicated therein, denied Respondent's request for disclosure of certain e-mails as stated in its letter of 5 October 2016.

120. Also on 7 October 2016, pursuant to the Tribunal's decisions on 5 October 2016, Claimant submitted (i) a witness statement of Rushmi Bhaskaran, one of Claimant's counsel who participated in the calls with Col. Sher Kahn; (ii) the new exhibits cited in that witness statement; and (iii) an updated index of Claimant's Exhibits.

121. A first week hearing on Respondent's Application to Dismiss the Claims was held at the ICC, Paris from 10 October 2016 to 15 October 2016. The following persons were present at the first week hearing:

TRIBUNAL	
Dr. Klaus M. Sachs	President
Dr. Stanimir A. Alexandrov	Co-Arbitrator
Lord Hoffmann	Co-Arbitrator

ICSID SECRETARIAT	
Ms. Mercedes Cordido-F. de Kurowski	Secretary of the Tribunal

ASSISTANT TO TRIBUNAL	
Ms. Susanne Schwalb	Assistant to the Tribunal

CLAIMANT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel	
Donald Francis Donovan	Debevoise & Plimpton LLP
Mark W. Friedman	Debevoise & Plimpton LLP
Natalie L. Reid	Debevoise & Plimpton LLP
Rushmi Bhaskaran	Debevoise & Plimpton LLP
Berglind Haldorsdottir Birkland	Debevoise & Plimpton LLP
Feisal Naqvi	HaidermotaBNR & Co.
Carl Riehl	Debevoise & Plimpton LLP
Elizabeth Nielsen	Debevoise & Plimpton LLP
Fiona Poon	Debevoise & Plimpton LLP
Jennifer Wagner	Debevoise & Plimpton LLP

CLAIMANT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Othman El Malih	
Parties	
William Hayes	Tethyan Copper Company Pty Ltd
Ramon Jara	Tethyan Copper Company Pty Ltd
Rich Haddock	Barrick Gold Corporation
Julian Anderson	Antofagasta Plc
Jonathan Drimmer	Barrick Gold Corporation

RESPONDENT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel	
Ms. Judith Gill QC	Allen & Overy LLP
Mr. Mark Levy	Allen & Overy LLP
Mr. Matthew Hodgson	Allen & Overy LLP
Mr. Rick Gal	Allen & Overy LLP
Mr. Matthew Hudson	Allen & Overy LLP
Mr. Otakar Hajek	Allen & Overy LLP
Ms. Katrina Limond	Allen & Overy LLP
Mr. Jacky Fung	Allen & Overy LLP
Mr. Ali Zahid Rahim	Axis Law Chambers
Mr. Hassan Ali	Axis Law Chambers
Mr. Usman Raza Jamil	Advocate High Court, Counsel to Government of Balochistan
Parties	
Mr. Ashtar Ausaf Ali	Attorney General for Pakistan
Mr. Sardar Sanaullah Zehri	Chief Minister, Government of Balochistan
Mr. Shahid Khaqan Abbassi	Minister, Petroleum and Natural Resources, Government of Pakistan
Mr. Arshad Mirza	Secretary, Ministry of Petroleum and Natural Resources, Government of Pakistan
Mr Saif Ullah Chattha	Chief Secretary Balochistan
Mr. Amanullah Karnani	Advocate-General, Government of Balochistan
Mr. Ahmed Sharif Chaudhry	Deputy Secretary, Law and Parliamentary Affairs Department, Government Balochistan
Mr. Muhammad Khan	Advisor to Chief Minister, Mines and Mineral Development Department, Government of Balochistan

Mr. Saleh Muhammad	Secretary, Mines and Mineral Development Department, Government of Balochistan
Mr. Muhammad Nadeem Butt	Additional Secretary, Mines and Mineral Development Department, Government of Balochistan
Mr. Mukhtar	Additional Secretary, Ministry of Petroleum and Natural Resources, Government of Pakistan
Mr. Ahmad Irfan Aslam	Office of the Attorney-General for Pakistan
Mr. Zeeshaan Zafar Hashmi	Office of the Attorney-General for Pakistan
Witness(es)	
Mr. Malik Masood Ahmed	Witness
Mr. Bari Dad	Witness
Mr. Sheikh Asmatullah	Witness
Mr. Muhammad Farooq	Witness
Mr. Zafar Iqbal	Witness
Mr. Muhammad Sher Khan	Witness
Mr. Shahbaz Khan Mandokhail	Witness
Mr. Abid S Mustikhan	Witness
Mr. Muhammad Tahir	Witness

COURT REPORTER	
Mr./Ms. First Name/ Last Name	**Affiliation**
Ms. Dawn K. Larson	English-Language Court Reporter

INTERPRETERS	
Mr./Ms. First Name/ Last Name	**Affiliation**
Mr. John Hanson	Urdu-English Interpreter
Ms. Shahida Sharif	Urdu-English Interpreter
Mr. Shoukat Mohammed	Urdu-English Interpreter

122. On 10 October 2016, Respondent filed its demonstrative RD-1.

123. On 13 October 2016, Respondent filed a letter regarding the discussions between the Parties and the Tribunal that week relating to the forensic examination of Mr. Aziz's diaries; informed the Tribunal of the issuance of Mr. Radley's Pakistan visa by the Pakistan High Commission in London on 13 October 2016; and requested that Claimant be given until 18 October 2016, to either persuade Mr. Radley to travel to Pakistan or appoint and alternative expert. In the event that Claimant failed to do so, Respondent suggested that the Tribunal should appoint an expert, in which case Respondent proposed

the appointment of Dr. Aginsky or one of the experts previously suggested by the Tribunal.

124. By letter of 19 October 2016, Claimant responded to Respondent's letter of 13 October 2016. Attached to Claimant's letter was a letter of Mr. Radley of the same date, explaining the reasons why he had concluded that he would not examine the documents in Pakistan. In its letter, Claimant requested that the Tribunal: (i) reinstate its order of 4 and 6 July 2016 and require Pakistan to immediately produce Mr. Aziz's diaries to Mr. Radley's laboratory for inspection and allow the presence of an NAB official during the examination subject to that official undertaking that he or she (*a*) would not interfere with Mr. Radley's examination in any way, (*b*) would present the diaries when requested, and (*c*) agreed not divulge any information learned by virtue of being present in the laboratory while other confidential work is being conducted; (*ii*) required Pakistan to make Mr. Aziz's diaries available for the Tribunal's inspection at the hearing in Hong Kong; and (iii) appointed Dr. Aginsky to conduct an ink dating examination, provided that any such examination was conducted only after Mr. Radley had completed his ESDA sequencing examination. In the alternative, should Pakistan refuse to deliver Mr. Aziz's diaries to Mr. Radley, Claimant requested the Tribunal to exclude all evidence related to these documents.

125. By letter of 20 October 2016, the Tribunal conveyed a message to the Parties on the matter of conducting a forensic examination of the so-called Aziz diaries, including a recommendation that Respondent produce Mr. Aziz's diaries to Mr. Radley's laboratory by 1 November 2016. Respondent was invited to respond by 26 October 2016.

126. On 26 October 2016, Respondent submitted a letter regarding the examination of Mr. Aziz's diaries. In its letter, Respondent informed the Tribunal that the NAB had reiterated its unwillingness for Mr. Aziz's diaries to be sent abroad under any circumstances, enclosing a letter sent by the NAB to the Attorney-General's Office in such regard. Respondent requested the Tribunal to withdraw its directions of 20 October 2016 and appoint a single Tribunal-appointed expert to assist the Tribunal to determine the authenticity of what Respondent's considered an important evidence. On 26 October 2016, Respondent submitted a further letter, this one requesting the Tribunal to revisit its order of 7 October 2016 regarding the disclosure of e-mails.

127. Also on 26 October 2016, Claimant requested that the Tribunal issue an order in relation to Respondent's alleged breaches of the Tribunal's Protective Order.

128. On 31 October 2016, Respondent submitted its comments in response to Claimant's letter of 26 October 2016 concerning Respondent's alleged breach of the Protective Order.

129. On 2 November 2016, Claimant submitted observations on Respondent's request of 26 October 2016 regarding the disclosure of e-mails, noting that Respondent's disclosure requests were untimely, improper and should in principle be rejected. However, in the

event that the Tribunal was minded to afford Respondent any relief, then Claimant consented to disclose the requested e-mails, provided that Respondent gave its consent (or the Tribunal ordered) that either party might admit any of those documents into evidence on or before 18 November 2016.

130. On 2 November 2016, Claimant filed a response to Respondent's letter of 26 October 2016 regarding the forensic examination of Mr. Aziz's diaries.

131. By letter of 4 November 2016, the Tribunal conveyed a message to the Parties with reference to Claimant's letter of 2 November 2016, Respondent's letter of 26 October 2016 and the Tribunal's directions of 20 October 2016, all concerning the forensic examination of Mr. Aziz's diaries.

132. On 7 November 2016, Respondent submitted a brief reply to Claimant's letter of 2 November 2016 regarding the disclosure of e-mails. Claimant submitted its rejoinder on this matter on 9 November 2016.

133. On 9 November 2016, the Tribunal invited Respondent to confirm by 14 November 2016, whether it had appointed Dr. Aginsky (or any other person) as its own Party-appointed expert, and if so, whether Respondent intended to produce him as an expert witness during the Hong Kong hearing.

134. On 10 November 2016, the Tribunal decided on Claimant's request of 26 October 2016 regarding the alleged violation of the Protective Order. For the reasons set out therein, Claimant's request was dismissed.

135. On 11 November 2016, the Tribunal decided on Respondent's request of 7 October 2016 to revisit its order of the same date concerning the disclosure of certain e-mails.

136. On 14 November 2016, Respondent informed the Tribunal that it would probably contract Mr. Gerald LaPorte as Respondent's forensic expert because Dr. Aginsky was not available. Respondent would confirm this the following week.

137. On 15 November 2016, Respondent informed the Tribunal that it had not received the 276 e-mails relating to Chris Arndt that Claimant had agreed to produce, requesting the Tribunal to order that Claimant produce them, and that Respondent be given five days from the date of production to review and submit any new exhibits. On the same date, Claimant informed the Tribunal that Respondent would receive the above-referenced e-mails later that day. By letter of 16 November 2016, the Tribunal took note of the Parties' communications of 15 November 2016 on the matter and gave the five days that had been requested by Respondent to proceed as suggested upon its receipt of the e-mails.

138. On 17 November 2016, Claimant requested that the Tribunal order Respondent to: (i) submit Mr. LaPorte's report no later than 26 November 2016; and (ii) direct Mr. LaPorte to take an additional set of ink-dating samples that replicate as closely as possible the samples Mr. LaPorte analyzes, and upon his return from Pakistan, promptly deliver the

additional samples by overnight mail to a representative of Claimant's choosing. In addition, Claimant requested that the Tribunal amend the hearing schedule so that Mr. LaPorte would testify on 10 December 2016.

139. On 18 November 2016, the Tribunal requested Respondent to: (i) confirm by 21 November 2016 whether Mr. LaPorte had indeed travelled to Pakistan for a forensic examination of Mr. Aziz's diaries and was in the process of preparing an expert report on this matter for Respondent; and (ii) comment by the same date on the requests raised in Claimant's letter of 17 November 2016. The Tribunal noted that, under the circumstances, it was inclined to grant Claimant's requests (to the extent an order from the Tribunal would be required), but would nevertheless like to hear Respondent first.

140. On 21 November 2016, Respondent submitted a letter in response to Claimant's letter of 17 November 2016 and the Tribunal's letter of 18 November 2016, regarding the forensic examination of Mr. Aziz's diaries.

141. On 22 November 2016, Respondent filed a letter in response to the Tribunal's correspondence of November 11, 2016, and submitted ten documents from the 276 e-mails that had been disclosed by Claimant on 15 November 2016, as new exhibits RE-515 to RE-524. In addition, Respondent noted that Claimant's supplemental document production raised two questions which should be addressed by Claimant.

142. By letter of 22 November 2016, Respondent informed the Tribunal that Mr. LaPorte could not get the visa to Pakistan and would not be able to travel. On the same date, Claimant sent a brief response.

143. Also on 22 November 2016, Claimant filed a letter regarding the disclosure of e-mails, together with new exhibits numbered CE-840 to CE-867, and an updated index reflecting the additional exhibits.

144. On 25 November 2016, Respondent requested leave to submit nine documents as new exhibits.

145. On 28 November 2016, Claimant commented on Respondent's requests in connection with the disclosure of certain e-mails relating to Chris Arndt that were raised in Respondent's letter of 22 November 2016.

146. On 29 November 2016, the Tribunal referred to Claimant's letter on 29 November 2016, noting that "*TCCA has no Arndt e-mails from the period August to December 1999, and it does not have more complete copies of the e-mail chains included in the production*" as well as the explanation provided by Claimant in this regard. Consequently, the Tribunal considered that no further order was required on Respondent's requests of 22 November 2016.

147. On 30 November 2016, Claimant commented on Respondent's request for leave to submit nine documents as new exhibits.

148. On 1 December 2016, the Tribunal granted Respondent's request to submit proposed exhibits RE-528 to RE-531, which it deemed responsive to Former Ambassador Haqqani's expert report, into the record. In accordance with Section 15.9 of Procedural Order No. 1, Claimant was granted leave to submit evidence in rebuttal to these four exhibits until 4 December 2016. Respondent's request to submit the remaining proposed exhibits was denied as belated.

149. A second week hearing on Respondent's Application to Dismiss the Claims was held at the Hong Kong International Arbitration Centre (HKIAC), Hong Kong from 3 December 2016 to 10 December 2016. The following persons were present at the second week hearing:

TRIBUNAL	
Dr. Klaus M. Sachs	President
Dr. Stanimir A. Alexandrov	Co-Arbitrator
Lord Hoffmann	Co-Arbitrator

ICSID SECRETARIAT	
Ms. Mercedes Cordido-F. de Kurowski	Secretary of the Tribunal

ASSISTANT TO TRIBUNAL	
Ms. Susanne Schwalb	Assistant to the Tribunal

CLAIMANT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel	
Mr. Donald Francis Donovan	Debevoise & Plimpton LLP
Mr. Mark W. Friedman	Debevoise & Plimpton LLP
Ms. Natalie L. Reid	Debevoise & Plimpton LLP
Mr. Carl Riehl	Debevoise & Plimpton LLP
Mr. Feisal Naqvi	HaidermotaBNR & Co.
Ms. Rushmi Bhaskaran	Debevoise & Plimpton LLP
Ms. Berglind Haldorsdottir Birkland	Debevoise & Plimpton LLP
Ms. Elizabeth Nielsen	Debevoise & Plimpton LLP
Ms. Fiona Poon	Debevoise & Plimpton LLP
Mr. James Parkinson	BuckleySandler LLP (individual counsel to witnesses)
Parties	
Mr. William Hayes	Tethyan Copper Company Pty Ltd
Mr. Ramon Jara	Tethyan Copper Company Pty Ltd
Mr. Julian Anderson	Antofagasta Plc

Mr. Jonathan Drimmer	Barrick Gold Corporation
Expert	
Ambassador Husain Haqqani	Witness
Witnesses	
Mr. Gibson Pierce	Witness
Mr. Robert Skrzeczynski	Witness
Mr. Cory Williams	Witness
Mr. David Moore	Witness
Mr. Tim Hargreaves	Witness
Mr. Eduardo Flores	Witness
Mr. Hugh James	Witness
Mr. Mark Wall	Witness
Ms. Catherine Boggs	Witness
Mr. Barry Flew	Witness
Mr. Peter Jezek	Witness
Mr. Timothy Livesey	Witness

RESPONDENT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel	
Ms. Judith Gill QC	Allen & Overy LLP
Mr. Mark Levy	Allen & Overy LLP
Mr. Matthew Hodgson	Allen & Overy LLP
Mr. Matthew Hudson	Allen & Overy LLP
Mr. Otakar Hajek	Allen & Overy LLP
Ms. Katrina Limond	Allen & Overy LLP
Mr. Jacky Fung	Allen & Overy LLP
Mr. Ali Zahid Rahim	Axis Law Chambers
Mr. Hassan Ali	Axis Law Chambers
Mr. Usman Raza Jamil	Advocate High Court, Counsel to Government of Balochistan
Parties	
Mr. Sardar Sanaullah Zehri	Chief Minister, Government of Balochistan
Mr. Shahid Khaqan Abassi	Minister, Petroleum and Natural Resources, Government of Pakistan
Mr. Saleh Muhammad	Secretary, Mines and Mineral Development Department, Government of Balochistan
Mr. Mukhtiar	Additional Secretary, Ministry of Petroleum and Natural Resources, Government of Pakistan
Mr. Ahmad Irfan Aslam	Office of the Attorney-General for Pakistan

Mr Khawaja Humayun Nizami	Vice Chairman, Balochistan Board of Investment
Witness(es)	
Mr Abdul Aziz	Witness

COURT REPORTERS	
Mr./Ms. First Name/ Last Name	**Affiliation**
Ms. Dawn K. Larson	English-Language Court Reporter
Ms. Victoria Lynne	English-Language Court Reporter

INTERPRETERS	
Mr./Ms. First Name/ Last Name	**Affiliation**
Ms. Shahida Sharif	Urdu-English Interpreter
Mr. Gul Ifat	Urdu-English Interpreter

150. On 4 December 2016, pursuant to the Tribunal's decision of 1 December 2016, permitting Claimant to submit evidence in rebuttal to Respondent's newly-admitted exhibits, Claimant submitted seven new exhibits, marked as Exhibits CE-868 through CE-874, together with an updated index of Claimant's Exhibits.

151. On 7 December 2016, Respondent filed its demonstratives RD-2 through RD-7 and Respondent's slides from day 7 of the Hearing (5 December 2016 in Hong Kong).

152. On 7 December 2016, Claimant filed Mr. Gibson Pierce's corrected witness statement, along with a redline showing the corrections.

153. On 8 December 2016, Respondent filed its demonstratives RD-8 and RD-9.

154. On 9 December 2016, pursuant to the Tribunal's invitation, Claimant submitted Exhibit CE-875 into the record.

155. On 9 January 2017, Claimant filed a letter requesting the exclusion of the expert report of Mr. LaPorte and the cancelation of all further submissions and proceedings related to the forensic examination of Mr. Aziz's diaries.

156. On 10 January 2017, Respondent filed a letter attaching (i) Mr. LaPorte's Expert Report ("**LaPorte Report**"), and (ii) Respondent's Submission Accompanying Mr. LaPorte's Expert Report ("**Respondent's LaPorte Submission**"). In its letter Respondent expressed its intention to file a separate response to Claimant's letter as soon as possible, and by no later than 12 January 2017. Separately, Respondent filed Appendices 1 to 11 to the LaPorte Report (Exhibits RE-534 to RE-544) and legal authorities RLA-330 to RLA-334 as well as updated indices of Respondent's exhibits and legal authorities.

157. On 11 January 2017, the Tribunal acknowledged receipt of Claimant's request of 9 January 2017, noting that it would decide upon receipt of Respondent's observations. Respondent's filed its observations on 12 January 2017.

158. On 15 January 2017, the Tribunal decided not to exclude Mr. LaPorte's Expert Report but invited Claimant to raise any questions it might have regarding the specific source material mentioned in its letter of 9 January 2017 that it would have requested in advance of Mr. LaPorte's examination if it had known about the techniques that Mr. LaPorte would apply and to put such questions directly to Mr. LaPorte, and fixed a procedural calendar for the Parties' subsequent submissions on the examination of Mr. Aziz's diaries.

159. On 18 January 2017, Claimant posed questions to Respondent's Expert Mr. LaPorte pursuant to the invitation of the Tribunal of 15 January 2017.

160. On 20 January 2017, Respondent filed a request for the Tribunal to re-issue its decision dated 15 January 2017 to refuse Claimant's request to exclude Mr. LaPorte's Expert Report and Respondent's Accompanying Submission without any further qualification.

161. On 23 January 2017, Respondent requested that the Tribunal confirm that Claimant's questions of 18 January 2017 should be narrowed down in the manner suggested by Respondent in its letter to Claimant of 20 January 2017, which had been provided to the Tribunal.

162. On 23 January 2017, Respondent filed a letter objecting to the procedural schedule for the eventual quantum phase, that was fixed during the last day of the Hong Kong Hearing. On the same date, Claimant was invited to comment by 27 January 2017.

163. On 24 January 2017, Claimant filed a letter in response to (i) Respondent's letter of 20 January 2017, requesting that the Tribunal withdraw certain portions of its 15 January 2017 decision, and (ii) Pakistan's letter of 23 January 2017, requesting that the Tribunal narrow the list of questions that Claimant posed to Mr. LaPorte on 18 January 2017.

164. On 25 January 2017, the Tribunal decided on Respondent's requests of 20 January 2017 and of 23 January 2017.

165. On 26 January 2017, Respondent filed a copy of its letter to Claimant with copy to the Tribunal concerning the forensic examination of Mr. Aziz's diaries, attaching Mr. LaPorte's answers to Claimant's questions with one attachment.

166. On 27 January 2017, Claimant filed a letter commenting on Respondent's request of 23 January 2017.

167. By letter of 31 January 2017, the Tribunal denied Respondent's request of 23 January 2017, noting that it expected the Parties to prepare their submissions on quantum, if any, in accordance with the schedule agreed on with the Parties on the last hearing day in Hong Kong.

168. On 6 February 2017, Respondent filed a letter in response to the Tribunal's decision of 31 January 2017.

169. On 8 February 2017, Respondent filed a copy of its letter to Claimant, regarding the issue of documents relating to Claimant's investigation into allegations that it had tried to bribe Chief Minister Raisani in 2009-2010. On the same date, Claimant submitted a copy of its response to Respondent.

170. On 9 February 2017, Respondent filed a request for the Tribunal to amend the Protective Order.

171. Also on 9 February 2017, Claimant filed a 10-page submission ("**Claimant's LaPorte Response**") together with Mr. Robert Radley's Expert Report ("**Radley Report**"), accompanied by Exhibits CE-876 to CE-882 and an updated index of its exhibits.

172. On 13 February 2017, the Tribunal decided that the hearing on the forensic examination of Mr. Aziz's diaries tentatively scheduled for 21 February 2017, should take place with the President of the Tribunal at the ICC in Paris, with the co-arbitrators participating by video-link.

173. On 14 February 2017, Claimant filed observations on Respondent's request of 9 February 2017 seeking an amendment of the Protective Order. On the same date, Respondent filed a response to Claimant's observations of 14 February 2017.

174. On 15 February 2017, the Tribunal decided to grant Respondent's request for an amended order, subject, however to the addition that Claimant had subsidiarily requested, *i.e.*, that the signed undertaking be provided to, and kept on file with, the ICSID Secretariat.

175. On 21 February 2017, Claimant submitted Exhibits CE-883 to CE-888 into the record.

176. On 21 February 2017, the Tribunal held a hearing on the forensic examination of Mr. Aziz's diaries, at the ICC in Paris, with the President of the Tribunal participating in person and the co-arbitrators by video-link. The following persons were present at this hearing:

TRIBUNAL	
Dr. Klaus M. Sachs	President
Dr. Stanimir A. Alexandrov	Co-Arbitrator (by V.C. from Washington, D.C.)
Lord Hoffmann	Co-Arbitrator (by V.C. from Cape Town)

ICSID SECRETARIAT	
Ms. Mercedes Cordido-Freytes de Kurowski	Secretary of the Tribunal

CLAIMANT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel	
Mr. Donald Donovan	Debevoise & Plimpton LLP
Ms. Rushmi Bhaskaran	Debevoise & Plimpton LLP
Mr. Nawi Ukabiala	Debevoise & Plimpton LLP
Parties	
Mr. Jonathan Drimmer	Barrick Gold Corp.
Mr. Julian Anderson	Antofagasta PLC
Expert(s)	
Mr. Robert Radley	The Radley Forensic Document Laboratory
RESPONDENT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel	
Mr. Mark Levy	Allen & Overy LLP
Mr. Rick Gal	Allen & Overy LLP
Ms. Sophie Davin	Allen & Overy LLP
Mr. Usman Raza Jamil	Advocate High Court, Counsel to Government of Balochistan
Parties	
Mr. Ahmad Irfan Aslam	Office of the Attorney-General for Pakistan
Expert(s)	
Mr. Gerald M. LaPorte	Riley Welch LaPorte & Associates

COURT REPORTER	
Ms. Yvonne Vanvi	English Court Reporter

177. On 23 February 2017, pursuant to the Tribunal's invitation, Claimant submitted Exhibit CE-889 and an updated index of its exhibits.

178. On 7 March 2017, each Party filed a Post-Hearing Brief on Respondent's Application to Dismiss the Claims ("**Respondent's Post-Hearing Brief**"; "**Claimant's Post-Hearing Brief**"). Attached to Respondent's Post-Hearing Brief were new legal authorities, *i.e.*, RLA-335 to RLA-339, together with an updated consolidated index of authorities.

179. By letter of 8 March 2017, the Tribunal acknowledged receipt of the Parties' Post-Hearing Briefs, and informed the Parties that the Tribunal would be rendering its Decision on Respondent's Application to Dismiss the Claims if not by 15 March 2017, at the latest on 20 March 2017.

180. Upon receipt of the Parties' Post-Hearing Briefs and as announced in the Tribunal's letter of 8 March 2017, the Tribunal intensively deliberated on Respondent's Application and

carefully considered each of the arguments put forward by the Parties, including the evidence adduced to support them.

181. After thorough and open-minded deliberations, the Tribunal has unanimously reached the decision to reject Respondent's Application to Dismiss the Claims and, on 20 March 2017, communicated its Decision on Respondent's Application to Dismiss the Claims (with reasons to follow) to the Parties. For a summary of the procedural history leading up to the Tribunal's approach to first communicate its decision to the Parties and then provide the reasons for its decision in a second step, *see* paragraphs 8 to 16 of the Tribunal's Decision on Respondent's Application to Dismiss the Claims (with reasons to follow) dated 20 March 2017. As announced in the Tribunal's letter of 31 May 2017, the Tribunal further issues its Decision on Jurisdiction and Liability, as amended pursuant to the Parties' comments of 4 April 2016 (the "**Decision on Jurisdiction and Liability**"), together with this fully reasoned Decision on Respondent's Application to Dismiss the Claims.

182. On 20 April 2017, the Parties filed their respective Statements of Costs for the present phase of the proceedings concerning Respondent's Application to Dismiss the Claims.

IV. FACTUAL BACKGROUND

183. For a detailed summary of the factual background to the dispute between the Parties, the Tribunal makes reference to Section IV of its Decision on Jurisdiction and Liability.

184. The Tribunal further notes that in the present phase of the proceeding, it has been presented with certain additional facts, supplementing the chronology of events as set out in the Decision on Jurisdiction and Liability, which are either undisputed between the Parties or are otherwise established by the evidence submitted in these proceedings to the satisfaction of the Tribunal. These will be addressed as part of the Tribunal's reasoning on Respondent's individual allegations.

V. POSITIONS OF THE PARTIES

A. Summary of Respondent's Contentions

1. Factual Allegations

185. Respondent submits that it has presented compelling documentary and witness evidence of corruption by BHP and TCC in relation to the Reko Diq project. In particular, Respondent asserts that by paying numerous bribes as detailed in Respondent's submissions, Claimant achieved results regarding both the procurement of the foundational agreements (*i.e.*, the *Agreement for Chagai Hills Exploration Joint Venture*

(the "**CHEJVA**"),[1] the *Addendum No. 1 to Chagai Hills Exploration Joint Venture Agreement* (the "**Addendum**"),[2] the letter by which BHP's 75% in the Joint Venture was certified (the "**Certification**"),[3] the Deed of Waiver and Consent (the "**Deed**"),[4] and the *Novation Agreement – Chagai Hills Exploration Joint Venture Agreement* (the "**Novation Agreement**")[5]) and the expansion of its investment (relating to the grant of land lease rights to construct an airstrip (the "**Airstrip Land Lease**"),[6] the second renewal of Exploration License EL-5,[7] the grant of surface rights (the "**Surface Rights Lease**"),[8] as well as the Mining Lease and Mineral Agreement which were never obtained).[9]

186. Respondent perceives that Claimant's attack on the NAB and its investigative process and the resultant conspiracy theory that multiple Pakistani State branches worked together to procure false confessions has fallen flat for three main reasons.[10]

187. Firstly, Respondent submits that there is no evidence that Pakistan's witnesses were coerced into making false confessions; cross-examination failed to garner support for this theory.[11] Respondent maintains that the NAB inquiry was conducted in accordance with law and procedure and that attempts to disprove this are uncorroborated. In fact, Respondent takes the position that Claimant's evidence (particularly the Flew Transcript and the Debevoise Notes) serves to undermine this theory.[12] Secondly, according to Respondent, the factual circumstances in which evidence was obtained, including the fact that investigations began in 2011 and that half of the witness statements were obtained before the NAB's involvement, demonstrate the implausibility of Claimant's theory.[13] Lastly, Respondent argues that Mr. Haqqani's "*independent expert report*" is simply a "*vitriolic attack on the country he abandoned amidst allegations of serious impropriety.*"[14]

188. Moreover, Respondent contends that it is a falsity that Claimant maintained a robust compliance culture and that the corruption allegations therefore must be a conspiracy. In reality, Respondent submits that Claimant and its shareholders, Barrick Gold and

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[1] **Exhibit CE-1**.
[2] **Exhibit CE-2**.
[3] **Exhibit CE-193**.
[4] **Exhibit CE-194**.
[5] **Exhibit CE-3**.
[6] **Exhibit CE-213**.
[7] **Exhibit CE-16**.
[8] **Exhibits CE-43** and **CE-66**.
[9] Respondent's Post-Hearing Brief, ¶¶ 32-41.
[10] Respondent's Post-Hearing Brief, ¶¶ 255-281.
[11] Respondent's Post-Hearing Brief, ¶¶ 256-271.
[12] Respondent's Post-Hearing Brief, ¶¶ 256-271.
[13] Respondent's Post-Hearing Brief, ¶¶ 272-277.
[14] Respondent's Post-Hearing Brief, ¶¶ 278-281 *referring to* Haqqani Report, dated 15 September 2016.

Antofagasta, have committed serious and repeated violations of their own internal compliance policies, Pakistani law and the FCPA, particularly evidenced by the trips for Government delegations to Chile (December 2006) and Canada (March 2007), as will be addressed in more detail in Section VII.D.2.a below.[15]

189. Respondent submits that Claimant knew of the national corruption risk and Mr. Farooq's reputation for corruption.[16] Nonetheless, Respondent maintains that incoming CEOs were unprepared and Col. Khan lacked qualification to deliver anti-corruption training to employees (which in fact was not delivered).[17] Moreover, Respondent alleges that 'red flags' of corruption were not dealt with (including Col. Khan's meteoric salary rise, the bribe offer to Chief Minister (**CM**) Raisani and the expatriate work visa bribes) even though the aforementioned knowledge of corrupt Government officials and the high risk nature of the jurisdiction necessitated a heightened degree of diligence.[18] Respondent also highlights the failure of Dr. Jezek to act diligently in the employment of Mr. Mustikhan, who was employed in relation to the Umbrella Strategy, which Respondent describes as "*aggressively targeting*" key-decision makers and influencers and as involving substantial wrongdoing on the part of Claimant's consultants and employees, all in an attempt to secure the Mineral Agreement.[19]

2. Legal Consequences

190. As for the legal consequences arising out of the acts of corruption it alleges, Respondent refers to the Expert Opinion of Judge Stephen Schwebel who concluded that faced with an investment tainted with such corruption, a tribunal may find that: (i) it lacks jurisdiction; (ii) the claim is inadmissible; or (iii) on the merits, the substantive protections contained within the investment treaty are not available.[20]

191. Respondent advances two main arguments to support the proposition that the Tribunal lacks jurisdiction.[21]

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[15] Respondent's Post-Hearing Brief, ¶ 282.
[16] Respondent's Post-Hearing Brief, ¶¶ 283-300 *referring to* Transcript (Day 11), p. 3055 lines 21-22 and p. 3034 lines 8-12; Transcript (Day 9), p. 2430 lines 6-10 and 19 and p. 2441 lines 2-4; Transcript (Day 10), p. 2490 lines 1-3 and p. 2579 lines 8-14 and p. 2829 lines 4-9; Boggs IV, ¶ 5; Boggs III, ¶ 13 *and* Transcript (Day 1), p. 170 lines 13-15.
[17] Respondent's Post-Hearing Brief, ¶¶ 284-300 *referring to* Transcript (Day 10), p. 2579 lines 15-22 and p. 2580 lines 7-9; Transcript (Day 9), p. 2467 line 22 to p. 2468 line 5 and p. 2435 line 7 to p. 2436 line 20; Transcript (Day 11), p. 2833 lines 18-20, Transcript (Day 3), p. 820 line 17 to p. 821 line 5; Transcript (Day 4), p. 1113 line 22.
[18] Respondent's Reply, ¶¶ 82-103; Respondent's Post-Hearing Brief, ¶¶ 310-321 *citing to Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016 [**RLA-334**], ¶ 519.
[19] Respondent's Post-Hearing Brief, ¶ 313; Respondent's Reply, ¶¶ 355-369.
[20] Respondent's Post-Hearing Brief, ¶ 384, *referring to* Schwebel Opinion, ¶ 90.
[21] Respondent's Post-Hearing Brief, ¶¶ 416-471.

192. Firstly, Respondent argues that Claimant's alleged investment fails to meet the legality requirement in Article 1(1)(a) of the Treaty (requiring investments to be made within framework of Pakistani laws).[22] Respondent maintains that: (i) the Addendum and related agreements are void due to corruption and thus do not constitute assets within the meaning of Article 1(1) of the Treaty; and (ii) valid and effective acceptance of Claimant's investment never existed due to breaches of fundamental Pakistani law principles.[23] By reference to a number of investment treaty decisions, Judge Schwebel noted in his Opinion that jurisdictional arguments based on the illegality of an investment will have temporal limitations, namely that such arguments will only bar jurisdiction where the "*establishment*," rather than the "*performance*," of the investment is tainted by illegality.[24]

193. Secondly, Respondent argues that even if the Tribunal finds that Claimant's corruption did not infect the inception of its investment but went to its operation and/or performance, the Tribunal nonetheless lacks jurisdiction to hear the claims.[25] Respondent maintains that pursuant to a proper construction of Article 25(1) of the ICSID Convention and Article 13(3)(a) of the Treaty, Pakistan has not consented to arbitrate claims arising from investments tainted by fraud and corruption (a conclusion which does not depend on the construction of Article 1(1)(a)).[26] Respondent again refers to Judge Schwebel's Opinion in which he states that in the case of corruption in the performance of the investment, the Tribunal must look beyond this legality requirement, considering the impact of public policy on the host State's consent to arbitrate and the investor's entitlement to rely on that consent.[27] Respondent submits that given Claimant's corruption during the performance of the investment, Claimant should be estopped from relying on the host State's consent to arbitrate or should be found not to meet the implied conditions attaching to the host State's offer to arbitrate.[28]

194. In the event that the Tribunal finds that it does have jurisdiction, Respondent maintains that the corruption in relation to the inception or performance of Claimant's investment

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[22] Respondent's Post-Hearing Brief, ¶¶ 419-464 *referring to* Schwebel Opinion ¶ 90; Respondent's Application, ¶¶ 160-168; Respondent's Reply, ¶¶ 419-464.
[23] Respondent's Post-Hearing Brief, ¶¶ 412-419.
[24] Schwebel Opinion, ¶ 73.
[25] Respondent's Post-Hearing Brief, ¶ 420 *referring to* Schwebel Opinion, ¶¶ 76-83.
[26] Respondent's Post-Hearing Brief, ¶¶ 420-424; Respondent's Application, ¶¶ 181-183; Respondent's Reply, ¶¶ 465-466.
[27] Respondent's Post-Hearing Brief, ¶ 420 *referring to* Schwebel Opinion, ¶¶ 76-83.
[28] Schwebel Opinion, ¶ 76.

nonetheless renders the claims inadmissible based on transnational public policy or the application of the "*unclean hands*" doctrine.[29]

195. Finally, if the Tribunal were to find that it has jurisdiction and that Claimant's claims are admissible, Respondent's position is that: (i) its corruption and lack of diligence render the substantive protections in the Treaty unavailable to Claimant; and (ii) even if such protections are available, each of them is vitiated by Claimant's illegal conduct.[30]

B. Summary of Claimant's Contentions

196. Throughout the proceedings, Claimant has maintained that the preliminary objections in Respondent's Application have been waived and are time-barred – this will be considered in Section VII.A below.[31] Contrary to Respondent's assertion that any corruption, whether in relation to the foundational agreements or the collateral events is relevant, Claimant further asserts that allegations of corruption that do not concern the foundational rights do not fall properly within the remit of this investment treaty Tribunal.[32]

1. Factual Allegations

197. In response to Respondent's factual allegations, Claimant submits that a voluminous documentary record and a dozen witnesses have refuted Respondent's claims and demonstrated the foundational agreements to be the product of a normal bureaucratic process.[33] In contrast, the fact that none of the highest-ranking government officials implicated in Respondent's allegations have testified, allegedly speaks volumes as to the falsity of its claims.[34]

198. Claimant submits that this evidence and the objective facts demonstrate that the real scandal here is not Claimant's alleged corruption, but Respondent's cynical abuse of the international community's commitment to eliminate corruption to escape liability for already determined Treaty breaches.[35]

199. Claimant highlights that for years no-one was able to uncover the alleged widespread corruption, but suddenly, when Respondent needed to avoid its liability to Claimant, it convened a Local Expert Group, which "*unearthed*" in weeks evidence that had eluded

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[29] Respondent's Post-Hearing Brief, ¶¶ 425-426; Respondent's Application, ¶¶ 129-145; Respondent's Reply, ¶¶ 473-478.
[30] Respondent's Post-Hearing Brief, ¶¶ 427-439; Respondent's Reply ¶¶ 479-491; Respondent's Application, ¶¶ 210-215.
[31] Claimant's Rejoinder, ¶¶ 79-89.
[32] Claimant's Rejoinder, ¶ 188.
[33] Claimant's Post-Hearing Brief, ¶ 14.
[34] Claimant's Post-Hearing Brief, ¶ 8.
[35] Claimant's Post-Hearing Brief, ¶ 2.

the Governments for years and deputized the NAB, all to assist with this arbitration.[36] The documentary record allegedly establishes that this investigation was not driven by a commitment to "*intensify* [Respondent's] *investigation efforts*," but solely to rescue the Governments' hopeless arbitration position.[37]

200. Claimant contends that in pursuit of these aims, through intimidation, self-interest and confabulation, Respondent's witnesses were prompted by NAB interrogators to make false confessions.[38] However, this allegedly became clear at the Hearing when, according to Claimant, testimonies crumbled and Respondent's (albeit unconvincing) documentary evidence of the bribery, *i.e.*, Mr. Aziz's diaries, was undermined.

201. Claimant contends that it has maintained a robust compliance culture, further corroborating the conclusion that Respondent's allegations are a conspiracy. Dismissing Respondent's allegations that TCC ignored 'red flags' based on documentary and witness evidence, Claimant maintains that: (i) Col. Khan's salary increases were due to legitimate business considerations and company-wide policies; and (ii) Claimant's self-reporting of deficiencies in the application procedure for expatriate work visas provides no basis on which to dismiss Claimant's Treaty claims, but instead confirms its commitment to ethical business practice.[39] Moreover, Claimant submits that Respondent's claims of illegitimacy in relation to the Umbrella Strategy are contrary to the record and rely on a selective misinterpretation of the documents.[40]

2. Legal Consequences, If Any

202. As for legal consequences flowing from proven allegations of corruption, if any, Claimant emphasizes that the Tribunal's Draft Decision concluded that the three jurisdictional requirements were met and that Claimant's claims were admissible; in Claimant's view, Respondent has offered no reason for which these issues merit re-litigation.[41]

203. Claimant argues that the Tribunal has jurisdiction over its claims for four reasons. Firstly, Claimant emphasizes that the admission requirement contained in Article 1(1)(a) of the Treaty is not a legality requirement and cannot now be retroactively revisited since compliance is measured at the time of the investment's admission, not at any time thereafter.[42] Secondly, Claimant disputes the contention that a legality requirement can

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[36] Claimant's Rejoinder, ¶ 7 *referring to* **Exhibit RE-433**, p. 57.
[37] Claimant's Rejoinder, ¶¶ 69-78 *referring to* Respondent's Application, ¶ 71 *and* Respondent's Reply, ¶ 39.
[38] Claimant's Post-Hearing Brief, ¶¶ 298-320.
[39] Claimant's Post-Hearing Brief, ¶ 218; Claimant's Rejoinder ¶ 260.
[40] Claimant's Post-Hearing Brief, ¶¶ 223-231.
[41] Claimant's Post-Hearing Brief, ¶ 395 *referring to* Draft Decision, ¶¶ 628–640, 678–685.
[42] Claimant's Rejoinder, ¶¶ 117-134.

be read into the Treaty because it is implicit in international law.[43] Thirdly, Claimant asserts that pre- or post-admission allegations (of corruption that allegedly occurred before or after the conclusion of the 2006 Novation Agreement) are irrelevant to the legality requirement and thus at the jurisdictional stage.[44] Lastly, Claimant maintains that there is no implicit corruption-related condition on Pakistan's offer to arbitrate.[45]

204. Claimant further submits that despite Respondent's attempts to rely on the *World Duty Free* and the *Churchill Mining* cases, there is no general principle of "*unclean hands*" in international law that would render Claimant's claims inadmissible and the Tribunal cannot decline to exercise its mandate on the ground of transnational public policy.[46]

205. Finally, Claimant maintains that Respondent has not met the burden of proving its allegations and cannot save its Application by asking the Tribunal to connect the dots and infer the corruption which Respondent has failed to prove. In Claimant's view, there is no legal or factual basis for the relief that Respondent seeks; it thus asks the Tribunal to dismiss the Application in its entirety, grant a full remedy for the harm caused by Respondent's reliance on fraudulent evidence and move onto the next stage of proceedings.[47]

VI. THE PARTIES' REQUESTS FOR RELIEF

A. Respondent's Request for Relief

206. In its Post-Hearing Brief dated 7 March 2017, Respondent seeks relief in the following terms:[48]

(i) A declaration that Respondent's witness statements and accompanying evidence are admitted to the record;

(ii) A declaration that, as a result of Respondent's evidence of fraud and corruption, the Tribunal lacks jurisdiction to determine all of TCC's claims or all of Claimant's claims are inadmissible and are dismissed, with prejudice, or all of Claimant's claims are unsuccessful on the merits and are dismissed, with prejudice;

(iii) An order that Claimant should pay all costs incurred in connection with these arbitration proceedings, including their own costs, the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by Respondent, including

[43] Claimant's Rejoinder, ¶¶ 135-137.
[44] Claimant's Rejoinder, ¶¶ 138-150.
[45] Claimant's Rejoinder, ¶¶ 151-154.
[46] Claimant's Rejoinder, ¶¶ 155-170; Claimant's Post-Hearing Brief, ¶¶ 395-402.
[47] Claimant's Post-Hearing Brief, ¶ 13, 20 *referring to* Respondent's Reply, ¶ 383.
[48] Respondent' Post-Hearing Brief, ¶ 444.

the fees of its legal counsel, experts and consultants, as well as the expenses of Respondent's own officials and employees on a full indemnity basis, plus interest thereon at a reasonable rate; and

(iv) Such further or other relief as the Tribunal, in its discretion, considers appropriate.

207. Respondent further continues to reserve all of its rights in respect of the Draft Decision, which it submits must be substantially revised to take account of the Tribunal's findings on Respondent's Application to Dismiss and to reflect the relief sought above.[49]

B. Claimant's Request for Relief

208. In its Post-Hearing Brief dated 7 March 2017, Claimant requests that the Tribunal:[50]

(i) Dismiss the Application in its entirety and with prejudice;

(ii) Order Respondent to pay, on a full indemnity basis and with interest, all legal and other costs incurred since the beginning of these proceedings through the end of this phase; and

(iii) Order such other and further relief as may be just and appropriate in the circumstances.

VII. THE TRIBUNAL'S REASONING

209. At the outset of its reasoning, the Tribunal wishes to emphasize that it has carefully reviewed all of the arguments and evidence presented by the Parties in the course of the present phase of the proceedings concerning Respondent's allegations of corruption as well as, to the extent relevant in the present context, the arguments and evidence adduced in the previous phase on jurisdiction and liability. 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.

210. The Tribunal's reasoning is structured as follows: As a first step, the Tribunal will assess Claimant's objections to the admissibility of Respondent's Application and of the new evidence that Respondent has submitted in support of its Application. In case the Tribunal reaches the conclusion that Respondent's Application and the new evidence is admissible, it will, as a second step, examine the standard and burden of proof applicable to Respondent's allegations of corruption. As a third step, the Tribunal will analyze each of Respondent's factual allegations and determine whether these have been established in accordance with the applicable standard and burden of proof. Finally, in case the Tribunal

[49] Respondent' Post-Hearing Brief, ¶ 445.
[50] Claimant's Post-Hearing Brief, ¶ 409.

finds that one or more of Respondent's factual allegations have been established, it will assess the legal consequences, if any, flowing from any such proven allegations.

A. Claimant's Objections to the Admissibility of Respondent's Application and of the New Evidence Respondent Has Submitted in Support of Its Application

1. Summary of Claimant's Position

211. Claimant contends that there was not a "*long running investigation into corruption*" prior to Respondent's decision to assert accusations here in a belated attempt to frustrate this arbitration.[51] Claimant argues that Respondent's enduring inaction despite its "*awareness of allegations of corruption*" since the inception of the Reko Diq project renders the Application inadmissible in three respects.[52]

212. Firstly, Claimant submits that Respondent has failed to raise the allegations of corruption, which it has now raised in its Application, as preliminary objections during the generous time set by the Tribunal and thus that Respondent has waived any objections to the Tribunal's jurisdiction over, or admissibility of, Claimant's claims.[53] Secondly, Claimant argues that Respondent's failure to pursue these allegations in a timely fashion also bars the Application, as a procedural matter by the doctrine of laches, and thirdly, as a substantive matter by the doctrine of acquiescence; both requiring denial of Respondent's request to admit new evidence and thus dismissal of the Application.[54]

a. Respondent's Application is Time-Barred

213. Claimant submits that ICSID Arbitration Rules 41 and 26 govern the Tribunal's determination of whether Respondent can assert preliminary objections at this stage of proceedings.[55] Claimant rejects: (i) Respondent's "*flawed proposition*" that these rules do not apply to corruption; and (ii) the alleged impossibility of presenting this evidence earlier.[56] To the contrary, Claimant maintains that Mr. Farooq's corrupt reputation, the fact that corruption was "*common knowledge*" and the fact that there were no barriers to Respondent questioning its officials, gave ample basis for inquiry.[57]

214. Claimant argues that Respondent's suggestion that Rule 41(1)'s mandatory language (objections "*shall*" be submitted "*no later than*" the counter-memorial deadline) should be disregarded given: (i) the Tribunal's obligation to investigate corruption; and (ii) the

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[51] Claimant's Rejoinder, ¶¶ 51-78 *referring to* Respondent's 17 August 2015 Letter to the Tribunal, at 2.
[52] Claimant's Rejoinder, ¶¶ 51-116 *referring to* Respondent's Application, ¶ 35.
[53] Claimant's Rejoinder, ¶ 50.
[54] Claimant's Rejoinder, ¶¶ 50, 78.
[55] Claimant's Rejoinder, ¶ 79 *referring to* Claimant's Opposition, ¶ 20 *and* Respondent's Reply, ¶¶ 371-373.
[56] Claimant's Rejoinder, ¶¶ 79-80 *referring to* Respondent's Reply, ¶ 371.
[57] Claimant's Rejoinder, ¶ 81 *referring to* Malik, ¶ 6.

language in Rule 41(2) permitting the Tribunal to consider jurisdiction at any stage, should be dismissed. Relying on commentators and various tribunals, Claimant submits that that key issue is the parties' equal right to due process which includes a respect for the Tribunal's time limits.[58]

215. Respondent's further suggestion that corruption allegations constitute "*special circumstances*" under Rule 26(3) is also rejected by Claimant.[59] Claimant criticizes Respondent's incorrect characterization of the *World Duty Free* and *Metal-Tech* decisions and instead cites *Siag* to support the fact that Respondent's failure to exercise diligence expected of a party with corruption concerns is sufficient to dismiss its challenges to jurisdiction and admissibility as time-barred.[60]

b. Laches Bars Respondent's Application

216. Claimant submits that laches is based on notions of equity and fairness and constitutes "*the exclusion of all pretensions to right*" on the basis of "*the length of time during which that right has been neglected.*"[61] Claimant perceives that Respondent's assertion that this doctrine does not apply since this is a challenge to jurisdiction in an existing claim, not an overdue claim, misses the point by focusing on the label rather than the substance of submissions.[62] Claimant maintains that these allegations have created a new phase in proceedings, comparible to a new case, not simply a procedural request for consolidation as in the *Canfor & Tembec* cases cited.[63]

217. Moreover, referring to the *Gentini* and *Cadiz* cases, Claimant argues that the delay has had a significant effect on the nature and the quality of available evidence.[64] Claimant alleges that its prejudice has been compounded by Respondent continuing to make new allegations (including the belated introduction of Mr. Iqbal's testimony) as evidenced by its ever-shifting testimony and the ease with which witnesses have been willing to deny such allegations.[65]

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[58] Claimant's Rejoinder, ¶¶ 82-83.
[59] Claimant's Rejoinder, ¶¶ 84-89.
[60] Claimant's Rejoinder, ¶¶ 84-89.
[61] Claimant's Rejoinder, ¶ 92 *citing to Spader* Case, United Nations Reports of International Arbitral Awards, Vol. IX, 223–224 (1903/1905) [**CA 266**] at 224 (*quoting Vattel*).
[62] Claimant's Rejoinder, ¶ 92.
[63] Claimant's Rejoinder, ¶ 93 *referring to* Respondent's Reply, ¶¶ 375-376.
[64] Claimant's Rejoinder, ¶ 94.
[65] Claimant's Rejoinder, ¶¶ 94-99 *citing to Gentini* Case, United Nations Reports of International Arbitral Awards Vol. X, 551–561[**CA 268**] *and Case of Ann Eulogia Garcia Cadiz (Loretta G. Barberie) v. Venezuela*, opinion of the Commissioner, Mr. Findlay, Claims Commission established under the Convention concluded between the United States of America and Venezuela on 5 December 1885, United Nations Reports of International Arbitral Awards Vol. XXIX, 293–298 [**CA 270**], p. 298.

c. Acquiescence Bars Respondent's Application

218. Claimant refers to a number of international tribunals holding that respondent states cannot ignore corruption and then try to use such alleged illegality as a shield against investment claims.[66] Thus, by reason of its two-decade long failure to investigate and prosecute, Claimant perceives that Respondent should be deemed to have acquiesced to the lapse of the claim.[67]

219. Claimant submits that Respondent's suggestion that any corruption, no matter how minor or how late the allegations are raised, should result in the Tribunal dismissing the investor's claims no matter their merit nor whether the state has attempted to punish its own official's conduct, would create perverse incentives in favour of corruption.[68] Claimant explains that despite countless opportunities to investigate the alleged corruption, Respondent was miraculously able to unearth its allegations after only a few days of interviews; Claimant draws similarities to a recent decision in the Supreme Court of Pakistan to contend that NAB is abusing its powers for purposes extraneous to anti-corruption goals in order for Respondent to avoid liability in this international arbitration.[69]

2. Summary of Respondent's Position

220. Respondent submits that it has not waived any of its objections and there are no procedural restrictions that bar its Application.

221. Firstly, in accordance with ICSID Arbitration Rule 41(1), Respondent argues that it has raised objections "*as early as possible.*"[70] While Claimant's corrupt practices may have been suspected, Respondent emphasizes a distinction between rumors and tangible evidence which could be placed before a tribunal. Additionally, Respondent claims that Claimant's suggestion that Respondent waited for "*two decades of deliquence*" is unsubstantiated given the investigations which were indeed initiated.[71] Respondent argues that it was unable to raise its objections earlier due to Claimant's failure to comply with disclosure obligations, concealing payments and witnesses.[72]

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[66] Claimant's Rejoinder, ¶ 101 *referring to* Claimant's Opposition, ¶¶ 269-270.
[67] Claimant's Rejoinder, ¶¶ 101-116 *referring to* International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 12 December 2001, [**CA 1**], Art. 45(b).
[68] Claimant's Rejoinder, ¶ 107 *referring to* Claimant's Opposition, ¶¶ 273-292, 241-253 *and* Respondent's Reply, ¶ 379.
[69] Claimant's Rejoinder, ¶¶ 113-115 *citing to* C.A. No. 82-K of 2015, Supreme Court of Pakistan, Order (Amir Hani Muslim, J.) [**CA 278**].
[70] Respondent's Reply, ¶ 371 *citing to EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2009 [**CA-136**], ¶ 221.
[71] Respondent's Post-Hearing Brief, ¶ 406(a)(i) *referring to* Transcript (Day 1), p. 183 lines 4-19.
[72] Respondent's Reply, ¶ 371 *referring to* Respondent's Application, ¶¶ 64-68.

222. Nonetheless, if the Tribunal determines that Respondent's new evidence was filed outside the time limits, Respondent argues that the Tribunal should make use of its power to examine its jurisdiction under ICSID Arbitration Rule 41(2) as well as its *ex officio* obligation to investigate and rule upon the existence and consequences of corruption.[73]

223. Furthermore, Respondent contends that in accordance with ICSID Arbitration Rule 26(3), "*special circumstances*" exist that entitle the Tribunal to disregard any applicable time limits – there is allegedly no doubt that the new evidence is significant enough to warrant the exercise of the Tribunal's power given that it goes directly to the jurisdiction of the Tribunal and the admissibility of the claims.[74] Respondent contends that the *Siag* case is not instructive given that it did not concern corruption allegations.[75]

224. Respondent further contends that the doctrine of laches does not apply here since: (i) this is not an application concerning an overdue claim, but Respondent is challenging jurisdiction in an existing claim; and (ii) the application of this equitable principle is not supported by Arbitration Rules or ICSID case law.[76] Respondent also considers that the doctrine of acquiescence does not apply since corruption has not been "*ignored*" as alleged by Claimant. In this regard, Respondent refers to prior investigations and its updates to the Tribunal on the NAB inquiry.[77]

3. Tribunal's Analysis

225. The Tribunal notes that Claimant's first argument, *i.e.*, that Respondent has waived any further preliminary objections under ICSID Arbitration Rule 41, relates exclusively to Respondent's claim that, based on the alleged acts of corruption, the Tribunal lacks jurisdiction to hear Claimant's claims and/or Claimant's claims are inadmissible. This first argument does not relate to Respondent's further claim that Claimant's claims should also fail on the merits or to the admission of the new evidence that Respondent has submitted in support of its Application. Therefore, the Tribunal will address the alleged waiver of preliminary objections first.

226. In the context of its further arguments, Claimant takes the position that Respondent's Application as a whole is time-barred, based on the doctrine of laches or extinctive

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[73] Respondent's Reply, ¶ 372 *citing to* Hwang & Lim, *Corruption in Arbitration - Law and Reality*, Asian International Arbitration Journal Volume No. 1, May 2012 [**RLA-33**], ¶ 15, 24.
[74] Respondent's Reply, ¶ 373.
[75] Respondent's Post-Hearing Brief, ¶ 406(a)(ii) *referring to* Transcript (Day 1), p. 46 line 12 to p. 47 line 2, *citing to, Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009 [**CA-195**], ¶¶ 296-300.
[76] Respondent's Reply, ¶¶ 361-370.
[77] Respondent's Post-Hearing Brief, ¶ 406(b) and (c) *referring to* Claimant's Rejoinder, ¶ 101, Transcript (Day 1), p. 190 lines 7-15 and p. 32 line 12 to p. 43 line 17, Respondent's Opening Slides pp. 11-20 *and* Respondent's Reply ¶ 10, 34-48.

prescription and on the doctrine of acquiescence, and also opposes the admission of the new evidence. These arguments will be addressed second.

a. Allegation that Respondent Has Waived Any Further Objections to the Tribunal's Jurisdiction and Admissibility of Claimant's Claims

227. Claimant firstly argues that, taking into account the advanced stage of the proceedings, Respondent has waived any further objections to the Tribunal's jurisdiction or the admissibility of Claimant's claims and makes reference to ICSID Arbitration Rules 41(1) and 26(3).[78] ICSID Arbitration Rule 41, which deals with "*Preliminary Objections,*" provides in relevant part:

> "*(1) Any objection 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 shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.*
>
> *(2) The Tribunal may on its own initiative consider, at any stage, of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.*"

228. ICSID Arbitration Rule 26, which is concerned with "*Time Limits,*" provides in relevant part:

> "*(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.*"

229. There is common ground between the Parties that Respondent raised the specific allegations of corruption that have been the subject of the present phase of the proceedings for the first time after the oral hearing on jurisdiction and liability and after the filing of the Parties' post-hearing briefs, at a time when the Tribunal was deliberating on its decision on jurisdiction and liability. It is therefore undisputed that Respondent did not raise its objections to jurisdiction and admissibility on the grounds of alleged corruption within the time limits set for its Counter-Memorial or its Rejoinder filed in the jurisdiction and liability phase of the proceedings.

230. Respondent takes the position that it has raised its objections "*as early as possible*" given that the facts on which they are based were unknown to it and it did not have tangible evidence to support them, until it established the Group of Experts to re-examine the allegations of corruption relating to the Reko Diq project.[79] Respondent thus invokes the

[78] Claimant's Opposition, ¶¶ 20-21.
[79] Respondent's Reply, ¶ 371.

exception provided in Rule 41(1): "… *unless the facts on which the objection is based are unknown to the party at the time*." In addition, Respondent notes that pursuant to Rule 41(2), the Tribunal may at any stage of the proceedings consider at its own initiative whether it has jurisdiction to hear the claims before it and claims that the Tribunal has an *ex officio* obligation "*to investigate and rule upon the existence and consequences of corruption*."[80] Finally, Respondent invokes the existence of "*special circumstances*" within the meaning of Rule 26(3), arguing that it has presented the Tribunal with new evidence "*in a timely manner and there can be no doubt that the new evidence is significant enough to warrant the exercise of the Tribunal's power*."[81]

231. As to Respondent's argument that the facts underlying its allegations of corruption were not known to it at the time it filed its written submissions on jurisdiction and liability, Claimant correctly points out that Respondent's own witnesses have testified that the alleged corruption was "*widely known*" and "*common knowledge*" within the BDA at the time the alleged acts of corruption took place.[82] While Respondent acknowledges that "*TCC's corrupt practices had long been suspected*" but distinguishes between rumors and "*tangible evidence that can be placed before a tribunal*,"[83] the Tribunal notes that Respondent did not provide an entirely satisfactory explanation as to why a Group of Experts was only established in 2015 and, most importantly, why the individuals that have now appeared as Respondent's witnesses had never been interviewed about the suspicions of corruption as part of the investigations that Respondent claims to have been ongoing since 2011.[84] In fact, Respondent itself submits that the Group of Experts was established in the course of settlement negotiations between the Parties following the oral hearing on jurisdiction and liability, in order to "*get to the bottom of the matter*," *i.e.*, of the purported irregularities identified by the investigation in 2011 and by the Supreme Court in 2014, and that it for the first time identified "*specific instances of corrupt practices*" in connection with the Reko Diq project.[85]

232. While the Tribunal is therefore not entirely convinced by the justification provided by Respondent regarding the timing of its investigations into the suspicions of corruption, the Tribunal is willing to accept that if the alleged instances of corruption on which Respondent relies actually happened, Respondent may not have been aware of them. Consequently, the Tribunal considers that it would go too far to assume that Respondent

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[80] Respondent's Reply, ¶ 372.
[81] Respondent's Reply, ¶ 373.
[82] Claimant's Opposition, ¶ 22; Claimant's October 2015 Opposition, ¶ 81. Farooq I, ¶ 26; Aziz, ¶ 20; Tahir I, ¶ 11; Malik, ¶ 6.
[83] Respondent's Reply, ¶ 371.
[84] *Cf.* Respondent's Application, ¶¶ 69-77. In its Briefing Note of 4 June 2015, the Group of Experts noted that "[a]*ll people we met stated how no one had ever questioned them before about the Project and that a day would come when the real facts about Reko Diq would come to light*." **Exhibit RE-443**, ¶ 4.1.1.
[85] Respondent's Application, ¶¶ 71-72.

has waived its right to raise objections to jurisdiction and admissibility on these grounds. Any possible delay in obtaining knowledge of the relevant facts can, and will, be taken into account in the Tribunal's evaluation of the evidence. In particular, any potential consequences that such delay may have had on Claimant's ability to adduce counter-evidence should not be held against it.

233. In addition, the Tribunal considers that in view of the seriousness of at least some of the allegations raised by Respondent and the fact that Respondent has advanced ten witnesses that testify to having paid or accepted bribes in connection with the Reko Diq project, there are indeed "*special circumstances*" that justify to hear Respondent's objections to jurisdiction and admissibility despite the fact that they have been raised only at a very late stage of the proceedings. The Tribunal is aware of Claimant's objection to the qualification of Respondent's allegation as "*special circumstances*" and its argument that there is no need to consider these as objections to jurisdiction or admissibility given that the Tribunal "*may appropriately consider the effect of the allegations as an affirmative defense on the merits to TCCA's claims*."[86] However, the Tribunal does not agree with this argument in its general form, taking into account the different legal issues to be addressed within an assessment of jurisdictional and admissibility objections on the one hand and the assessment of liability on the merits on the other, as demonstrated by the Legal Opinion of Judge Schwebel that Respondent submitted in this proceedings.[87] Similarly, a finding that the Tribunal lacks jurisdiction to hear certain claims cannot be equated with a finding that such claims fail on the merits.

234. Consequently, the Tribunal concludes that the allegations raised by Respondent in its Application give rise to "*special circumstances*" that justify hearing its objections to jurisdiction and admissibility at this stage of the proceedings.

b. Allegation that Respondent's Application and the New Evidence It has Submitted are Barred Based on the Doctrine of Laches and the Doctrine of Acquiescence

235. As a separate argument, Claimant claims that Respondent's "*long delay in submitting allegations and evidence of this kind*" is sufficient to bar Respondent's Application, invoking the principle of laches or "*extinctive prescription*" and the doctrine of acquiescence. On that basis, Claimant also objects to the admission of the new evidence submitted by Respondent in support of its allegations of corruption.[88]

236. Claimant claims that under the principle of laches, "*a party's undue delay in asserting a claim is considered, and can justify denial of the claim*" and argues that the rationale

[86] Claimant's Opposition, ¶¶ 26-27.
[87] Schwebel Opinion, ¶¶ 64 *et seq*.
[88] Claimant's Opposition, ¶¶ 93-96; Claimant's Rejoinder, ¶¶ 91-92, 100.

underlying this principle, which is based on "*fundamental notions of equity and fairness*," applies "*with special force here*." In Claimant's view, the admission of the new evidence would be unduly prejudicial to Claimant, arguing that such evidence is "*fundamentally unreliable*," disproven by the documentary record and, in some instances, concerns very distant events as a result of which evidence and witnesses may no longer be available to effectively mount a defense, and has been obtained by Respondent "*by misusing its sovereign police power as a discovery tool*."[89]

237. In the Tribunal's view, none of the above-mentioned considerations justify barring Respondent's Application or denying Respondent's request to admit the new evidence into the record. As mentioned above, any prejudice caused to Claimant and its ability to adduce counter-evidence can, and will, be taken into account in the Tribunal's evaluation of the evidence. In particular, the Tribunal will ensure that the fact that, as noted by Claimant, relevant parties and possible witnesses such as Chris Arndt and the former Chief Minister Muhammad Yousaf have passed away in the meantime,[90] will not go to Claimant's detriment. In addition, the Tribunal will take into account both Parties' submissions as to the circumstances in which the testimony of Respondent's witnesses was obtained and make its own assessment on Claimant's allegations in this regard, to the extent that it considers such allegations established on the facts of this case.

238. Claimant further relies on the doctrine of acquiescence, arguing that "*there is strong support among arbitration tribunals and commentators … for the rule that a respondent state should not be allowed to invoke corruption as a defense against investor claims if it has failed to genuinely investigate or prosecute the alleged corruption.*"[91] According to Claimant, the right to assert a claim is lost through acquiescence when a State "*fail*[s] *to assert a claim when a State would be expected to do so*," in particular when the ignorance invoked by the State was caused by a negligent failure to investigate.[92] In this regard, Claimant refers to "*two decades of delinquence*" in which no serious investigation was conducted given that Respondent "*did not so much as interview a single witness on allegations of corruption or review any documents or government records save the Supreme Court record.*"[93]

239. The Tribunal has already noted above that Respondent has not provided an entirely satisfactory explanation as to why it only established the Group of Experts in order to

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[89] Claimant's Opposition, ¶¶ 94-98; Claimant's Rejoinder, ¶ 94.
[90] *Cf.* Claimant's Opposition, ¶ 95 (with note 150).
[91] Claimant's Rejoinder, ¶ 103.
[92] Claimant's Rejoinder, ¶ 105 *quoting from* Aloysius P. Llamzon, *Corruption in International Investment Arbitration* (2014) [**CA 275**], p. 274.
[93] Claimant's Rejoinder, ¶¶ 51, 67.

"*get to the bottom of the matter*" in 2015.[94] In addition and while Respondent emphasizes that "[t]*he public officials implicated in corruption in this case are subject to the NAB's on-going criminal inquiry – Pakistan is not letting them go free,*"[95] it has not denied Claimant's submission that the NAB inquiry that was commenced after the Group of Experts had been disbanded in June 2015, has not yet been converted into a formal investigation and that so far, no individual prosecution has been initiated against any of Respondent's witnesses – despite the fact that they provided sworn testimony to the NAB in which they confessed to having paid or accepted bribes.[96]

240. Nevertheless, and taking into account that there has not been complete inaction of Respondent in respect of investigating the allegations of corruption, the Tribunal does not consider it justified to bar Respondent's Application from being heard or the new evidence from being admitted into the record. In the Tribunal's view, the current status of the NAB inquiry as well as the above noted considerations regarding the overall timing of the investigations, in particular the forming of the Group of Experts, should rather form part of the Tribunal's evaluation of the evidence and, specifically, the assessment of the credibility of the account that Respondent's witnesses have given on the alleged acts of corruption.

c. Conclusion on Claimant's Objections and the Admission of the New Evidence

241. In conclusion, Claimant's objections to the admissibility of Respondent's Application are dismissed and the concerns raised by Claimant regarding the timing and further circumstances surrounding the investigations conducted by Respondent will be taken into account on the merits – as part of the Tribunal's evaluation of the evidence presented by both Parties.

242. As to the new evidence submitted by Respondent, which has up to date been admitted only *de bene esse*, the Tribunal decides to admit such evidence, as well as the counter-evidence submitted by Claimant, into the record.

B. Approach to Respondent's Application

243. At the outset of its assessment of the merits of Respondent's Application, the Tribunal takes note of the concern expressed by Respondent that the Tribunal may be inclined to attribute more credibility to Claimant's witnesses, whom Respondent describes as "*articulate, polished English-speaking professionals,*" than to the witnesses presented by

[94] *Cf.* Respondent's Application, ¶ 71.
[95] Respondent's Post-Hearing Brief, ¶ 406.
[96] *Cf.* Claimant's Rejoinder, ¶¶ 76-77.

Respondent, to whom Respondent refers as "*parochial government employees operating in a process-driven but ultimately corrupt environment*."[97]

244. At this point, the Tribunal wishes to emphasize that it is well aware of the unfamiliar situation in which witnesses testifying to a tribunal find themselves, which may have been particularly the case for Respondent's witnesses, as well as of the interpretation issues that arose during the oral testimony given by the witnesses who testified in Urdu. The Tribunal has taken Respondent's concern seriously and has taken particular care to make its assessment of the credibility of the witnesses' accounts independent of the cultural differences which Respondent has highlighted and independent of a particular witness's ability to articulate their account of the events in a well-formulated manner.

245. As a second preliminary matter, Respondent has expressed the concern that the Tribunal may be vulnerable to a "*confirmation bias*" given that it has already provided the Parties with its Draft Decision on Jurisdiction and Liability, which contains findings that, but for the corruption allegations raised by Respondent in its Application, Claimant succeeds in its claims. Specifically, Respondent argues that the Tribunal may be inclined to "*ignore inconvenient evidence which undermines the Draft Decision*" and emphasizes the importance of "*not glossing over factual allegations*."[98]

246. The Tribunal wishes to note that it has taken the allegations raised by Respondent in its Application very seriously, as demonstrated, *inter alia*, by the fact that it has heard the Parties in a separate phase of proceedings dealing exclusively with these allegations, which consisted of two rounds of written submissions, a total of 13 days of oral hearings in which all 24 fact and expert witnesses were heard, and written post-hearing submissions. The Tribunal further recalls that, while Claimant requested in its October 2015 Opposition, *inter alia*, that the Tribunal proceed to issue its Decision on Jurisdiction and Liability on the basis of the evidence in the record, the Tribunal informed the Parties on 27 October 2015 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.*"

247. At that point and throughout this phase of the proceedings, the Tribunal has always been aware that Respondent's allegations, if and to extent they would be proven in the course of this separate phase, could warrant a substantial revision of the conclusions the Tribunal had reached in its deliberations on the basis of the evidence in the record by the time Respondent submitted its Application. The members of the Tribunal have therefore been

[97] Respondent's Post-Hearing Brief, ¶¶ 17-18.
[98] Respondent's Post-Hearing Brief, ¶¶ 19-23.

careful to review and evaluate the new submissions and new evidence presented by the Parties with an open mind and with the constant aim of avoiding what Respondent has described as "*confirmation bias*."

248. In this context, the Tribunal also takes note of the concerns expressed by Respondent in its letter of 30 June 2017 regarding the Tribunal's approach to issue a Decision on Respondent's Application to Dismiss the Claimants (with Reasons to Follow) and the fact that the Tribunal took more time than expected by Respondent to draft and finalize this fully reasoned Decision. For the reasons set out in its message of 4 July 2017, the Tribunal re-confirms that it has given itself sufficient time to fully and properly review the Parties' Post-Hearing Briefs and to deliberate on each of the allegations raised in Respondent's Application, with an open mind, before rendering its Decision with Reasons to Follow on 20 March 2017. In particular, the reasons for the Tribunal's conclusion on each individual allegation, which are now set out in the present Decision in detail, were fully discussed and agreed between the members of the Tribunal before that date.

249. More specifically, the Tribunal has carefully considered and thoroughly discussed the written and oral testimony provided by all 24 witnesses in this phase of the proceedings as well as the documentary evidence, in particular, Mr. Aziz's diaries and the evidence produced in relation to their authenticity, as well as all other contemporaneous documents presented by the Parties. On that basis, the Tribunal has assessed each of Respondent's allegations by taking into account both the direct evidence and the surrounding circumstances invoked by Respondent and, in addition, it has evaluated the Parties' more general submissions, including on the timing and circumstances in which the evidence was produced, as noted above.

250. In the following analysis, the Tribunal will first address the standard and burden of proof in respect of Respondent's allegations of corruption, including the question as to the requirements that would have to be proven. As a second step, the Tribunal will assess the factual circumstances, *i.e.*, whether and to what extent Respondent's allegations of corruption have been proven on the facts of the case as established on the basis of the evidence in the record. Finally, if and to the extent such allegations have been proven, the Tribunal will assess the legal consequences arising from its findings on the facts.

C. Standard and Burden of Proof

1. Summary of Respondent's Position

a. Standard of Proof

251. Respondent submits that the Tribunal has discretion as to the applicable standard of proof. According to Respondent, the Tribunal should apply the ordinary civil 'balance of probabilities' standard and reject Claimant's claims under the Treaty if it is more likely

than not that Claimant engaged in corruption with the intention of obtaining, maintaining or expanding its investment.[99] Respondent argues that Claimant attempts to impose a more onerous standard which goes beyond that required by international law.[100]

252. Respondent submits that there is a lack of uniform approach to the standard in corruption cases. Various tribunals (*Metal-Tech v. Uzbekistan, Desert Line v. Yemen and Rompetrol v. Romania*) have confirmed that a flexibility to adopt the appropriate standard should be adopted by tribunals, evaluating the evidence before them.[101] Respondent maintains that this approach was confirmed by Judge Higgins and codified by the ICSID Convention in Articles 43-45 and in ICSID Arbitration Rule 34.[102]

253. Respondent therefore firstly rejects the necessity for "*but-for*" causation; while the causal link between the investment and corruption may be one of the factors that impacts the Tribunal's analysis, Respondent contends that any corruption made in connection with the investment is pertinent to the outcome.[103] Respondent criticizes Claimant's reliance on cases which not only fail to support the application of such a strict requirement, but in a number of instances directly contradict it.[104] In fact, Respondent refers to *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic* where the tribunal observed that "*regular payments over a period of time effectively* 'buy' *the long-term goodwill of the recipient*" and "*make it difficult to establish a causal link between the bribe and the advantage that it procures.*"[105] Respondent thus argues that in most cases its evidence does establish a link, but where this is not so, the Tribunal should "*connect the dots,*" inferring a link between payments and Claimant's investment.[106]

254. Respondent submits that Claimant's reliance on *Niko* is inapposite since Claimant fails to mention that the tribunal's purported dismissal of the corruption defence for lack of causation, was a mere jurisdictional decision.[107] Respondent maintains that *Tanesco* was

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[99] Respondent's Post-Hearing Brief, ¶¶ 386-389; Respondent's Application, ¶¶ 146-157; Respondent's Reply, ¶¶ 377-404.
[100] Respondent's Reply, ¶ 378.
[101] Respondent's Application, ¶¶ 146-150 *citing to, Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214 / Exhibit SS-7**], ¶ 239, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 [**CA 115**], ¶ 129 (quoting from the *Oil Platforms Case*) *and The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 [**RLA-268**], ¶ 182.
[102] Respondent's Application, ¶¶ 148-149 *referring to* Rosalyn Higgins, Speech to the Sixth Committee of the General Assembly of the United Nations, 2 November 2007 [**RLA-255**], p. 4.
[103] Respondent's Reply, ¶ 380.
[104] Respondent's Post-Hearing Brief, ¶ 386; Respondent's Reply, ¶¶ 382-389 *referring to* Claimant's Opposition, ¶¶ 40-70.
[105] Respondent's Reply, ¶ 383 *citing to Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 [**CA-157**], ¶ 44.
[106] Respondent's Reply, ¶ 383.
[107] Respondent's Reply, ¶ 385 *referring to* Claimant's Opposition, ¶ 44, 50 *and citing to Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production*

a commercial case dealing with contractual rights, not investment treaty rights, therefore the causal link required to be established in that case is not comparable to that which is required to exist here.[108] In *World Duty Free*, Respondent submits that the type of causal link required to enable Kenya to lawfully avoid the contract was of secondary importance; the investor's claims were ultimately dismissed as corruption constituted a breach of transnational public policy.[109]

255. Respondent refers to the late Professor Wälde in the *Methanex v. United States* case and the tribunal in *Metal-Tech* to support the argument that the Tribunal should "*connect the dots*" created by circumstantial evidence, notwithstanding the absence of any direct evidence of investor wrongdoing.[110] Respondent maintains that Mr. Farooq's corrupt conduct, the widespread Pakistani corruption and the fact that "*one in five cases of transnational bribery occur in the extractive sector*" constitute relevant circumstantial evidence, making it unrealistic to assume corruption is unlikely in this context.[111] Respondent also refers to the World Bank's Sanctions Board's discretion in determining the relevance and sufficiency of evidence, as well as inferring intent and knowledge in corruption cases and thus argues that an ICSID tribunal should not apply an inconsistent standard of proof.[112]

256. Respondent secondly rejects Claimant's assertion that Pakistan must prove any wrongfully obtained rights to be "*foundational to TCCA's investment.*"[113] While Respondent acknowledges the distinction between illegality at the inception of the investment and illegality during its performance, it does not accept that the latter would be "*outside of the Tribunal's mandate.*"[114] Respondent dismisses Claimant's authorities provided in support of its argument and additionally highlights that none of these (bar *Metal-Tech)* actually involved corruption.[115] Respondent argues that *Yukos* was based on domestic tax law and cannot be compared to the special status of corruption in an

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Company Limited, & Bangladesh Oil Gas and Mineral Corporation, ICSID Case Nos. ARB/10/11 & ARB/10/18, Decision on Jurisdiction, 19 August 2013 [**CA-205 / Exhibit SS-11**].

[108] Respondent's Reply, ¶ 386 *referring to* Claimant's Opposition, ¶ 44, 51-52 and *citing to Tanzania Electric Supply Co. Ltd. (Tanesco) v. Independent Power Tanzania Ltd.* ICSID Case No. ARB 98/8, Decision on Tariff and Other Remaining Issues, 9 February 2001 [**CA-209**].

[109] Respondent's Reply, ¶ 388 referring to Claimant's Opposition, ¶ 47 *citing to World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 [**RLA-36 / Exhibit SS-2**], ¶ 167, 175.

[110] Respondent's Reply, ¶ 384 *citing to Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005 [**CA-191 / RLA-107**], Part III, Chapter B, ¶¶ 2-3; *and Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA-214** / **Exhibit SS-7**].

[111] Respondent's Reply, ¶ 407 *referring to* Boggs III, ¶ 13; Hargreaves, ¶ 63; Flores, ¶¶ 28, 34; **Exhibit RE-181**, p. 5; *and* **Exhibit RE-458,** p. 10.

[112] Respondent's Reply, ¶ 408.

[113] Respondent's Reply, ¶ 390.

[114] Respondent's Reply, ¶¶ 390-393 *referring to* Claimant's Opposition, ¶ 167.

[115] Respondent's Reply, ¶ 391.

international context.[116] Respondent maintains that, to the contrary, to its knowledge, no investment treaty tribunal has yet had to consider the legal effect of corruption during the performance of an investment.[117] Respondent also deems Claimant's reliance on *NIOC* to be inapposite since it does not introduce a general principle that "*nebulous concepts, like* 'tainting'*, simply cannot be employed in order to trump the fundamental requirement of causation*" as Claimant's counsel argued in its opening statement at the hearing.[118]

257. Respondent maintains that there is a clear commentator, practitioner and tribunal consensus that the starting point for the standard of proof for corruption should be the ordinary civil standard – is it "*more likely than not*" that corruption has occurred?[119] Pakistan asserts that Claimant's reliance on a handful of international arbitration cases, mainly commercial cases settled in accordance with domestic law, does not support the use of the heightened "*clear and convincing evidence*" standard.[120]

258. Respondent refers to Contantine Partasides QC's remarks in relation to the *EDF v. Romania* award which Claimant cites in support of this heightened standard.[121] Respondent maintains that it creates an impossible tension by recognizing that corruption is notoriously difficult to prove but nevertheless raising the evidential hurdle to make it harder to prove than other allegations. Respondent further maintains that the tribunal in *Tokios Tokeles v. Ukraine*, also rejected arguments for a heightened standard of proof and determined that the starting point should always be the 'balance of probabilities'.[122]

b. Burden of Proof

259. While Respondent accepts that it bears the overall burden of proof, it argues that Claimant has failed to refute any of the international law authorities which support the concept that

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[116] Respondent's Reply, ¶¶ 391-393 *citing to Yukos Universal Ltd. (Isle of Man) v. The Russian Federation*, PCA Case No. 227, Final Award, 18 July 2014 [**CA-178 / Exhibit SS-18**].
[117] Respondent's Reply, ¶ 393.
[118] Respondent's Post-Hearing Brief, ¶ 387 *referring to* Claimant's Rejoinder, ¶ 190; *National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Crescent Gas Corporation Ltd* [2016] EWHC 510 (Comm) [**CA-289**], ¶ 49(3) *and* Transcript (Day 1), p. 224 line 19 to p. 225 line 22 (in particular p. 225 lines 14-16).
[119] Respondent's Application, ¶ 15, 146-157; Respondent's Reply, ¶ 405.
[120] Respondent's Post-Hearing Brief, ¶ 389; Respondent's Reply, ¶ 406; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Dissenting Opinion of Professor Francisco Orrego Vicuña [**RLA-326 / Exhibit SS-**22], p. 4; *Westinghouse International Projects Company & Westinghouse Electric S.A. & Westinghouse Electric Corp. & Burns & Roe Enterprises Inc. v. National Power Corp. & The Republic of the Philippines*, ICC Case No. 6401/BGQ, Preliminary Award of 19 December 1991 [**CA-216**], p. 34 *and*, *Broker v Contractor*, ICC Case No. 5622, Final Award (1988) [**CA-217**], ¶ 23.
[121] Respondent's Reply, ¶ 406 *referring to*, Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, ICSID Review 25, no. 1 (2010) 51 [**RLA-221**], ¶ 43; Hwang and Lim, *Corruption in Arbitration – Law and Reality*, Asian International Arbitration Journal, Volume 8 No. 1, pp. 1-119 [**RLA-33**], ¶ 38.
[122] Respondent's Application, ¶¶ 151-153 *citing to*, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 [**RLA-178**], ¶ 124.

where it establishes *prima facie* proof, and Claimant possesses evidence to rebut it, the burden may shift.[123] Respondent refers to Constantine Partasides' statement that "*plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by the party denying the allegation*" and maintains that this has been expressly acknowledged in *Fraport II*.[124] Pakistan asserts that these observations also accord with the decisions of various other tribunals including but not limited to *Rockwell v. Iran, AAPL v. Sri Lanka, Middle East Cement v. Egypt, Feldman v. Mexico, International Thunderbird Gaming v. Mexico*, and *Siag v. Egypt*.[125]

260. Referring to Professor Cremades' standpoint and the tribunal in *ECE v. Czech Republic*, Respondent further maintains that should the Tribunal have any doubts, it has the duty under international law independently to inquire into and fully investigate that corruption.[126]

c. The Legal Standards Relevant to Mr. Aziz's Diaries

261. As will be discussed in Section D.2.e below in relation to the Surface Rights Lease, Respondent relies on Mr. Aziz's diaries, which form part of a broader series of diaries kept by Mr. Aziz as Personal Assistant to Mr. Farooq (BDA Chairman), to substantiate its claim that Claimant made improper surface rights payments and other bribes. It claims that the diaries are authentic documentary evidence, debunking TCC's "*grand conspiracy*" theory.[127]

262. Respondent refers to *Churchill Mining v Republic of Indonesia* to advance the argument that it has the initial burden of establishing the *prima facie* authenticity of the diaries, while Claimant has the burden of establishing fabrication.[128] Respondent maintains that

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[123] Respondent's Application, ¶¶ 155-157; Respondent's Reply, ¶¶ 412-415; Respondent's Post-Hearing Brief, ¶ 390.
[124] Respondent's Reply, ¶ 413 *referring to* Constantine *Partasides, Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, ICSID Review - Foreign Investment Law Journal 25, no. 1 (2010) 47 [**RLA-221**], ¶ 66; *and citing to Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 [**RLA-231**], ¶ 299.
[125] Respondent's Reply, ¶¶ 413-414.
[126] Respondent's Reply, ¶ 412 *referring to* B. Cremades and D. Cairns, *Transnational Public Policy in International Arbitral Decisionmaking: The Cases of Bribery, Money laundering and Fraud* in K. Karsten and A. Berkeley (eds.) Arbitration: Money Laundering, Corruption and Fraud (2003) [**RLA**-211], pp. 65-92 at p. 85; *and citing to ECE Projektmanagement International GmbH & Kommanditgesellschaft Panta Achtundsechzigste Grundstucksgesellschaft mbH & Co. v. Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 [**CA-208**], ¶ 4.871).
[127] Respondent's Post-Hearing Brief, ¶¶ 233-253.
[128] LaPorte Submission, ¶ 10 *citing to Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016 [**RLA-334**].

the Parties agree on this, but do not agree on what Respondent must do to satisfy this hurdle and whether or not it has been met.[129]

263. Respondent criticizes Claimant's suggestion that the burden is "*not a simple burden*" based on *Golshani*.[130] Respondent maintains that Claimant's reliance on this award is misplaced; the nature of the tribunal's inquiry clearly distinguishes it from the present case. Nonetheless, Respondent highlights the guiding statement from that award and maintains that Mr. Aziz's diaries do "*inspire a minimally sufficient degree of confidence*" in their authenticity, if indeed not a greatly higher level of confidence and as such, Pakistan's burden has been met for the following reasons.[131]

264. Firstly, Respondent maintains that its witness evidence is itself enough to satisfy this burden.[132] Pakistan maintains that the questions posed to Mr. Aziz during cross-examination, in an attempt to disprove his testimony were adequately answered and Mr. Farooq and Mr. Dad further corroborated his account.[133]

265. Secondly, Respondent submits that it has given Claimant every opportunity to inspect the diaries.[134] Even if the Tribunal accepts Claimant's argument that they should have been made available at a particular location, Respondent maintains that due to ongoing criminal investigations, there are legitimate reasons for their only being available in Pakistan.[135] Respondent thus maintains that to the extent Claimant takes the position that Mr. Aziz's diaries cannot be authenticated without having been produced in original form, such an argument must fail.[136]

266. Thirdly, Respondent maintains that the case-law on which Claimant relies to suggest that the diaries should be excluded can be distinguished.[137] Respondent argues that the claimant in *EDF* did not provide a similarly legitimate reason for the non-production of an audio recording and the claimant's own expert witness was unable to examine the original recording. Here, however, leading forensic examiner Mr. LaPorte has produced a report following forensic examination which concludes that there was "*not a single feature in these questioned documents to suggest that they were fraudulently prepared*"

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[129] Respondent's Post-Hearing Brief, ¶ 391, *referring to* its argument to this effect in Respondent's LaPorte Submission, ¶ 10, which it claims has not been challenged in Claimant's LaPorte Response.
[130] Respondent's Post-Hearing Brief, ¶ 393 *citing to Abrahim Rahman Golshani v The Government of the Islamic Republic of Iran*, IUSCT Case No. 812 (546-812-3), Final Award, 2 March 1993 [**RLA-330**].
[131] Respondent's Post-Hearing Brief, ¶ 394 *citing to Abrahim Rahman Golshani v The Government of the Islamic Republic of Iran*, IUSCT Case No. 812 (546-812-3), Final Award, 2 March 1993 [**RLA-330**], ¶ 49.
[132] Respondent's Post-Hearing Brief, ¶¶ 235-239, 392.
[133] Respondent's Post-Hearing Brief, ¶¶ 235-239 *referring to* Transcript (21 February 2017), p. 24 lines 18-20 *and* Claimant's LaPorte Response, ¶ 15 *and* Transcript (Day 2), p. 586 lines 3-9 and p. 587 lines 7-8.
[134] Respondent's Post-Hearing Brief, ¶¶ 396-398.
[135] Respondent's Post-Hearing Brief, ¶¶ 399-400.
[136] LaPorte Submission, ¶ 15.
[137] Respondent's Post-Hearing Brief, ¶¶ 401-404.

as alleged.[138] Respondent thus contends that there is no basis for comparing Mr. Aziz's diaries with the unexamined and clearly altered audio recordings in *EDF*.[139] Respondent further distinguishes *Europe Cement* on the factors the tribunal considered relevant to an assessment of (in)authenticity of documents. Respondent maintains that here there is corroborating witness evidence of authenticity which did not exist in *Europe Cement*. Respondent has produced originals for inspection and Mr. Aziz's diaries have withstood forensic scrutiny.[140]

267. Respondent thus contends that having discharged its burden of *prima facie* proving the authenticity of the diaries, the burden of proving fabrication is upon Claimant. This will be considered in light of the forensic examination results and circumstances surrounding the relevant diary entries in Section D.2.e below.

2. Summary of Claimant's Position

a. Standard of Proof

268. Claimant argues that it is insufficient for Respondent to establish that at some point during the project, Claimant ran afoul of the law. Arbitrators should not be surrogates for the host state's government, policing all investor misconduct without regard to the limited civil nature of the dispute before it.[141]

269. Firstly, Claimant contends that, provided Respondent could prove that the alleged corruption actually occurred, it would then need to prove that such corruption caused Claimant to obtain a right or benefit to which it was otherwise not entitled (the 'but-for' element).[142] Claimant argues that Respondent has not even so much as alleged such a causal link with respect to many of its allegations and although corruption is hard to prove, tribunals do not have a licence to engage in gap-filling.[143] Claimant refers to the tribunal in *Niko* which maintained that when dealing with corruption allegations, a tribunal should "*only decide on substantiated facts, and cannot base itself on inferences*" drawn from circumstantial evidence.[144]

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[138] Respondent's Post-Hearing Brief, ¶ 240, 402(b) *referring to* LaPorte Report, ¶ 24.
[139] Respondent's Post-Hearing Brief, ¶ 402.
[140] Respondent's Post-Hearing Brief, ¶¶ 403-404 *citing to Europe Cement Investment & Trade S.A. v Republic of Turkey*, ICSID Case No. ARB(AF)/07/2 Award, 13 August 2009 [**RLA-228**].
[141] Claimant's Opposition, ¶¶ 41-42.
[142] Claimant's Rejoinder, ¶¶ 177-187; Claimant's Opposition, ¶¶ 44-53; Claimant's Post-Hearing Brief, ¶ 26.
[143] Claimant's Post-Hearing Brief, ¶ 26 *referring to* Transcript (Day 10), p. 2523 lines 4–17, p. 2524 line 18 to p. 2525 line 2 and p. 2551 lines 12–14.
[144] Claimant's Post-Hearing Brief, ¶ 22 *citing to Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, & Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19 August 2013 [**CA 205**], ¶ 424.

270. Claimant submits that the authorities advanced as support for its connect-the-dots theory of causation do not allow Respondent to escape the 'but-for' obligation.[145] Claimant criticizes Respondent's ignorance to the fact that in *Sistem v Kyrgyz Republic*, although acknowledging that a causal link might be "*difficult to establish*," the tribunal did not conclude that this difficulty meant that the requirement should be dispensed with.[146] Claimant further argues that although the *Methanex* award did use the phrase "*connecting the dots*," it took pains to caution against misuse of that approach in precisely the way Respondent attempts to do here.[147] Claimant further deems Respondent's reliance on the *Metal-Tech* award to be misplaced. Contrary to the impression Respondent seeks to give, Claimant maintains that the tribunal did not jump from fact to fact, speculatively filling in gaps, nor did it conduct an inquisition by suspicion but instead maintained a straightforward application of a tribunal's powers under the ICSID Rules and the IBA Rules.[148]

271. Claimant maintains that *World Duty Free* supports the causation requirement since the decision exemplifies that a tribunal should not allow a respondent state to avoid a transaction and deny an investor relief, if the state cannot show that the investor's alleged wrongdoing in fact induced the official acts.[149] Claimant further maintains that it is no surprise that when a state does not establish such causation, tribunals (such as those in *Niko* and *Tanesco*) have given no effect to the corruption allegations, even when the allegations are undisputed or proved to be true.[150] Claimant submits that Respondent attempts to avoid this evident causation requirement only by misreading the *Niko*, *Tanesco* and *World Duty Free* decisions and mischaracterizing the arguments advanced by Claimant in its Opposition.[151]

272. Secondly, Claimant argues that Respondent must prove that Claimant obtained foundational rights through the alleged corruption, while any allegations which do not

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[145] Claimant's Rejoinder, ¶¶ 177-187.
[146] Claimant's Rejoinder, ¶¶ 180-182.
[147] Claimant's Rejoinder, ¶ 186 *citing to Methanex Corporation v. United States of America* (UNCITRAL), Final Award on Jurisdiction and Merits, 3 August 2005 [**CA 191 / RLA-107**], Part III- Chapter B, ¶ 3.
[148] Claimant's Rejoinder, ¶¶ 183-185 *referring to* Respondent's Reply, ¶ 384 (citing to *Metal-Tech* Award [**CA 214**]).
[149] Claimant's Opposition, ¶¶ 46-47 *citing to*, *World Duty Free v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 [**RLA-36**].
[150] Claimant's Opposition, ¶¶ 50-52 *citing to Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, & Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19 August 2013 [**CA 205**], ¶¶ 384–385, 423 and *Tanzania Electric Supply Co. Ltd. (Tanesco) v. Independent Power Tanzania Ltd. (IPTL)*, ICSID Case No. ARB 98/8, Decision on Tariff and Other Remaining Issues, 9 February 2001 [**CA 209**], ¶ 55.
[151] Claimant's Rejoinder, ¶ 187 *referring to* Claimant's Opposition, ¶¶ 47-53 *and* Respondent's Reply, ¶¶ 382-388.

concern these rights are collateral and not properly within the remit of the Tribunal.[152] Claimant maintains that Respondent advances no authority demonstrating that any corruption relating to any aspect of the investment must be fatal to Claimant's claims (it thus sufficing that Claimant's rights were 'tainted' by the alleged corrupt acts).[153] Claimant cites *Yukos* in support of its contention that Respondent disregards two well-established distinctions that tribunals have drawn in cases of corruption; between illegality at the inception of an investment, which could bar an investor's claims, and illegality during the performance of that investment, which does not.[154]

273. Claimant refers to the rejection of a similar 'tainting' theory from an English case, *NIOC*.[155] Claimant submits that this test would provide an exceedingly low hurdle meaning any act of bribery, whenever it occurred and no matter how peripheral, would be sufficient to bar a treaty claim. In fact, as the *Fraport II* tribunal explained, the illegality must get to the "*essence of the investment.*"[156] Claimant urges the Tribunal not to manufacture a rule "*out of thin air*" to allow Respondent to escape liability for its alleged violations of international law.[157]

274. Thirdly, Claimant argues that Respondent has failed to address the authorities (including *EDF, Fraport II* and *Siag*) which support the need for clear and convincing evidence.[158] In support of the 'balance of probabilities' standard, Pakistan relies on cases which actually acknowledge the weight of authority in favor of the higher standard.[159] As conceded by Respondent, the Tribunal is indeed free to choose the most relevant standard based on the circumstances, which in cases of grave misconduct such as corruption, has been deemed the "*clear and convincing*" standard by several international tribunals.[160] Moreover, the blind use of the English balance of probabilities standard would ignore the confirmation from the English courts that this embodies a "*generous degree of flexibility*

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[152] Claimant's Opposition, ¶¶ 54-57; Claimant's Rejoinder, ¶ 188; Claimant's Post-Hearing Brief, ¶ 25.
[153] Claimant's Rejoinder, ¶ 190 *referring to* Respondent's Reply, ¶ 501(d), 532.
[154] Claimant's Opposition, ¶ 55 *citing to Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 [**CA 178**], ¶ 1354.
[155] Claimant's Rejoinder, ¶ 190 *citing to National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Crescent Gas Corporation Ltd*, [2016] EWHC 510 (Comm) [**CA 289**], ¶ 49(3).
[156] Claimant's Opposition, ¶ 57 *citing to Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 [**CA 200**], ¶ 332.
[157] Claimant's Rejoinder, ¶ 192.
[158] Claimant's Rejoinder, ¶ 193; Claimant's Opposition, ¶¶ 58-59 *citing to Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 [**CA 200**], ¶ 479, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 [**CA 101**], ¶ 221 *and Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009 [**CA 195**], ¶ 325.
[159] Claimant's Rejoinder, ¶ 193.
[160] Claimant's Opposition, ¶¶ 58-59; Claimant's Rejoinder, ¶ 195 *citing to Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009 [**CA 195**], ¶ 326.

in respect of the seriousness of the allegation," thus for more serious corruption allegations, the stronger the evidence needs to be.[161] Finally, Claimant argues that Respondent misses the point arguing that it is "*unrealistic to start from the premise that corruption is inherently unlikely*" given Mr. Farooq's corrupt reputation and widespread Pakistani corruption, since what is being tested are specific allegations made against Claimant here, not simply general propositions.[162]

b. Burden of Proof

275. Claimant argues that Respondent attempts to establish two fall-back options in an attempt to dispute that as the moving party, it bears the burden of substantiating its allegations.[163]

276. Firstly, Respondent asks that should the Tribunal have any doubts, it should "*independently inquire into and fully investigate*" the allegations.[164] Claimant argues that filling the alleged gaps in Respondent's case is not the Tribunal's duty.[165] Secondly, Respondent has provided no explanation as to why the burden should shift to Claimant. Instead it mistreats authority in order to justify this shift.[166] Claimant submits that, not only does Respondent misinterpret a passage from *Siag v Egypt*, it misleadingly truncates passages from *Fraport II* and Constantine Partasides' article which, read properly, stand for the proposition that when facing allegations of corruption, it would be unwise to "*sit back and not contribute to the evidentiary exchange,*" instead of supporting the burden-shifting gambit.[167]

c. The Legal Standards Relevant to Mr. Aziz's Diaries

277. While Claimant has not addressed the burden of proof in relation to Mr. Aziz's diaries by distinguishing between the *prima facie* authenticity and the purported fabrication, it generally takes the position that Respondent "*always bears the burden of proving its allegations*" and explicitly rejects Respondent's argument that it need only make a *prima facie* showing.[168]

278. Specifically with regard to Mr. Aziz's diaries, Claimant considers that the conclusion that they were indeed fabricated "*is compelled*" by the results of the forensic examination, Mr.

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[161] Claimant's Rejoinder, ¶ 196 *citing to In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 (Lord Nicholls of Birkenhead) [**CA 292**].
[162] Claimant's Rejoinder, ¶ 198 *referring to* Respondent's Reply, ¶ 407.
[163] Claimant's Rejoinder, ¶¶ 172-176.
[164] Claimant's Rejoinder, ¶ 173 *referring to* Respondent's Reply, ¶ 412.
[165] Claimant's Rejoinder, ¶ 173 *referring to* Respondent's Reply, ¶ 412.
[166] Claimant's Rejoinder, ¶¶ 174-176 *referring to* Respondent's Reply, ¶ 413 *and* Claimant's Opposition, ¶¶ 62-63.
[167] Claimant's Rejoinder, ¶¶ 175-176 *referring to* Claimant's Opposition, ¶ 63 and Respondent's Reply, ¶ 413.
[168] Claimant's Post-Hearing Brief, ¶ 30.

Aziz's testimony during the hearing and Respondent's refusal to deliver the originals of Mr. Aziz's diaries to Claimant or the Tribunal.[169] In addition, Claimant argues that an adverse inference of fabrication must be drawn from Respondent's refusal to produce the originals and its "*intentional obstruction of any meaningful forensic examination*." Referring to Article 9(5) of the IBA Rules of Evidence and quoting from *Europe Cement*, Claimant therefore asks the Tribunal to draw the "*strong inference that the documents were not produced*" or subjected to effective examination "*because they would not withstand forensic scrutiny.*"[170] It also

279. Claimant refers to its efforts to have Mr. Aziz's diaries subjected to an effective forensic examination and what it describes as a "*campaign to prevent such examination*" by Respondent. According to Claimant, it was indisputable by the end of the hearing on the forensic examination that Respondent "*deliberately obstructed the effective performance of at least three forensic examinations that could have dispositively proven that the Aziz Diaries, or at least the relevant passages, had been fabricated, giving rise to an unassailable inference that Pakistan refused to allow the documents to be examined because it realized that the examination would prove fabrication.*"[171]

280. Claimant argues that it needs to prove only two points for the Tribunal to draw an adverse inference of fabrication: (i) that any one of the ESDA indentation, ESDA sequencing, or ink dating examinations might have provided proof of fabrication; and (ii) that by refusing to produce the originals for its expert Mr. Radley to conduct ESDA examinations at his laboratory and by refusing to allow Respondent's expert Mr. LaPorte to take samples from which to conduct ink dating examinations, Respondent has prevented those examinations from taking place.[172]

281. Claimant maintains that Respondent steadfastly refused to produce the originals and instead waged a campaign of obstruction preventing forensic scrutiny. At the February 2017 Hearing, Claimant referred to *EDF* to substantiate its argument that as a matter of law, a party cannot prove a *prima facie* case of authenticity without producing the originals.[173] Nonetheless, Claimant alleges that Respondent has tried to justify its recalcitrance with the pretext that production of the originals poses an unspecified risk to their admission in a "*hypothetical criminal proceedings that still has not commenced.*"[174]

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[169] Claimant's Post-Hearing Brief, ¶¶ 321-326.
[170] Claimant's Post Hearing Brief, ¶ 326, 390 *citing to* IBA Rules, Art. 9(5) *and Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009 [**RLA-228**], ¶ 152.
[171] Claimant's Post-Hearing Brief, ¶¶ 324-325.
[172] Claimant's Post-Hearing Brief, ¶¶ 389-390.
[173] Transcript (21 February 2017), p. 29 lines 8-11.
[174] Claimant's Post-Hearing Brief, ¶¶ 360-364.

282. In relation to what Respondent must do to satisfy the burden of establishing even *prima facie* authenticity of the diaries, at the February 2017 Hearing, Claimant argued that contrary to Pakistan's suggestions, *Golshani* showed that the burden of proving *prima facie* authenticity was not simple and "*actually requires a very searching examination.*"[175]

283. Both Parties' specific arguments concerning whether the burden of proof regarding Mr. Aziz's diaries has been successfully discharged will be summarized below in Section D.2.e below in relation to the results of the forensic examination and the specific circumstances surrounding the relevant entries in the diaries.

3. Tribunal's Analysis

284. In the following analysis, the Tribunal will first assess the standard of proof to be applied in order to assess Respondent's allegations of corruption in general. Second, the Tribunal will address the burden of proof and, in particular, Respondent's arguments regarding a shifting of such burden. Third, the Tribunal will determine the requirements that would have to be established in order to (possibly) give rise to legal consequences for Claimant's claims under the Treaty. Finally, the Tribunal will address, more specifically, the standard and burden of proof applicable to assess the authenticity of Mr. Aziz's diaries.

a. In General: The Standard of Proof Applicable to the Allegations of Corruption Raised by Respondent

285. At the outset, the Tribunal notes that, as pointed out by Respondent, neither the ICSID Convention nor the ICSID Arbitration Rules provide for guidance as to the standard or burden of proof to be applied but rather provide the Tribunal with considerable discretion to determine matters of evidence. As also noted by Respondent, there is further no uniform approach in international investment treaty arbitration to determining the standard of proof in connection with allegations of corruption.[176]

286. Respondent takes the position that the Tribunal should apply the oridinary civil law standard of balance of probabilities, *i.e.*, it should assess "*whether it is* 'more likely than not' *that corruption has occurred*." Respondent claims that this standard is supported by "[a] *clear consensus* [that] *is developing among commentators, practitioners and tribunals,*" citing, in particular, to the investment treaty cases of *Rompetrol v. Romania* and *Tokelės v. Ukraine*.[177]

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[175] Transcript (21 February 2017), p. 29 lines 16-22.
[176] Respondent's Application, ¶¶ 147-149.
[177] Respondent's Reply, ¶ 405 (with note 1389 *referring to The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 [**RLA-268**], ¶ 183 *and Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 [**RLA-178**], ¶ 124). *See also* Respondent's Post-Hearing Brief, ¶ 389 (with note 1545).

287. Claimant on the other hand makes reference to the tribunal in *EDF v. Romania*, which held that "[t]*here is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption*," and to the finding made by the tribunal in *Fraport v. Philippines II* that evidence to establish corruption must be "*clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred*."[178] On that basis, Claimant advances the application of a heightened standard of "*clear and convincing*" evidence to allegations of corruption.[179]

288. In light of the differing positions adopted by the Parties, with each claiming that their position is supported by a consensus among tribunals and commentators, the Tribunal will analyze in particular the investment treaty case law which the Parties have cited in their submissions.

289. First, the *Rompetrol* tribunal, drawing guidance from tribunals in investor-State arbitration as well as in State-to-State dispute settlement, which dealt with bad faith, fraud, corruption or – as in the case before the *Rompetrol* tribunal – "*improper, irregular, or potentially sanctionable conduct on the part of State officials*," made the following findings:

> "*The guidance which the Tribunal draws from the cases is that there may well be situations in which, given the nature of an allegation of wrongful (in the widest sense) conduct, and in the light of the position of the person concerned, an adjudicator would be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence - as opposed to pure probabilities or circumstantial inferences. But the particular circumstances would be determinative, and in the Tribunal's view defy codification. The matter is best summed up in general and nonprescriptive terms by Judge Higgins,* 'the graver the charge the more confidence must there be in the evidence relied on.' *Or as the matter was put in greater detail (citing Judge Higgins) by the tribunal in* Libananco v. Turkey:
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> > In relation to the Claimant's contention that there should be a heightened standard of proof for allegations of '*fraud or other serious wrongdoing,*' the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that —the graver the charge, the more confidence there must be in the evidence relied on ..., this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a

[178] Claimant's Opposition, ¶ 58 *quoting from EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009 [**CA 136**], ¶ 221 *and Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines,* ICSID Case No. ARB/11/12, Award, 10 December 2014 [**CA 200**], ¶ 479.
[179] Claimant's Rejoinder, ¶ 193.

> fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged."[180]

290. On that basis, the *Rompetrol* tribunal concluded:

> "*Therefore the Tribunal, while applying the normal rule of the* 'balance of probabilities' *as the standard appropriate to the generality of the factual issues before it, will where necessary adopt a more nuanced approach and will decide in each discrete instance whether an allegation of seriously wrongful conduct by a Romanian state official at either the administrative or policymaking level has been proved on the basis of the entire body of direct and indirect evidence before it.*"[181]

291. Second, the *Tokio Tokelės* tribunal, noting that there are diverging views regarding the applicable standard of proof in connection with allegations such as, in that case, "*a deliberate campaign to punish* [the claimant's Ukrainian subsidiary] *for its impertinence in printing materials opposed to the regime, or to expose* [it] *as an example to others who might be tempted to do the same*," reasoned as follows:

> "[W]*e shall not propose a solution for the current uncertainty about the standard of proof to be applied in a case such as the present. We emphasise the standard of proof, not the burden of proof, for there can be no doubt that the latter rests on the Claimant. As regards the standard, three possibilities have attracted support. First, the usual standard, which requires the party making an assertion to persuade the decision-maker that it is more likely than not to be true. Second, that where the dispute concerns an allegation against a person or body in high authority the burden may be lower, simply because direct proof is likely to be hard to find. Third, that in such a situation, the standard is higher than the balance of probabilities.*"[182]

292. Dismissing the second and third standards based on the consideration that they would cause "*serious logical problems*," the *Tokio Tokelės* tribunal reiterated that it made "*no assumptions of this kind, one way or the other, in the present case, and shall approach the issues on the basis that in order to prove its case on the existence and causal relevance of a nayizd the Claimant must show that its assertion is more likely than not to be true*."[183]

293. By contrast, the *EDF* tribunal held in the context of an alleged bribe solicitation:

> "*In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a*

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[180] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 [**RLA-268**], ¶ 182.
[181] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 [**RLA-268**], ¶ 183.
[182] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 [**RLA-178**], ¶ 124.
[183] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 [**RLA-178**], ¶ 124.

> *high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing."*[184]

294. The Tribunal notes that Respondent cites to two commentaries, which: (i) criticized the *EDF* tribunal for creating a message that is "*difficult … to accept*" because it recognized on the one hand that it is "*notoriously*" difficult to prove allegations of corruption but on the other hand imposed an enhanced standard of proof; and (ii) advanced the view that the ordinary standard of balance of probabilities should apply to allegations of corruption.[185]

295. The Tribunal agrees with the consideration as it was expressed by the commentary cited by Respondent – and which was also recognized by the *EDF* tribunal – that "*in determining an appropriate standard of proof, arbitration tribunals should take account not only of the seriousness or likelihood of the allegation, but also the intrinsic difficulty of proving it.*" However, as noted by the same commentary, a heightened standard of "*clear and compelling*" evidence has been applied by a number of tribunals that were faced with an assessment of corruption allegations.[186]

296. The *Fraport II* tribunal also explicitly recognized these conflicting considerations with regard to allegations of corruption and found:

> "*The Tribunal holds that considering the difficulty to prove corruption by direct evidence, the same may be circumstantial. However, in view of the consequences of corruption on the investor's ability to claim the BIT protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred.*"[187]

297. Similarly, the tribunal in *Niko Resources v. Bangladesh*, on which Claimant also relies and from which Judge Schwebel quotes in his legal opinion,[188] found:

> "*The Tribunal is aware that acts of corruption are often difficult to prove, and arbitral tribunals have only very limited means to reach their*

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[184] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 [**CA 136**], ¶ 221.
[185] Respondent's Reply, ¶ 406 *citing to* Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, ICSID Review 25, No. 1 (2010) 47 [**RLA-221**], ¶ 43 *and* Michael Hwang S.C. and Kevin Lim, Corruption in Arbitration, Law and Reality, 2012 [**RLA-33**], ¶ 36.
[186] Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, ICSID Review 25, No. 1 (2010) 47 [**RLA-221**], ¶¶ 53, 48-49 *also referring to* two ICC cases: (i) W*estinghouse Int'l Projects Co., Westinghouse Elec. S.A. and Barns & Roe Enterprises, Inc. v. Nat'l Power Corp. and The Republic of the Philippines*, ICC Case No. 6401, Preliminary Award (19 December 1991), ¶¶ 33-35, which required "*clear and convincing evidence*" of corruption amounting to "*more than a mere preponderance*"; and (ii) *Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A.*, ICC Case No. 5622 (1988), ¶ 23, which demanded proof "*beyond doubt*" of corruption.
[187] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 [**CA 200**], ¶ 479.
[188] Schwebel Opinion, ¶ 44.

> *conclusions. While they must bear in mind these difficulties they must also be aware that findings of corruption are a serious matter which should not be reached lightly. As the tribunal put it in* Hamester v. Ghana, *a tribunal would* 'only decide on substantiated facts, and cannot base itself on inferences'."[189]

298. Claimant further relies on the tribunal in *Siag v. Egypt*, the majority of which held in the context of allegations of fraud:

> "… *The standard suggested by the Claimants was the American standard of* 'clear and convincing evidence,' *that being somewhere between the traditional civil standard of* 'preponderance of the evidence' *(otherwise known as the* 'balance of probabilities'*), and the criminal standard of* 'beyond reasonable doubt.'
>
> *The Tribunal accepts the Claimants' submission. It is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof. The same is the case in international proceedings, as can be seen in the cases cited by Claimants, among them the Award of the ICSID Tribunal in Wena Hotels. …*"[190]

299. The *Siag* tribunal then noted that Egypt had not submitted that it should be held to a lesser standard than that advanced by the claimants and agreed with the test of "*clear and convincing evidence.*"[191]

300. The Tribunal further notes that a commentary, which both Parties cited in support of their respective submissions, first noted that in proving corruption, "*investment tribunals … have largely adopted high standards of proof,*" making reference to the standard applied by the *EDF* tribunal and the majority of the *Siag* tribunal and discussing in particular the dissenting opinion issued in that case by Professor Orrego Vicuña, who disagreed on the application of the "*clear and convincing*" evidence standard and stated:

> "[I]*t is my view that arbitration tribunals, particularly those deciding under international law, are free to choose the most relevant rules in accordance with the circumstances of the case and the nature of the facts involved, as it has been increasingly recognized … The facts of this case, difficult as they are to establish with absolute certainty, could be best judged under a standard of proof allowing the tribunal* 'discretion in inferring from a collection of concordant circumstantial evidence (*faisceau d'indices*) the facts at which the various indices are directed'."[192]

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[189] *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, & Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19 August 2013 [**CA 205**], ¶ 424.
[190] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009 [**CA 195**], ¶¶ 325-326.
[191] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009 [**CA 195**], ¶ 326.
[192] Aloysius P. Llamzon, *Corruption in International Investment Arbitration* (2014) [**CA 275**], ¶¶ 9.18-9.19 *quoting from Waguih Elie George Siag and Clorinda Vecci v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Dissenting Opinion of Professor Francisco Orrego Vicuña, 11 May 2009 [**RLA-326**], p. 4.

301. The same commentary further made reference to the most recent decision in this context rendered by the tribunal in *Metal-Tech v. Uzbekistan* on which Claimant also relies. In that case, the tribunal did not clearly distinguish between the standard of proof and the burden of proof. Having noted that the warranted application of international law included the general maxim that each party bears the burden of proof for the facts on which relies, it stated:

> "*Here, the question is whether for allegations of corruption, the burden should be shifted to the Claimant to establish that there was no corruption. Rules establishing presumptions or shifting the burden of proof under certain circumstances, or drawing inferences from a lack of proof are generally deemed to be part of the* lex causae*. In the present case, the* lex causae *is essentially the BIT, which provides no rules for shifting the burden of proof or establishing presumptions. Therefore, the Tribunal has relative freedom in determining the standard necessary to sustain a determination of corruption. Both Parties subscribe to this view: both have relied on case law to convince the Tribunal that their respective positions – a high standard advocated by the Claimant* ['clear and convincing evidence or more'] *and a low standard advocated by the Respondent* ['more likely than not to be true'] – *should be adopted.*"[193]

302. The *Metal-Tech* tribunal did not have to decide on the rules applicable to the standard and burden of proof to resolve the dispute before it because the relevant payment had been admitted by the claimant's principal witness and the tribunal itself had sought further evidence on the nature and purpose of such payments. On that basis, as has also been noted by Judge Schwebel in his legal opinion,[194] the *Metal-Tech* tribunal concluded:

> "[T]*he Tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence.*"[195]

303. As noted above, the Tribunal agrees with the above referenced tribunals and commentators that, particularly in the context of allegations of corruption and fraud, there are two conflicting evidentiary considerations. As it has been put by the *Niko Resources* tribunal, "*acts of corruption are often difficult to prove, and arbitral tribunals have only very limited means to reach their conclusions. While they must bear in mind these*

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[193] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214**], ¶ 238.
[194] Schwebel Opinion, ¶ 32.
[195] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214**], ¶ 243.

difficulties they must also be aware that findings of corruption are a serious matter which should not be reached lightly."[196]

304. More generally, the importance of fighting and defeating corruption can be considered universally recognized. At the same time, a finding of corruption may give rise to serious consequences and thus should indeed not be presumed lightly. Taking into account these considerations, the Tribunal stated at the end of the oral hearing that it was looking for "*solid evidence regarding the alleged acts of corruption that are attributable to the Claimant*."[197] For the same reasons, the Tribunal generally agrees with the *Hamester* and *Niko Resources* tribunals that a finding of corruption must be based on "*substantiated facts*"[198] or, as put by the *Metal-Tech* tribunal, that it must be established with "*reasonable certainty.*"[199]

305. In that regard, the Tribunal notes that the *Rompetrol* tribunal, which applied the standard of balance of probabilities, decided to do so because it considered that this standard enabled it to retain a "*more nuanced approach*" and to assess whether the allegation before it "*has been proved on the basis of the entire body of direct and indirect evidence before it.*"[200] At the same time, it quoted with approval from the *Libananco* tribunal, which rejected a heightended standard of proof but also stated that "*in the case of a fact that is inherently improbable*," a tribunal may require "*more persuasive evidence*" before finding that the burden of proof has been discharged.[201]

306. In the Tribunal's view, the dispute should not be about whether the applicable standard of proof should be labelled "*clear and convincing*" evidence or whether any other term should be used instead. The essential question is whether the standard of proof allows for the consideration of indirect or circumstantial evidence in addition to, or even in the absence of, direct evidence that would establish specific acts of corruption, and thus allows for inferring corrupt practices from the circumstances surrounding a particular event.

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[196] *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, & Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19 August 2013 [**CA 205**], ¶ 424.
[197] Transcript (Day 12), 3206:9-11.
[198] *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, & Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19 August 2013 [**CA 205**], ¶ 424, *quoting from Gustav F. W. Hamester GmbH & Co. KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 [**RLA-48**].
[199] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214**], ¶ 243.
[200] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 [**RLA-268**], ¶ 183.
[201] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 [**RLA-268**], ¶ 182 *quoting from Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 [**RLA-129**].

307. In this regard, the Tribunal agrees with the *Rompetrol* tribunal that a tribunal may "*be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence - as opposed to pure probabilities or circumstantial inferences*" but also that "*the particular circumstances would be determinative, and … defy codification.*" In any event, the standard of proof should enable a tribunal to assess the allegation "*on the basis of the entire body of direct and indirect evidence before it.*"[202] Similarly, the *Metal-Tech* tribunal, recognizing the difficulty of establishing corruption by direct evidence, considered that "*it is thus generally admitted that it can be shown through circumstantial evidence*."[203] And even the *Fraport II* tribunal, which applied a standard of "clear and convincing" evidence, stated that "*considering the difficulty to prove corruption by direct evidence, the same may be circumstantial.*"[204] This view is confirmed by Judge Schwebel, who concluded in his legal opinion that "*in view of the difficulty in establishing the facts surrounding allegations of corruption circumstantial evidence may be employed*."[205] Claimant does not directly challenge this view but argues in favor of a but-for causation requirement,[206] which will be addressed in further detail below.

308. Consequently, the Tribunal does not wish to decide in the abstract on the relevance, if any, of the indirect or circumstantial evidence presented by Respondent in support of its allegations. The Tribunal will rather perform a detailed review and evaluation of both direct and indirect evidence adduced by Respondent in the context of each individual allegation and decide whether such evidence is sufficiently "*solid*" and "*persuasive*" to reach the conclusion that the allegation has been proven.

b. In General: The Burden of Proof Applicable to the Allegations of Corruption Raised by Respondent

309. As to the burden of proof, Respondent "*accepts that it has the primary burden of proving its allegations of TCC's corruption.*" However, it further argues that "*burden shifting is permissible in respect of allegations which are made out* prima facie *and where the responding party should possess evidence to rebut them,*" which it considers to be supported by commentators and investment treaty tribunals.[207] On that basis, it argues that in light of the "*evidence of many individual irregularities in connection with the*

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[202] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 [**RLA-268**], ¶¶ 182-183.
[203] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214**], ¶ 243.
[204] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 [**CA 200**], ¶ 479.
[205] Schwebel Opinion, ¶ 90.
[206] *Cf.* Claimant's Rejoinder, ¶¶ 183, 177.
[207] Respondent's Reply, ¶¶ 412-414. *See also* Respondent's Application, ¶¶ 155, 157; Respondent's Post-Hearing Brief, ¶ 390.

obtaining of key contracts and approvals for its investment, TCC should be expected to rebut such evidence with proper explanations."[208]

310. Claimant rejects Respondent's suggestion that where Respondent has presented *prima facie* evidence of corruption, it would be for Claimant to disprove Respondent's allegations and submits that, to the contrary, "*investment treaty tribunals have routinely held that a party alleging corruption in an arbitration proceeding always carries the burden of proving its claims*."[209] In addition and while noting that this is not a case in which Claimant has "s[a]*t back and not contribute*[d] *to the evidentiary exchange*," Claimant denies that in a case of alleged corruption involving government officials within the control of the respondent State, the claimant would have the "*control of the relevant evidence*" and emphasizes that "*it is often difficult to prove a negative*."[210]

311. The Tribunal notes that in support of its position, Respondent relies on a commentary, which notes that "[i]*n applying the standard of a balance of probabilities, English courts look to the balance of evidence offered by both sides*" and further adds:

> "*In practice this means that once a certain* prima facie *threshold of evidence is reached by the party alleging illegality, which may not in and of itself be enough to discharge the standard of proof, it should not be adequate—given the nature of the allegation—for the defendant to sit back and not contribute to the evidentiary exchange on that issue*."[211]

312. On that basis, the commentary offers the proposition that "*plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by the party denying the allegation*."[212]

313. As pointed out by Respondent, this proposition was applied by the *Fraport II* tribunal, which held in the context of proving jurisdictional objections in general:

> "*Regarding burden of proof, in accordance with the well-established rule of* onus probandi incumbit actori, *the burden of proof rests upon the party that is asserting affirmatively a claim or defense. Thus, with respect to its objections, Respondent bears the burden of proving the validity of such objections. The Tribunal accepts that if Respondent adduces evidence sufficient to present a* prima facie *case, Claimant must produce rebuttal*

[208] Respondent's Reply, ¶ 415.
[209] Claimant's Opposition, ¶¶ 60-61; Claimant's Rejoinder, ¶ 174.
[210] Claimant's Opposition, ¶ 63; Claimant's Rejoinder, ¶ 176.
[211] Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, ICSID Review 25, No. 1 (2010) 47 [**RLA-221**], ¶¶ 62-63.
[212] Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, ICSID Review 25, No. 1 (2010) 47 [**RLA-221**], ¶ 66.

> *evidence, although Respondent retains the ultimate burden to prove its jurisdictional objections*."[213]

314. In light of the above, the Tribunal is not convinced that "*look*[ing] *to the balance of the evidence*" actually entails a shifting of the burden of proof in the sense that, if the opposing party *does* adduce certain counter-evidence, which would, however, not be in itself sufficient to disprove an allegation, *prima facie* evidence would be sufficient to consider the allegation established. As pointed out by the same commentary, "*a simple shifting of the burden of proof, all in one go, is rightly difficult for any lawyer to accept*" and reaching the *prima facie* threshold of evidence "*may not in and of itself be enough to discharge the burden of proof.*"[214]

315. The Tribunal is aware that Respondent also cites several investment treaty cases, which recognized the possibility of shifting the burden of proof once a *prima facie* has been made.[215] However, as pointed out by Claimant, most of these cases did not concern allegations of corruption and those that did, specifically the *Fraport II* and *Siag* decisions, in fact did not involve a shifting of the burden of proof. Apart from the *Fraport II* decision, which has already been quoted above, the *Siag* tribunal, in the context of allegations of fraud raised by Egypt in connection with the claimant's nationality, held as follows:

> "*As noted earlier, on 27 February 2008 Claimants stated that Mr Siag had provided extensive prima facie evidence of his Lebanese nationality, and that accordingly* 'the burden of proof is now on Egypt.' *The Tribunal agrees with this contention. On 29 February 2008 Claimants stated:* 'As an initial matter, of course, Egypt bears the burden of proof with respect to each of its jurisdictional objections. It is not Claimants' burden to disprove jurisdictional objections made by Egypt.' *For its part, Egypt asserted that it had proved Mr Siag's non-Lebanese nationality and that accordingly* 'the burden has shifted.' *The Tribunal does not accept this latter submission. Because negative evidence is very often more difficult to assert than positive evidence, the reversal of the burden of proof may make it almost impossible for the allegedly fraudulent party to defend itself, thus violating due process standards. It is for this reason that Tribunals have rarely shifted the burden of proof.*"[216]

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[213] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12 Award, 10 December 2014 [**RLA-231**], ¶ 299.
[214] Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, ICSID Review 25, No. 1 (2010) 47 [**RLA-221**], ¶¶ 28, 63.
[215] Respondent's Reply, ¶ 414 (with notes 1415 through 1418).
[216] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009 [**CA 195**], ¶ 317.

316. The *Metal-Tech* tribunal, in a passage already quoted above, first recognized that "*as reflected in the maxim* actori incumbat probatio, *each party has the burden of proving the facts on which it relies*" and then added:

> "*Here, the question is whether for allegations of corruption, the burden should be shifted to the Claimant to establish that there was no corruption. Rules establishing presumptions or shifting the burden of proof under certain circumstances, or drawing inferences from a lack of proof are generally deemed to be part of the* lex causae. *In the present case, the* lex causae *is essentially the BIT, which provides no rules for shifting the burden of proof or establishing presumptions. Therefore, the Tribunal has relative freedom in determining the standard necessary to sustain a determination of corruption.*"[217]

317. While it thus appears that the Metal-Tech tribunal did not exclude the possibility of shifting the burden of proof, it concluded that "*the present factual matrix does not require the Tribunal to resort to presumptions or rules of burden of proof where the evidence of the payments came from the Claimant and the Tribunal itself sought further evidence of the nature and purpose of such payments.*"[218]

318. The Tribunal considers that this aspect of the dispute arises out of a confusion about the meaning of the term "*burden of proof.*" To say that a party bears the burden of proof means that if, after considering all the evidence, a tribunal is left in doubt as to whether the party has proved its case to the necessary standard, that party loses. In that sense, the burden of proof never shifts. The references to "*shifting*" are to the process of reasoning by which the tribunal decided whether the case has been proved or not. A tribunal may take into account that a party has not adduced rebutting evidence in circumstances in which that party would have been expected to be able to do so. In this sense the tribunal may be said to have imposed upon the party a "*burden*" to adduce evidence. But the burden of proof as such has not shifted. It is only that the opposing party's failure to adduce evidence is part of the material which has enabled the tribunal to conclude that the first party has proved its case.

319. In response to Respondent's allegations and the evidence it has submitted, Claimant has presented 14 witnesses and various contemporaneous documents in rebuttal. Thus, it cannot be said that Claimant has generally refused to contribute to the evidentiary exchange. The Tribunal is aware that Respondent complains about the fact that Claimant has withheld several internal documents regarding its own investigation into allegations of corruption, invoking legal privilege. However, in the Tribunal's view, this does not

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[217] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214**], ¶¶ 237-238.
[218] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214**], ¶ 243.

justify a "*shift*" of the burden of proof – also taking into account the Tribunal's understanding of this term explained in the previous paragraph. If and to the extent it becomes relevant, a lack of rebuttal evidence concerning individual allegations will be taken into account in the evaluation of the evidence submitted by both Parties. Nevertheless, if the Tribunal is not satisfied that Respondent's allegations have not been established in accordance with the standard set out above, Respondent's case will not have been made out.

c. The Requirements of What Needs to Be Proven

320. In addition to the standard and burden of proof, the Parties are in dispute as to what Respondent has to prove, *i.e.*, the requirements to be met in order for Respondent to succeed with its objection to jurisdiction and admissibility and/or its affirmative defense. Specifically, Claimant argues that Respondent "*must prove not only* (i) *that* 'TCC engaged in corruption,' *but also* (ii) *that TCC thereby procured certain rights or benefits, and* (iii) *that such rights or benefits were foundational to TCCA's investment.*"[219]

321. Respondent opposes the second and third requirements as going "*far beyond the standard required by international law and* [] *allow*[ing] *a corrupt party to avoid any consequences for its actions before an investment treaty tribunal*."[220] The Tribunal will thus focus on these two requirements in the following analysis.

i. The Alleged But-for Causation Requirement

322. As to the second requirement, Claimant takes the position that Respondent must prove a "*causal* 'link between the [alleged] advantage bestowed and the [alleged] improper advantage obtained'" or, in other words, "*proof that* but for *the alleged corruption, TCC would not have its investment.*"[221] In this regard, Claimant refers to Article 50 of the Vienna Convention, which allows a State to vitiate its consent to a treaty if its "*consent to be bound … has been* procured through *the corruption of its representative*," and claims that the underlying concern that the corruption defense could be used "*as a pretext*" for reneging on treaty commitments also applies to obligations assumed under the Treaty.[222] In addition, Claimant relies on the cases of *World Duty Free v. Kenya*, *Niko Resources v. Bangladesh* and *TANESCO v. IPTL*.[223]

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[219] Claimant's Opposition, ¶ 40.
[220] Respondent's Reply, ¶ 378.
[221] Claimant's Opposition, ¶ 44 *quoting from* Sist*em Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award 9 September 2009 [**CA 157**], ¶ 43.
[222] Claimant's Opposition, ¶¶ 45-46 *quoting from* Vienna Convention on the Law of Treaties adopted on 22 May 1969 and entered into force on 27 January 1980 [**CA 141**], Article 50 (emphasis added by Claimant).
[223] Claimant's Opposition, ¶¶ 47-52 *referring to World Duty Free v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 [**RLA-36**], *Niko Resources (Bangladesh) Ltd. v. People's Republic of*

323. Respondent, on the other hand, claims that "*any corruption (and any attempt to corrupt) made in connection with TCC's alleged investment is relevant to the outcome of the case*." It adds that "[w]*hile the type of causal link between an investor's corruption and its investment may be one of the factors that impacts the tribunal's precise analysis … the investor's corruption will always be relevant and indeed decisive for the outcome of the arbitration.*"[224] Respondent is of the view that in most cases, it has sufficiently established the causal link but requests that where this is not the case, "*the Tribunal should* 'connect' the dots' *and infer the link between those payments or promises and TCC's alleged investment*." In support of its position, Respondent relies on the cases of *Sistem v. Kyrgyz Republic* and *Metal-Tech v. Uzbekistan*.[225]

324. In this context, the Tribunal will again draw guidance from the case law cited by the Parties. First, the *World Duty Free* tribunal found that bribery is contrary to transnational public policy and, on that basis, concluded that "*claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal*." In the passage quoted by Claimant, the tribunal further rejected the claimant's argument that the admitted bribe was "*severable*" from the relevant contract and, in that context, stated that "*there can here be no severance when the bribe, as known and intended by Mr. Ali, formed an intrinsic part of the overall transaction without which no contract would have been agreed by the parties*."[226]

325. Second, the *Niko Resources* tribunal, making reference in its decision on jurisdiction to the statement made by the *World Duty Free* tribunal regarding "*contracts of corruption*" and "*contracts obtained by corruption*," distinguished between the two categories and referred to Article 50 of the Vienna Convention, which it considered as "*a general principle of law and as such applicable to contracts concluded by States*."[227] Emphasizing that a contract obtained by corruption should be voidable at the discretion of the bribery victim, the *Niko Resources* tribunal noted that Bangladesh did not rely on the avoidance

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Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, & Bangladesh Oil Gas and Mineral Corporation, ICSID Case Nos. ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19 August 2013 [**CA 205**] *and Tanzania Electric Supply Co. Ltd. (Tanesco) v. Independent Power Tanzania Ltd. (IPTL)*, ICSID Case No. ARB 98/8, Decision on Tariff and Other Remaining Issues, 9 February 2001 [**CA 209**].

[224] Respondent's Reply, ¶¶ 379-380.

[225] Respondent's Reply, ¶¶ 382-384 *referring to Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 [**CA 157**] *and International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, Separate Opinion of Prof. Wälde dated December 2005, 26 January 2006 [**RLA-241**].

[226] *World Duty Free v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 [**RLA-36**], ¶¶ 157, 174-175.

[227] *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, & Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19 August 2013 [**CA 205**], ¶¶ 440-451.

of the agreements (which contained the relevant arbitration agreements) and then addressed the question of causation as follows:

> "*The case of bribery which has been established in the present case did not procure the contracts on which the claims in this arbitration are based. … Thus, there is no link of causation between the established acts of corruption and the conclusion of the agreements, and it is not alleged that there is such a link.*"[228]

326. The *Niko Resources* tribunal added that "[m]*ore importantly, the Respondents have not sought to avoid the agreements nor did they state that the Agreements were void* ab initio." On that basis, the tribunal concluded that the arbitration agreements were binding on the parties and the additional argument that an investment had not been made in good faith did not establish a lack of jurisdiction, which it emphasized was based on two arbitration agreements rather than a treaty, but would have to be considered on the merits of the dispute.[229] In the end, the *Niko Resources* tribunal did not have to decide on the allegation that the relevant agreement "*was procured by corruption and is therefore void.*" Noting that it had determined in its decision on jurisdiction that "*there was no evidence that the* [agreement] *had been procured by corruption*" and that no new evidence had be submitted since then, it concluded that the request had been withdrawn in the course of the merits phase.[230]

327. Third, the *TANESCO* tribunal examined allegations of unlawful payments given "*to induce the* [relevant agreement's] *execution*" that allegedly rendered the agremement void and noted that only one payment offer had been accepted. In that regard, it held:

> "*Although Mrs Masunzu is said to have admitted that, by her taking the 100,000 Tanzanian shillings,* 'Mr Rugemalira succeeded in getting her assistance in direct support of the IPTL project'*, there is no evidence to suggest either (i) that, but for the alleged bribe, she would have cast any vote or used any influence against the IPTL project, or (ii) that her support was crucial or indeed made any difference.*"[231]

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[228] *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, & Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19 August 2013 [**CA 205**], ¶¶ 452-455.
[229] *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, & Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19 August 2013 [**CA 205**], ¶¶ 456, 471.
[230] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited & Bangladesh Oil Gas and Mineral Corporation*, ICSID Cases No. ARB/10/11 & ARB/10/18, Decision on the Payment Claim, 11 September 2014 [**CA 291**], ¶ 154.
[231] *Tanzania Electric Supply Co. Ltd. (Tanesco) v. Independent Power Tanzania Ltd. (IPTL)*, ICSID Case No. ARB 98/8, Decision on Tariff and Other Remaining Issues, 9 February 2001 [**CA 209**], ¶¶ 54-55.

328. In the context of alleged attempts at bribery, which had been rejected, the *TANESCO* tribunal further found:

> "*There is no suggestion that these alleged attempts caused either Mr Rutabanzibwa or Mr Victus to favour IPTL's cause. Indeed, one might have thought that, as men of honour, as they purport to be, the attempted bribes would have had the very opposite effect.*"[232]

329. On that basis, the tribunal concluded that the relevant agreement remained in effect.[233]

330. Fourth, the *Sistem* tribunal on which both Parties relied in their submissions had to decide on an allegation that the refurbishment of the Kyrgyz President's guest residency by the claimant amounted to an attempt to bribe the President. The tribunal stated that it "*would not have hesitated to attach the appropriate legal consequences to any proven instance of bribery or corruption.*"[234] However, it considered that there was no such proof because it did not consider the refurbishment to be an act of bribery. It nevertheless held with respect to causation:

> "*If an agreement is to be nullified, or benefits under a BIT are to be denied, because the transaction is tainted by corruption, the case needs to be clearly made out. In this context, one important element of the concept of bribery or corruption is the link between the advantage bestowed and the improper advantage obtained. In the present case Sistem had made its investment in 1993. The refurbishment occurred in mid-1995. Sistem lost control of the hotel in December 1995. Only in 1999 did it recover control. No plausible explanation was suggested as to how the refurbishment could be linked to any improper advantage. The only suggestion was that* 'there is no explanation of the [1999] main agreement if there was no bribe involved.'
>
> *In some circumstances it may happen that regular payments over a period of time effectively* 'buy' *the long-term goodwill of the recipient, so as to make it difficult to establish a causal link between the bribe and the advantage that it procures. But that is not the case here. This was a one-off transaction, from which no individual derived a personal advantage (the refurbishment being of the President's official accommodation); and it is not suggested that the transaction was made surreptitiously.*"[235]

331. Fifth, as regards the *Metal-Tech* case, the Tribunal notes that the Parties focused on the question whether or not the tribunal made its finding of corruption "*solely by* 'connecting

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[232] *Tanzania Electric Supply Co. Ltd. (Tanesco) v. Independent Power Tanzania Ltd. (IPTL)*, ICSID Case No. ARB 98/8, Decision on Tariff and Other Remaining Issues, 9 February 2001 [**CA 209**], ¶ 56.
[233] *Tanzania Electric Supply Co. Ltd. (Tanesco) v. Independent Power Tanzania Ltd. (IPTL)*, ICSID Case No. ARB 98/8, Decision on Tariff and Other Remaining Issues, 9 February 2001 [**CA 209**], ¶ 57.
[234] *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 [**CA 157**], ¶ 40-41.
[235] *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 [**CA 157**], ¶ 43-44.

the dots' *created by circumstantial evidence*" as alleged by Respondent.[236] In the Tribunal's view, this question pertains to the standard of proof, which has been addressed above, but not to the specific question of causation, which is at issue here. In respect of the causal link between the act of corruption and the investment, the *Metal-Tech* tribunal first noted that the legality requirement in the applicable treaty applied only to the establishment of the investment, not to its operation, but that the relevant payments all post-dated the establishment of Claimant's investment.[237]

332. While noting the claimant's argument that because of this timing, "*none of its payments can be viewed as compensation for obtaining the approval of its investment*," the tribunal nevertheless considered the payments relevant because the services under the alleged consultancy agreements, which served as the cover for the bribery payments, would have had to be rendered prior to the establishment of the investment and it was admitted that the consultants "*were a substantial part in putting the deal together*."[238] On that basis, the *Metal-Tech* tribunal concluded:

> "*… Metal-Tech had promised as early as 1998 to pay the Consultants if and when the Claimant's investment was established. In consequence, the actual date of the payments does not prevent the Tribunal's consideration of those payments as relating to the implementation of the Claimant's investment when assessing the evidence in respect of the corruption allegations.*"[239]

333. Finally, the Tribunal notes that Respondent's legal expert Judge Schwebel, while not explicitly addressing the alleged requirement of but-for causation because his legal opinion was submitted already with Respondent's Application, stated in his conclusions drawn from arbitral precedents and treaties addressing corruption:

> "- *There is an accepted international public policy that condemns corruption of public officials and debars judicial and arbitral upholding of agreements tainted by corruption.*
>
> - *This international public policy applies to investments obtained by corruption and to investments furthered, renewed or implemented by corruption.*"[240]

334. The Tribunal notes that, first, it can be considered common ground between the Parties that an established act of corruption must (at least) be "*connected with*" Claimant's investment, in the sense that the investment must be "*tainted*" by the act of corruption.

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[236] Respondent's Reply, ¶ 384. *See also* Claimant's Rejoinder, ¶¶ 183-185.
[237] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214**], ¶ 267.
[238] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214**], ¶¶ 267-271.
[239] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214**], ¶ 273.
[240] Schwebel Opinion, ¶ 90.

This threshold is confirmed by the conclusions of Judge Schwebel in his legal opinion and was also applied by the *Sistem* tribunal. Similarly, the *Metal-Tech* considered it decisive that the bribery "*related to*" the implementation of the claimant's investment. While Claimant rejects the term "*tainted*" (albeit in the context of the third requirement) to the extent that it would include "*allegations* [that] *are far removed in time and have no connection to the grant of those rights*,"[241] the Tribunal considers that this does not adequately capture the meaning of "*tainted*" as it has been used by Judge Schwebel or by the *Sistem* tribunal – on whose findings Claimant itself relies.

335. Moreover, having reviewed the case law cited above, the Tribunal is not convinced that it should impose a requirement of *but-for* causation, *i.e.*, proof that the act of corruption "*caused TCCA to obtain a right to which it was otherwise not entitled*."[242] In particular, the recognized evidentiary difficulties in connection with allegations of corruption may often relate not only to the act of corruption itself but also to the link between the act of corruption and the investment. In fact, it may in some instances be close to impossible to prove that, *but for* a payment made to obtain a certain right or benefit, such an advantage could not have been obtained if the payment had not been made.

336. The Tribunal notes that of the above referenced cases, only the *TANESCO* tribunal used the term "*but for*" in its decision. However, as pointed out by Respondent, the tribunal in that case was concerned with the question whether the relevant contract was void and not with the quality of the necessary link between an act of corruption and an investment under a treaty. As to the term "*contract obtained by corruption*" established by the *World Duty Free* tribunal as well as the term "*procured by corruption*" used by the *Niko Resources* tribunal, the Tribunal does not understand these to impose a strict *but-for* requirement. It rather appears that they required a causal link in the sense that the act of corruption must have contributed to obtaining a right or benefit related to the investment – while such contribution may not be remote, it need not be the only cause and the right or benefit need not be one to which the investor would not be entitled or that it would not have been able to obtain by legitimate means. In that sense, one can say that the investment must be "*tainted*" or, as put by Judge Schwebel, it must be "*obtained … furthered, renewed or implemented*" by corruption.

ii. The Alleged "*Foundational Rights*" Requirement

337. As to the third requirement, Claimant makes reference to the distinction between the *making* of an investment on the one hand and the *performance* of an investment on the other and claims that only the former can bar an investor's claims. According to Claimant,

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[241] Claimant's Rejoinder, ¶ 190.
[242] *Cf.* Claimant's Rejoinder, ¶ 177.

this is a distinction between "essential *and* peripheral *illegality*." More specifically, Claimant takes the position that "*to defeat an investor's treaty claim, the state must prove that the alleged corruption caused the claimant to obtain the rights it seeks to enfore in arbitration.*"[243] Claimant further argues that "[a]*llegations of corruption that do not concern these foundational rights are collateral, and not properly within the remit of this investment treaty Tribunal.*"[244] In support of its position, Claimant relies in particular on the cases of *Yukos v. Russia* and *Fraport II*.[245]

338. Respondent, on the other hand, takes the view that "*the Tribunal should consider and duly investigate any corruption (and any attempt to corrupt) in relation to any aspect of TCC's alleged investment*." While recognizing that some tribunals have distinguished between the inception and the performance of an investment in their jurisdictional analysis, Respondent rejects Claimant's argument that illegality in the performance of the investment would be "*ouside the Tribunal's mandate*" or would not have any impact on its investment treaty claim.[246] Respondent acknowledges that no investment treaty tribunal has yet had to consider the legal consequences of corruption in the performance of an investment but makes reference to the legal opinion of Judge Schwebel, who concludes that corruption at that stage can become relevant at the jurisdictional, admissibility or merits level.[247]

339. The Tribunal notes that the Parties appear to agree on the elements which constitute what Claimant refers to as the "*foundational rights*" pertaining to its investment, *i.e*., the 1993 CHEJVA, the 2000 Addendum, the 2000 certification of BHP's 75% interest, the 2000 Deed of Waiver and Consent and the 2006 Novation Agreements.[248] There is further common ground that the dispute regarding the alleged "*foundational rights*" requirement concerns the question of whether an act of corruption, in order to (possibly) give rise to legal consequences to Claimant's claims under the Treaty, must necessarily relate to the *making* of the investment. In other words, there is a dispute whether and, if so to what extent, the alleged acts of corruption relating to the *performance* of the investment in the present proceeding bear any relevance to Claimant's claims.

340. Before turning to the legal opinion of Judge Schwebel on this matter, the Tribunal will review the case law relied on by Claimant in support of its argument.

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[243] Claimant's Opposition, ¶¶ 54-56 (emphasis added by Claimant).
[244] Claimant's Rejoinder, ¶ 188.
[245] Claimant's Opposition, ¶¶ 55-57 *referring to Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 [**CA 178**] *and Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 [**CA 200**].
[246] Respondent's Reply, ¶¶ 390-391.
[247] Respondent's Reply, ¶ 393 *referring to* Schwebel Opinion, ¶ 90.
[248] *Cf*. Claimant's Post-Hearing Brief, ¶ 14 and ¶¶ 39 *et seq*.; Respondent's Post-Hearing Brief, ¶ 388 and ¶¶ 29 *et seq*.

341. The *Yukos* tribunal held, *inter alia*, that even in the absence of an express legality requirement in the applicable treaty, an investment obtained in bad faith or in violation of the host State's law should not be protected under the treaty (even though it left open whether such implied legality requirement oprated as a bar to jurisdiction or whether it deprived the investor of the substantive protections of the treaty). In that context, it further found:

> "*However, the Tribunal does need to address Respondent's contention that the right to invoke the ECT must be denied to an investor not only in the case of illegality in the making of the investment but also in its performance. The Tribunal finds Respondent's contention unpersuasive.*
>
> *There is no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State in the course of its investment. If the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law, as the Russian Federation indeed purports to have done by reassessing taxes and imposing fines. However, if the investor believes these sanctions to be unjustified (as Claimants do in the present case), it must have the possibility of challenging their validity in accordance with the applicable investment treaty. It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.*"[249]

342. The *Yukos* tribunal noted that the respondent had not been able to cite any authority that would support its submission and discussed in particular the tribunal's statement in *Fraport v. Phillipines I*, which had stated that illegal acts in the course of the investment "*might be a defense to claimed substantive violations.*" In the view of the *Yukos* tribunal, however, this statement did "*not imply the unavailability of the substantive protections of the treaty, but rather concludes that the respondent State has not incurred any liability under the treaty.*"[250]

343. The Tribunal notes that the above quoted statement made by the *Fraport I* tribunal was made in the context of its analysis of whether an express requirement in the applicable treaty that an investment be made "*in accordance*" with relevant domestic law applied only "*at the time of commencement of the investment*" or whether, in order to give rise to the tribunal's jurisdiction, the investment had to "*continuously remain in compliance with domestic law … in the course of the operation.*" The *Fraport I* tribunal dismissed this argument by stating:

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[249] *Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 [**CA 178**], ¶¶ 1354-1355.
[250] *Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 [**CA 178**], ¶ 1356.

> "*If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction*."[251]

344. Following annulment of this decision, a newly constituted tribunal in *Fraport II* addressed the same provision of the treaty, albeit in the context of a different argument, *i.e.*, that it allegedly did not contain any legality requirement. The *Fraport II* tribunal dismissed that argument and held that the provision "*limits the scope of* 'investment' *under the BIT to investments that were lawful under (*i.e. 'in accordance'*) with the host State's laws and regulation* at the time the investments were made."[252] It then added:

> "*The Tribunal is also of the view that, even absent the sort of explicit legality requirement that exists here, it would be still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.*
>
> *In light of the foregoing analysis, the Tribunal concludes that Article 1(1) of the BIT requires that an investment comply with the laws of the host State at the time it is made in order to be accorded protection under the BIT. The Tribunal's assessment of Respondent's jurisdictional objections will therefore focus on the time of entry of Claimant's investment*."[253]

345. The Tribunal notes that the findings made by the *Fraport II* tribunal (and also those made by *Fraport I* tribunal) relate only to the legality requirement it found to exist in the applicable treaty and thus to the question as to whether it had jurisdiction to hear the claimant's claims. While it indeed appears that, in the view of the *Fraport II* tribunal, this requirement applied only to the time of making the investment (as opposed to the subsequent performance), it did not have to, and did not, make any findings as to any possible (other) legal effects that an alleged illegality during the performance of the investment could have.

346. As for the *Yukos* tribunal, Respondent correctly pointed out that while the tribunal did not deny the claimant's right to invoke the applicable treaty "*altogether*," it did consider the illegal conduct that it found to have occurred on the part of the claimants in its further

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[251] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 [**CA 130**], ¶¶ 344-345.
[252] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 [**CA 200**], ¶ 331 (emphasis in original).
[253] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 [**CA 200**], ¶¶ 332-333.

analysis on: (i) the State's liability (albeit concluding that the State's measures nevertheless had an expropriatory effect); and (ii) the amount of compensation to be paid (as a result of which it concluded that "*the Claimants have contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent's destruction of Yukos*").[254] Consequently, the Tribunal considers that this decision also does not support Claimant's argument that acts of corruption relating to the performance of the investment would not be relevant to its claims or, in other words, that they would "*not* [be] *properly within the remit of this investment treaty Tribunal.*"[255]

347. Respondent's legal expert Judge Schwebel, who rendered an opinion on the international legal consequences flowing from a finding of corruption, also makes a distinction between the "*establishment*" of an investment on the one hand and the "*management or operation*" of that investment on the other. Specifically, Judge Schwebel explains that "[w]*here the investor has bribed officials as part of the establishment of its investment, it will have breached the implied or express legality requirement in the BIT and/or in the ICSID Convention*" and makes reference to several investment treaty cases in which claims were dismissed on the basis of an express or implied legality requirement.[256] Judge Schwebel further points out:

> "*A number of investment treaty decisions have confirmed that jurisdictional arguments based on the illegality of an investment have temporal limitations, namely that such arguments will only bar jurisdiction whether the establishment, rather than the performance, of the investment is tainted by illegality. …*
>
> *Accordingly, it is open to this Tribunal to hold that it lacks jurisdiction to determine the Claimant's claims if it finds that the Claimant bribed public officials of the Respondent and that those bribes were made during the inception or novation of the Claimant's investment.*"[257]

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[254] *Cf. Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 [**CA 178**], ¶¶ 1577-1580 *and* ¶ 1637.
[255] *Cf.* Claimant's Rejoinder, ¶ 188.
[256] Schwebel Opinion, ¶¶ 65-72 *referring to Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214 / Exhibit SS-7**], *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 [**CA 123 / Exhibit SS-13**] , *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 and Dissenting Opinion of Bernado M. Cremades, 19 July 2007 [**CA 130 / RLA-38 / Exhibit SS-14**], *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 [**CA 215 / Exhibit SS-15**] *and Phoenix Action, Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 [**RLA-127 / Exhibit SS-16**].
[257] Schwebel Opinion, ¶¶ 73-74 *referring to Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 [**CA 214 / Exhibit SS-7**], *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 and Dissenting Opinion of Bernado M. Cremades, 19 July 2007 [**CA 130 / RLA-38 / Exhibit SS-14**] *and Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 [**CA 178 / Exhibit SS-18**]. Judge Schwebel notes, however, that the *Yukos* tribunal was not faced with allegations of bribery.

348. The Tribunal notes that it can thus be considered established and supported by both the legal opinion of Judge Schwebel and the case law cited above that an act of corruption in the performance of the investment would not be relevant in the context of the Tribunal's jurisdictional analysis of whether Claimant has made an "*investment*" within the meaning of Article 1(1)(a) of the Treaty, *i.e.*, whether it has an asset "*admitted by* [Respondent] *subject ot its law and investment policies applicable from time to time*," or whether the dispute arises directly out of an "*investment*" within the meaning of Article 25(1) of the ICSID Convention.

349. As to acts of corruption found to have occurred in the performance of the investment, Judge Schwebel opines:

> "*An investor that has partaken in acts of corruption during the life of an investment should be estopped from relying on the host State's consent to arbitrate or should not found not to meet the implied conditions attaching to the host State's offer to arbitrate. Consequently, a Tribunal will lack jurisdiction*."[258]

350. According to Judge Schwebel, both Respondent's consent to arbitration given in Article 13 of the Treaty and the requirement of consent to ICSID arbitration provided in Article 25(1) of the ICSID Convention "*must … be interpreted in view of international public policy against corruption and bribery*."[259]

351. "*Further and alternatively*," Judge Schwebel takes the following view:

> "[W]*here a claim is based on the protections contained in a BIT (as opposed to the contractual rights contained in a contract), an investor that engages in bribery in relation to its investment should not be entitled to rely on the legal rights contained within the BIT. The Tribunal in such a case should declare the claim inadmissible or the substantive rights as not being subject to protection*."[260]

352. The Tribunal does not consider it necessary at this stage to express any view on the arguments presented by Judge Schwebel in his legal opinion. It suffices to note the obvious, *i.e.*, that the question as to the whether an act of corruption that could potentially

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[258] Schwebel Opinion, ¶ 76.
[259] Schwebel Opinion, ¶¶ 77-80.
[260] Schwebel Opinion, ¶¶ 84-89 *referring to World Duty Free v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 [**RLA-36 / Exhibit SS-2**], *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/03/25, Dissenting Opinion of Bernado M. Cremades, 19 July 2007 [**RLA-38 / Exhibit SS-14**], Wagu*ih Elie George Siag and Clorinda Vecci v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Dissenting Opinion of Professor Francisco Orrego Vicuña, 11 May 2009 [**RLA-326 / Exhibit SS-22**], Bernardo Cremades, *Corruption and Investment Arbitration*, in Global Reflections On International Law, Commerce And Dispute Resolution, Liber Amicorum In Honour Of Robert Briner, (Gerald Aksen et al. eds. 2005), [**RLA-291 / Exhibit SS-21**], p. 213; *and* C.B. Lamm, H.T. Pham and R. Moloo, *Fraud and Corruption in International Arbitration*, in Liber Amicorum Bernardo Cremades, 2010 [**RLA-295 / Exhibit SS-23**], p. 727.

be found to have occurred in the performance of the investment could give rise to legal consequences for Claimant's claims under the Treaty is in dispute between the Parties. In the Tribunal's view, this question should not be answered in the abstract. In particular, the Tribunal does not wish to categorically exclude the possibility that an established act of corruption in the performance of the investment – which Claimant has labelled as "*collateral allegations*"[261] – could become relevant to the Tribunal's legal analysis at either of the levels indicated by Judge Schwebel. Therefore, the Tribunal is not convinced of the alleged general requirement that an act of corruption must relate exclusively to the establishment of Claimant's investment or, in other words, to Claimant's "*foundational rights*."

353. While the Tribunal will follow the distinction applied by both Parties between "*foundational*" events that preceded and constituted Claimant's investment decision embodied in the conclusion of the Novation Agreement and further events that post-dated this investment decision, it will in any event assess all allegations of corruption, including those relating to events in the performance of the investment. If and to the extent it will find that any such allegation has been established, it will decide on the legal consequences of such finding at the appropriate stage below.

d. Specifically: The Standard and Burden of Proof Applicable to the Dispute Regarding the Authenticity of Mr. Aziz's Diaries

354. According to Respondent, it is undisputed that it "*has the initial burden of establishing, prima facie, that the Aziz Diaries are authentic; but that the burden of proving fabrication is TCC's to satify.*"[262] However, the Parties are in dispute as to the hurdle of showing *prima facie* authenticity and whether such burden has been met by Respondent. Respondent takes the view that "*its burden is relatively low and has been met in circumstances where: (i) numerous witnesses including the author have been presented for examination on the Aziz Diaries and the allegations underlying the questioned payments in the Aziz Diaries; (ii) the Aziz Diaries were made available for inspection; and (iii) a leading forensic document examiner, Mr LaPorte, who after carrying out a range of tests on the original documents in Pakistan, produced a report concluding that there was no indication that the Aziz Diaries were, in whole or in part, fabricated.*"[263]

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[261] *Cf.* Claimant's Post-Hearing Brief, ¶ 133.
[262] Respondent's Post-Hearing Brief, ¶ 391 *referring to* LaPorte Submission, ¶ 10. In that submission, Respondent relies in particular on *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016 [**RLA-334**] and *Dadras International, Per-Am Construction Corporation v The Islamic Republic of Iran Tehran Redevelopment Company,* IUSCT Case Nos. 213 and 215 (567-213/215-3), Award, 7 November 1995 [**RLA-331**].
[263] Respondent's Post-Hearing Brief, ¶ 392.

355. Claimant does not explicitly address the distinction drawn by Respondent between a *prima facie* showing that Mr. Aziz's diaries are authentic and the burden of proving that they are fabricated. However, it argues that the evidence in fact "*compel*[s]" the conclusion that Mr. Aziz's diaries *have* been fabricated and further requests that the Tribunal draw an adverse inference of fabrication based on Respondent's refusal to produce the original Diaries for a proper forensic examination.[264] In that context, it argues that it "*need only prove two points, and it has proven both. First, it has proven that any one of the ESDA indentation, ESDA sequencing, or ink dating examinations might have provided material proof of fabrication. Second, it has proven that Pakistan, by refusing to produce the originals to Mr. Radley to conduct ESDA examinations at his laboratory and by refusing to allow Mr. LaPorte to take samples with which he and Dr. Aginsky could conduct ink dating examinations, has prevented those examinations from taking place.*"[265]

356. The question for the Tribunal to assess is thus which conclusions are to be drawn from the following circumstances: (i) the original Aziz diaries were made available for inspection, but only under the restricted conditions permitted by the NAB, *i.e.*, in particular, the examination had to be conducted in a forensic laboratory within Pakistan and Respondent's expert was "*not granted permission to perform any form of destructive analysis, which is necessary to conduct a chemical analysis of the inks*";[266] (ii) on the basis of the examinations Respondent's expert *was* permitted to carry out either himself or through a forensic scientist,[267] he did find certain peculiarities, in particular that a page is missing between two of the relevant entries and that different inks had been used, but concluded that "*there is no evidence to indicate that the Aziz Journal of Q2B, including the three questioned entries, were created at any other time than on or around their purported dates*";[268] and (iii) Claimant's expert considered that "*it is **equally** accurate that there is no evidence that the entres **were** created on or around their purported dates*" and "*either of these contrasting statements is equally likely*," which, in his view, renders the examination "*inconclusive,*" but that further examinations could have, but were not, performed that "*may have shed further light on the way in which these documents have been created*."[269]

357. Contrary to what Respondent suggests, Claimant does not accept that it has a burden of proving that the relevant entries in the Diaries were not written on the dates on which they

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[264] Claimant's Post-Hearing Brief, ¶ 326.
[265] Claimant's Post-Hearing Brief, ¶¶ 388-390.
[266] LaPorte Report, ¶ 1.
[267] *Cf.* LaPorte Response to Claimant's Queries Regarding the forensic Examination oft he Aziz Diaries, 26 January 2017.
[268] LaPorte Report, ¶ 24.
[269] Radley Report, ¶¶ 4-5 (emphasis in original).

purport to have been written or are otherwise forgeries. It generally rejects Respondent's position that the burden of proof will shift it it makes a *prima facie* showing and maintains that Respondent "*always bears the burden of proving its allegations*."[270] Also taking into account its general findings on the burden of proof above, the Tribunal agrees with Claimant that this general rule also applies in the present context because the Aziz diaries are simply part of the evidence by which the Respondent proposes to discharge its burden of proving acts of corruption. Even if there is no forensic evidence to prove when the relevant entries were made, the absence of such evidence cannot prove that they must have been made on any particular date, still less that they are truthful records of the transactions in question. The Tribunal must decide upon the whole of the evidence, giving the evidence of the Aziz diaries such weight as it thinks appropriate, whether Respondent has proved its case.

358. In addition to its argument that the fabrication is in fact proven by the results of the forensic examination of the Diaries and further evidence on the record, Claimant asks the Tribunal to draw adverse inferences based on Respondent's refusal "*to produce the originals and its intentional obstruction of any meaningful forensic examination*."[271] Respondent denies that Mr. Aziz's diaries would have to be produced in original form to the Tribunal or Claimant, in particular where there are legitimate and "*compelling reasons*" why it was unable to do so, and maintains that it "*has given a reasonable opportunity to a Tribunal-appointed or a TCC-appointed expert to review the original Aziz Diaries.*"[272]

359. In this regard, the Tribunal notes that in its Procedural Order No. 9 dated 12 May 2016, it granted Claimant's request that "[t]*he complete and original notebook(s), journal(s), diary or diaries, or other larger document or collection reportedly belonging to Abdul Aziz, from which pages were excerpted and exhibited in support of his 24 June 2015 witness statement*" be produced to Claimant. This order was confirmed in the Tribunal's communications of 4 July 2017 and 6 July 2017. In the following months, extensive correspondence was exchanged between the Parties on the matter of a forensic examination of Mr. Aziz's diaries in which Respondent, *inter alia*, produced a letter from the NAB that it would not permit the Diaries to be sent "*abroad outside NAB jurisdiction*" because they were "*original evidence of an ongoing inquiry/investigation.*"[273] Despite several attempts by the Tribunal and the Parties, no mutually agreeable solution could be found regarding an examination of Mr. Aziz's diaries within Pakistan.

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[270] Claimant's Post-Hearing Brief, ¶ 30.
[271] Claimant's Post-Hearing Brief, ¶ 326.
[272] LaPorte Submission, ¶¶ 14-15; Respondent's Post-Hearing Brief, ¶¶ 396-399.
[273] NAB letter dated 14 July 2017.

360. Consequently, the Tribunal pointed out in its letter of 20 October 2016 that it "*agree*[d] *with Claimant that procedural fairness requires that the Aziz diaries be made available to the expert chosen by Claimant for inspection at his own laboratory in order for him to carry out an adequate examination regarding their authenticity*." It further provided, *inter alia*, the following directions:

> "*Therefore, the Tribunal strongly recommends that Respondent comply with Claimant's request and promptly produce the Aziz diaries to Mr. Radley's laboratory in Reading, England for inspection under the conditions set out in Claimant's letter of 19 October 2016.*
>
> *The same applies to Claimant's second request, i.e., that the Aziz diaries be made available for the Tribunal's inspection at the hearing in Hong Kong. While the Tribunal refrains from ordering Respondent to do so, it again strongly recommends that Respondent comply with this request in order to allow the Tribunal to make its own assessment of the diaries' authenticity.*
>
> *The Tribunal notes that, in case Respondent should not follow the Tribunal's recommendations regarding Claimant's first and/or second request for whatever reason, the Tribunal will not entirely exclude the Aziz diaries or the relevant portions of all witness statements from the record. However, the Tribunal wishes to make clear that it would definitely take into account any refusal to produce the original diaries to an expert and/or the Tribunal when assessing the evidentiary value of the diaries – a value that would naturally be significantly reduced in the absence of any evidence on the diaries' authenticity*."

361. Following Respondent's statement that "*the NAB has reiterated that it is unwilling for the Aziz Diaries to be sent abroad under any circumstances*,"[274] the Tribunal confirmed in its letter of 4 November 2016 its "*strong recommendation*" that:

> "*(i) Respondent promptly produce the Aziz diaries to Mr. Radley's laboratory in Reading, England for inspection under the conditions set out in Claimant's letter of 19 October 2016; and (ii) the Aziz diaries be made available for the Tribunal's inspection at the hearing in Hong Kong. The Tribunal has duly considered the Parties' submissions on this matter and sees no reason to deviate from these two recommendations.*
>
> *The Tribunal further re-affirms the notice given to Respondent in its letter of 20 October 2016 and again in the message to the Parties on 27 October 2016 that the diaries' non-availability to Claimant for examination by its own expert and by the Tribunal in Hong Kong might affect their probative value*."

362. In addition, the Tribunal notes that this decision did not prevent Respondent from appointing its own expert, "*bearing in mind, however, the Tribunal's notice reiterated above regarding the evidentiary value of evidence to which neither an expert of the opposing Party nor the members of the Tribunal have been given access*."

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[274] Respondent's letter dated 26 October 2016, p. 2.

363. In addition to the above, the Tribunal recalls that throughout the correspondence exchanged over the course of 2016 on this matter, Respondent argued on various occasions that an ink-dating analysis would be useful and proposed that the Tribunal appoint an ink-dating expert.[275] It also noted that it had "*obtain*[ed] *the NAB's consent to conduct forensic examination of the Aziz Diaries by multiple experts*."[276] After the Tribunal had decided that it would not appoint an expert, Respondent informed the Tribunal that it had appointed Mr. LaPorte as its own expert to conduct an ink-dating analysis in Pakistan and that, as requested by Claimant, he would take an additional set of ink-dating samples for examination by an expert appointed by Claimant.[277] Nevertheless, when Mr. LaPorte arrived in Pakistan, he was "*not granted permission to perform any form of destructive analysis, which is necessary to conduct a chemical analysis of the inks.*"[278] It also follows from correspondence exchanged between the Parties' counsel that Claimant was informed of this development only after the examination by Mr. LaPorte had been concluded.[279]

364. The Tribunal further notes that in its e-mail of 4 January 2017, Respondent argued for the first time that Mr. LaPorte had taken the view that an ink-dating analysis "*would be unlikely to advance matters in the present case.*"[280] In his expert report, Mr. LaPorte explained that he informed the NAB after his first day of examination that:

> "[G]*iven that (i) in any event the other two questioned entries were made more than 17 months ago; (ii) there is a reasonable chance that they were created using a fast ageing ink* [based on information of a published study]*; and (iii) the document containing those entries was not kept in any protected conditions but was exposed to normal climatic conditions in Pakistan, it was highly unlikely that chemical analysis of those entries would in any way assist any findings relating to the timing of the creation of the questioned entries in this report. On that understanding and given the pending criminal case where these documents are used as evidence, the NAB did not grant me permission to conduct this type of analysis.*"[281]

365. As pointed out by Claimant, however, Mr. LaPorte stated in the examination protocol that he had provided to Respondent prior to his examination that "[t]*he GC/MS analysis can*

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[275] *See, e.g.*, Respondent's letter dated 19 September 2016, p. 3. Claimant concurred with this proposal in its letter of 21 September 2016, p. 3. *See also* Respondent's letter dated 13 October 2016, p. 2; Respondent's letter dated 26 October 2016, p. 6.
[276] Respondent's letter dated 26 October 2016, p. 5.
[277] Respondent's letter dated 14 November 2016; Respondent's letter dated 21 November 2016. See also Respondent's letter dated 22 November 2016, p. 2.
[278] LaPorte Report, ¶ 1.
[279] Exhibit A to Claimant's letter dated 9 January 2017.
[280] Exhibit A to Claimant's letter dated 9 January 2017.
[281] LaPorte Report, ¶ 6.

be used to analyze the solvent levels in the inks to determine if any of the written entries were created in the past 2 years (ink aging analysis)."[282]

366. In addition, the Tribunal notes that during the hearing, Mr. LaPorte sympathized with the NAB's refusal to permit ink-dating on the grounds that it was a destructive analysis, which might impair the evidentiary value of Mr. Aziz's diaries, by stating that "*even in the United States, it would be consistent spoliation of evidence in a criminal proceeding, and that evidence would completely thrown out.*" However, this statement stands in contrast to the explanation he provided in his examination protocol:

> "*The removal of ink is minimally invasive and does not diminish the integrity of the document or any entries. Moreover, capturing images of the document via scanning and photography preserves the integrity of the document.* …
>
> *I have performed chemical analysis of documents in hundreds of criminal and civil cases, and I have never been involved in a criminal or civil matter where the court has prohibited me from performing ink aging analysis or testifying to my findings.*"[283]

367. In light of the above, the Tribunal is not convinced that the use of Mr. Aziz's diaries as evidence in a pending criminal case provides sufficient justification to refuse permission to conduct an ink-dating analysis; further, it is not convinced that it would have been "*highly unlikely*" that an ink-dating analysis could have assisted the Tribunal in assessing the authenticity of Mr. Aziz's diaries.

368. The Tribunal notes that it does not make a finding as to the appropriateness of drawing inferences and a positive finding of fabrication at this point, *i.e.*, without having examined the results of the forensic examination and the specific circumstances surrounding the relevant entries in Mr. Aziz's diaries and the events to which they purportedly pertain, which will be discussed in detail below. However, taking into account the circumstances set out above, in particular the fact that the original Aziz diaries were not made available for examination by Claimant's expert at his laboratory and that the NAB further refused (without giving advance notice to Claimant) that Respondent's expert perform an ink-dating analysis as it had been contemplated, any remaining uncertainty regarding the authenticity of Mr. Aziz's diaries cannot go to the detriment of Claimant.

369. In light of the above, the Tribunal concludes that even if it turns out that there is no forensic evidence that the relevant entries in the diaries were forged, this will not be to sufficient to draw an inference that they must positively be assumed to be authentic.

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[282] **Exhibit C-889**, ¶ 12.
[283] **Exhibit C-889**, ¶¶ 11, 13.

D. Factual Allegations

370. Having set out the applicable standard and burden of proof as well as the requirements of what needs to be proven, the Tribunal will now turn to the individual factual allegations of corruption raised by Respondent. As noted above, the Tribunal will in this analysis follow the distinction drawn by the Parties between allegations relating to: (i) the making of Claimant's investment, *i.e.*, the events preceding or constituting Claimant's main investment decision embodied in the conclusion of the 2006 Novation Agreement by which Claimant became party to the CHEJVA;[284] and (ii) the performance of Claimant's investment, *i.e.*, the events following the conclusion of the 2006 Novation Agreement.

371. At this point, this distinction is drawn without any prejudice to the legal consequences arising from a finding of corruption in connection with either the making or the performance of the investment. The Tribunal further notes that its use of the term "*investment*" at this stage is also without prejudice to a possible finding on Respondent's objection to the classification of Claimant's interest as an "*investment*" within the meaning of Article 1(1)(a) of the Treaty and Article 25(1) of the ICSID Convention – should the Tribunal make a finding of corruption in the establishment of the investment and thus have to decide on this objection further below.

372. Finally, the Tribunal is aware of Respondent's position that the conclusion of the Novation Agreement was not Claimant's "*main investment decision*" as the Tribunal found in its Draft Decision, bur rather "*one of a series of necessary investment decisions*."[285] The Tribunal is also aware that Judge Schwebel stated in his legal opinion that "*where the investor's investment decision can be viewed as part of a series, a narrow view as to the moment of the inception of the investment should not be taken*."[286] Claimant, on the other hand, argues that the Novation Agreement "*is the only agreement where any conduct attributable to TCCA could possibly affect its Treaty rights. To succeed on its Application, Pakistan must show that the execution of the Novation Agreement was procured by corruption*."[287] At the same time, however, Claimant acknowledges that the "*foundational agreements underpinning TCCA's investment* [are] *the CHEJVA, the Addendum* [and] *the Novation Agreements.*"[288] Consequently, on the assumption that the Tribunal were to find that an established act of corruption that it found to have occurred in the context of the CHEJVA or the 2000 instruments, if any, could be attributed to Claimant, there appears to be common ground that such an act of corruption could indeed be relevant to Claimant's investment and thus its claims under the Treaty.

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[284] *Cf.* Tribunal's Draft Decision, ¶ 897.
[285] Respondent's Reply, ¶ 105(f).
[286] Schwebel Opinion, ¶ 75.
[287] Claimant's Post-Hearing Brief, ¶ 118.
[288] Claimant's Post-Hearing Brief, ¶ 14.

373. On that basis, the Tribunal will now address the individual factual allegations raised by Respondent and assess them in a chronological order.

1. Allegations Relating to the Making of Claimant's Investment

374. In the context of the making of Claimant's investment, Respondent's allegations relate to the following events: (i) the conclusion of the CHEJVA on 29 July 1993 and the grant of certain relaxations to the then-applicable 1970 BMC Rules in January 1994; (ii) the conclusion of an addendum to the CHEJVA on 4 March 2000; (iii) the certification of BHP's 75% interest in the Joint Venture by letter of 14 April 2000; (iv) the conclusion of a deed of waiver and consent on 23 June 2000; and (v) the execution of two novation agreements regarding the CHEJVA and Exploration License EL-5 on 1 April 2006. The Tribunal will address these allegations in turn.

a. Allegations Relating to the 1993 CHEJVA and the 1994 Relaxations

i. Summary of Respondent's Position

375. In its Post-Hearing Brief, Respondent did not raise specific allegations of corruption relating to the CHEJVA. However, in its Reply it asked the Tribunal to "*make a finding that it is more probable than not that the CHEJVA was secured by corruption based on…circumstantial evidence.*"[289]

376. The first piece of such evidence is that the documentary record purportedly demonstrates anomalies in the approval process. Respondent submits that the record demonstrates that not all relevant stakeholders supported the CHEJVA, there were extensive delays in negotiation during the period when Mr. Khan was Chairman of the BDA, which frustrated BHP, significant failings in the approval process and eventual sign-off was given soon after Mr. Jaffar became Chairman (the same Mr. Jaffar who was later convicted of corrupt activities in 2001).[290] Respondent maintains that Mr. Jaffar's later conviction, combined with the fact that he was responsible for pushing through the anomalies in the process and the bribes paid to BHP officials shortly after the CHEJVA was signed, justify an inference that the CHEJVA was procured by corruption.[291]

377. Respondent refers to file notes which allegedly reveal that despite serious reservations raised by the Additional Chief Secretary (**ACS**) and the Chief Secretary (**CS**) over the CHEJVA, Mr. Jaffar moved at speed, exerting pressure to obtain vettings and moving

[289] Respondent's Reply, ¶ 108.
[290] Respondent's Reply, ¶ 111.
[291] Respondent's Reply, ¶ 21 lit. a.

forward without Planning & Development Department or the Industries Department approval.[292] Consequently, Respondent asks the Tribunal to: (i) re-visit its decision that it lacked sufficient evidence to establish any act of corruption in respect of Mr. Jaffar; and (ii) "*join the dots*" in the light of not only broader evidence of corruption by BHP throughout the project, but the "*red flag*" of Mr. Jaffar's attempts to expedite the process and his ultimate conviction for corruption.[293]

378. Respondent submits that other anomalies in the approval process include a breakdown in communication between the BDA and its independent counsel, Chima & Ibrahim (demonstrated by the fact that many of its concerns were ultimately ignored by the BDA), as well as the Mr. Ali Juma's vetting of the draft on behalf of the Law Department – the same Mr. Juma who allegedly later received a bribe to expedite vetting of the Addendum.[294]

379. Respondent submits that another piece of circumstantial evidence is a purported payment of PAK Rs 30,000 to Mr. Tahir by Mr. Farooqi (General Manager, Co-ordination BDA) to ensure his silence about a waiver of the annual fee over a reserved gold area in November 1994 (contrary to the parties agreement).[295] Respondent highlights that the Supreme Court noted in its January 2013 decision that this waiver of the annual fee was indeed highly irregular and that with the benefit of hindsight, it is clear why such irregularity took place.[296] Respondent also alleges that Mr. Farooqi himself was paid a bribe, although the amount of this is unknown.[297]

380. Respondent rejects Claimant's suggestion that Mr. Tahir was a low level bureaucrat and not in a position to voice any objection to the waiver; it maintains that documentary evidence shows that he was the key individual at the BDA responsible for obtaining the relaxation.[298] Secondly, Respondent dismisses Claimant's argument that if Mr. Tahir had been paid to keep quiet, this would have failed since the relaxation and fee waiver were not secret. In this regard, Respondent submits that whether or not it was actually kept a secret is irrelevant because few individuals understood the proper allocation of costs under the CHEJVA.[299]

381. Respondent thus asks for the aforementioned discrepancies in the approval process of the CHEJVA to be reviewed in light of this subsequent corrupt payment in securing the

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[292] Respondent's Reply, ¶¶ 115-118.
[293] Respondent's Reply, ¶¶ 111-122 *referring to* Draft Decision, ¶ 682.
[294] Respondent's Reply, ¶¶ 119-122.
[295] Respondent's Reply, ¶ 108(b).
[296] Respondent's Application, ¶ 35-36 *referring to* **Exhibit RE-18**, ¶ 40.
[297] Respondent's Reply, ¶ 129.
[298] Respondent's Reply, ¶ 126 *referring to* Claimant's Opposition, ¶ 169 *and* Tahir I, ¶ 4.
[299] Respondent's Reply, ¶¶ 125-129 *referring to* Tahir II, ¶¶ 9-10.

waiver for the gold area (firstly demonstrating a willingness to use corruption and secondly increasing the likelihood of corruption during CHEJVA negotiation and execution).[300]

382. Respondent further alleges that the comprehensive relaxations of the BMCR granted to BHP in January 1994 (before the waiver of the annual fee) "*to facilitate Stage One exploration activities*", when combined with inconsistencies in the record and the involvement of corrupt individuals such as Mr. Jaffar and Mr. Farooqi, evidence corruption in respect of the CHEJVA.[301] In particular, Respondent alleges that BHP did not fulfill the criteria for relaxations under the 1970 BMC Rules with Mr. Jaffar playing a key role in pressuring and misinforming the Government of Balochistan ("**GOB**") in order to obtain such relaxations which notably had no time limit and extended to Mincor (despite only being granted to BHP).[302]

ii. Summary of Claimant's Position

383. On a preliminary note, and as will be addressed in more detail in Section VII.D.1.b below in relation to the Addendum, Claimant maintains it should not be compelled to forfeit its valid Treaty claims because of alleged wrongdoing by BHP in the years before TCC existed or became a partner in the Reko Diq project.[303]

384. However, should the merits of these BHP-era claims be considered, Claimant argues that despite the lack of evidence of corruption that could have had any bearing on the negotiation and execution of the CHEJVA, Respondent seeks to resurrect arguments which have already been rejected by this Tribunal and the ICC Tribunal, about the CHEJVA's validity, and ultimately asks the Tribunal to find corruption here on the basis of circumstantial evidence and gap-filling.[304]

385. Firstly, Claimant argues that Respondent has not explained how irregularities post-dating the CHEJVA by more than a year (even if proven), could constitute evidence of corruption and "*wildly overstates*" the role of Mr. Jaffar, fails to explain the relevance of his conviction some eight years later and in fact has conceded that this was entirely "*unrelated*" to the CHEJVA itself.[305] Claimant maintains that Respondent must do more than simply "*suggest corruption*" on the basis of two allegedly "*corrupt individuals,*

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[300] Respondent's Reply, ¶¶ 123-129.
[301] Respondent's Reply, ¶¶ 130-132 *referring to* **Exhibit CE-187**, p. 2.
[302] Respondent's Reply, ¶¶ 130-132.
[303] Claimant's Post-Hearing Brief, ¶¶ 39-52.
[304] Claimant's Post-Hearing Brief, ¶¶ 39-52 *referring to* Draft Decision, ¶ 638, ICC Preliminary Issues Ruling, ¶ 411 *and* Respondent's Reply, ¶ 108.
[305] Claimant's Rejoinder, ¶¶ 345-346; Claimant's Post-Hearing Brief, ¶ 50 *referring to* Respondent's Application, ¶ 178(c).

namely Mr. Jaffar and Mr. Farooqi" and their purported roles in the relaxation process; Respondent must prove it.[306]

386. Secondly, Claimant argues that there is no evidence to suggest there was anything improper about the waiver and the relaxations.[307] Claimant highlights that Respondent's only specific corruption allegation relates to an alleged bribery payment to Mr. Tahir for him to keep quiet about the waiver of the prospecting license fee due in November 1994—sixteen months after the CHEJVA's conclusion in July 1993. There is allegedly no explanation as to how this waiver is relevant to determining whether the CHEJVA was corruptly procured in the first place. Claimant maintains that not only is this claim unsubstantiated but is undermined by the fact that Mr. Tahir was not in a position at the BDA to voice any meaningful objection, and the record showing that multiple Provincial Government authorities were involved in the process; the notification was kept far from quiet.[308]

387. Claimant specifically rejects Respondent's allegations that the BDA failed to act on Chima & Ibrahim's advice; not only were Pakistan's comments assessed in the wrong context, but the firm recognized its own lack of expertise, therefore it should not be surprising that the Government did not entirely follow the advice of corporate lawyers with no mining expertise.[309]

388. Thirdly, Claimant maintains that the CHEJVA was the product of extensive negotiation and review.[310] It rejects Respondent's allegations, including that: (i) the CHEJVA was procured in a "*non-transparent manner*"; (ii) Mr. Jaffar acted with undue haste; and (iii) external counsel's advice was ignored by the BDA. According to Claimant, these allegations are speculative, short of the evidentiary standard and unsupported by documentary evidence. Claimant submits that evidence demonstrates that over a three-year period, BHP negotiated the terms in multiple meetings with high-ranking government officials, at least five different drafts were proposed and considered by all relevant departments on different occasions and independent expert advice was widely obtained.[311] Claimant further disputes Respondent's suggestion that various departments did not vet the agreement; Claimant maintains this is directly contradicted by the BDA's Board of Directors' (which included the Secretaries of Planning and Development, Industries and Finance) approval of the agreement on 3 July 1993, and the fact that the

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[306] Claimant's Rejoinder, ¶ 357 *referring to* Respondent's Reply, ¶ 130.
[307] Claimant's Rejoinder, ¶¶ 354-360.
[308] Claimant's Post-Hearing Brief, ¶ 52 *referring to* Exhibits **RE-48**, p.2, **RE-50**, **CE-191** *and* Claimant's Opposition, ¶ 169.
[309] Claimant's Rejoinder, ¶ 352.
[310] Claimant's Opposition, ¶¶ 105-119 *referring to* Respondent's Application, ¶ 36.
[311] Claimant's Opposition, ¶ 105, 109; Claimant's Rejoinder, ¶ 348.

Planning and Development Department specifically authorized Mr. Jaffar to sign the agreement.[312]

389. Fourthly, Claimant argues that Balochistan's welcoming of an investment by a company of BHP's experience was not suspicious since it was still required to prove its credentials to earn its interest in the CHEJVA.[313] Equally, Claimant submits that the 1970 BMC rules were two decades old and thus did not contemplate the large-scale activities envisaged by the CHEJVA. Therefore, in order to guarantee security of tenure, BHP formally requested relaxation of certain provisions to make the project practicable.[314] Claimant thus contends that there was no occasion to speculate why Balochistan entered into the agreement which offered legitimate benefits to Balochistan and Pakistan including "*unprecedented*" value for Baloch society in terms of mineral and economic development.[315]

390. In response to Respondent's attempts to highlight that it was the purportedly corrupt Mr. Juma who vetted the CHEJVA on behalf of the Law Department, Claimant argues that any alleged payment made to Mr. Juma in relation to the Addendum cannot be of relevance to whether the CHEJVA was properly vetted six years earlier.[316]

391. Ultimately Claimant deems it "*both incredible and fundamentally unfair*" for Respondent to attempt to impugn the CHEJVA as a product of corruption twenty-three years later and after losing on jurisdiction and liability.[317] Instead of using the interim decades to present evidence to support this allegation, Respondent actually actively defended the CHEJVA's legitimacy in Pakistan's own courts. Having previously acknowledged in the two international arbitrations that it possesses no evidence of procurement by corruption in respect of the CHEJVA, Claimant questions how Respondent can now contend otherwise.[318]

iii. Tribunal's Analysis

392. At the outset of its analysis on the allegations of corruption that Respondent has raised in connection with the CHEJVA and the 1994 Relaxations, the Tribunal notes that Respondent did not include these allegations in its Post-Hearing Brief as part of the list of illegal acts that it sets out as being established on the basis of the evidence presented to the Tribunal. It is not entirely clear to the Tribunal whether Respondent maintains the

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[312] Claimant's Rejoinder, ¶ 348 *referring to* Respondent's Reply, ¶¶ 115-116, **Exhibit RE-39**, p. 9, **Exhibit CE-308**, p. 2 *and* **Exhibit RE-43**, p. 1.
[313] Claimant's Opposition, ¶¶ 111-112.
[314] Claimant's Opposition, ¶ 116 *referring to* Boggs II, ¶ 4 *and* Draft Decision, ¶¶ 926-930.
[315] Claimant's Opposition, ¶¶ 111-112, 118 *referring to* **Exhibit CE-212**, p. 9.
[316] Claimant's Rejoinder, ¶ 353 *citing to Cf. Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 [**CA 157**], ¶ 43.
[317] Claimant's Opposition, ¶ 118.
[318] Claimant's Opposition, ¶¶ 118-119 *referring to* **Exhibit CE-19**, p. 12, Draft Decision, ¶ 637 *and* Respondent's Application, ¶¶ 23-25.

allegations it has previously raised in its Reply. It will nevertheless address these allegations in the following analysis.

393. Respondent's allegations do not involve any specific payment or other form of bribe made in connection with the negotiation and execution of the CHEJVA. Respondent rather asks the Tribunal to find "*that it is more probable than not that the CHEJVA was secured by corruption*" based exclusively on circumstantial evidence. Specifically, Respondent invokes: (i) alleged "*anomalies in the approval process of the CHEJVA*" and the "*key role*" of Mr. Ata Muhammad Jaffar, who had become Chairman of the BDA in April 1993 and signed the CHEJVA on behalf of the BDA in July 1993; (ii) an alleged payment of PAK Rs. 30,000 paid by Mr. Mohammad Amin Farooqi, then General Manager Co-ordination BDA, – allegedly on behalf of BHP – to Mr. Muhammad Tahir, then Additional General Manager of the Mines Division at the BDA in relation to the waiver of an annual fee over a reserved gold area in November 1994; and (iii) "*anomalies in the process of the relaxations of the* [1970 BMC Rules]," which were granted by the GOB in January 1994.[319]

394. As to the first argument, Respondent relies primarily on the involvement of Mr. Jaffar in the final phase of the negotiations and in the execution of the CHEJVA and highlights that after more than two years of negotiations, it took only three months from Mr. Jaffar's taking office as Chairman of the BDA until the signing of the CHEJVA. In addition, Respondent notes that Mr. Jaffar was convicted in 2001 of having acquired properties totalling USD 6.5 million through corrupt practices.[320] However, as the Tribunal noted in its Draft Decision, this conviction was not related to the CHEJVA or to the Reko Diq project in general.[321] In addition, the Tribunal noted that while the Supreme Court held in its judgment of 2013 that the dual office held by Mr. Jaffar at the time the CHEJVA was signed, *i.e.*, Chairman of the BDA and Additional Chief Secretary within the GOB, presented a "*clear conflict of interest*," it did not make any finding that Mr. Jaffar's conduct in connection with the CHEJVA constituted an act of corruption and it did not mention any corresponding conduct of BHP in this regard.[322]

395. Respondent argues that this view of the Tribunal "*should be re-visited in light of the new evidence of corruption more broadly*" and that the Tribunal should "*join the dots*" based on the allegation that: (i) "*BHP furthered its interests in the investment by way of corruption from start to finish, including as early as 1994 (and later through Mr Iqbal)*"; (ii) Mr. Jaffar was later convicted of corruption "*on a significant scale*"; and (iii) Mr.

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[319] Respondent's Reply, ¶ 108.
[320] Respondent's Reply, ¶¶ 112-113.
[321] Draft Decision, ¶ 683, *maintained in* Decision on Jurisdiction and Liability, ¶ 686.
[322] Draft Decision, ¶ 683 *referring to* **Exhibit RE-18**, ¶ 50, *maintained in* Decision on Jurisdiction and Liability, ¶ 686.

Jaffar "*used considerable personal efforts*" to ensure the signing of the CHEJVA "*in an expedited time frame by an irregular process and in the face of serious and repeated objections.*"[323] In addition, Respondent notes that the vetting by the Law Department was signed by Mr. Ali Juma, *i.e.*, the same person that, according to Respondent, received a bribe from Mr. Farooq in December 1999 to vet the 2000 Addendum.[324]

396. The Tribunal is not convinced by any of these arguments. In particular, it appears to the Tribunal that apart from the events that were already subject to the Tribunal's consideration in the previous phase of the proceedings, Respondent attempts to prove its allegation in connection with the CHEJVA by arguing that the Tribunal should consider the other allegations of corruption it has raised in connection with other events as established. However, even if the Tribunal were to consider some of these allegations established, this would not be sufficient to draw an inference that there was also corruption in connection with the CHEJVA, which preceded all of these other events – in the case of the alleged illegitimate payment in December 1999, by several years. In addition, and while Respondent has now set out the negotiation history of the CHEJVA, including the communications exchanged with different departments within the GOB, in even more detail, it has not provided any additional evidence that would support a finding of corruption in this regard.

397. As to the second argument, *i.e.*, an alleged payment of PAK Rs. 30,000 to Mr. Tahir made in connection with the waiver of an annual fee in November 1994, the Tribunal notes that this allegation is supported by the witness testimony of Mr. Tahir, who testified that he received this payment "*for keeping quiet about the fact that the annual fees of this reserved area* [for gold exploration pursuant to a prospecting license] *had been waived*."[325] He added that, while the fact of the waiver was known to various GOB departments, this did not apply to the alleged inaccuracy of the statement made by Mr. Farooqi in the request for such waiver, *i.e.*, that the fee would otherwise have to be paid by BDA under the CHEJVA. According to Mr. Tahir, he "*intentionally kept quiet about the deliberate misinterpretation because* [he] *had been paid by Mr. Farooqi to do so.*"[326]

398. Claimant correctly points out that this alleged payment post-dates the signing of the CHEJVA by more than 15 months.[327] Even if the Tribunal were to consider this payment as established, it remains unclear to the Tribunal how it would support any finding of corruption in the context of the conclusion of the CHEJVA. In addition, the payment was allegedly made by Mr. Farooqi, *i.e.*, a BDA official. Respondent has not established that

[323] Respondent's Reply, ¶ 114.
[324] Respondent's Reply, ¶ 122
[325] Tahir I, ¶ 4.
[326] Tahir II, ¶ 9.
[327] *Cf.* Claimant's Post-Hearing Brief, ¶ 51.

the alleged payment was made with the knowledge of BHP at the time. While Respondent claims that the payment was made "*on behalf of BHP*" and argues that "[c]*learly, Mr Farooqi himself also received a bribe, although the amount of this is unknown*,"[328] this is an unsubstantiated allegation that does not satisfy the standard of proof established by the Tribunal above.

399. For this reason, the Tribunal is not convinced that the alleged payment, even if it was made, can be attributed to BHP and even less so, to Claimant, which was not involved in the project in any manner at the time. Therefore, it does not have to decide whether such act would be sufficient to "*taint*" the investment in the sense established above, *i.e.*, whether it contributed to BHP obtaining a right or benefit related to the investment, and what the legal consequences of such a finding would be.

400. As to the third argument, *i.e.*, alleged "*anomalies*" in the process of obtaining the 1994 Relaxations, the Tribunal recalls that it considered it unnecessary in its Draft Decision to express an opinion on the validity of the 1994 Relaxations under Pakistani law.[329] In any event, the GOB (at least) created the impression that the Relaxations had been validly granted and even confirmed in a letter dated 11 November 2000 that they "*still h*[e]*ld good*."[330] The Tribunal further considered that Respondent could not rely on a failure on the part of the GOB to comply with its own rules and thus, that, regardless of their validity under Pakistani law, the 1994 Relaxations could in any event form part of Claimant's legitimate expectations.[331]

401. Respondent now argues that "*inconsistencies in the record, and the recorded influence of two known corrupt individuals, namely Mr Jaffar and Mr Farooqi, suggest that corruption in this process is likely*."[332] The Tribunal is again not convinced by this argument because, similarly to the CHEJVA above, Respondent again attempts to prove its allegation in connection with the 1994 Relaxations by making reference to its other allegations of corruption that the Tribunal should consider established for the present purposes. However, the Tribunal is not convinced that there was any payment attributable to BHP in respect of the waiver of the annual fee, and Mr. Jaffar's conviction for corruption that is entirely unrelated to Claimant's investment does not constitute circumstantial evidence for a finding of corruption that "*tainted*" such investment. In addition, as to the alleged "*inconsistencies*" regarding the 1994 Relaxations, the Tribunal notes that the process in which they were granted was already subject to the Tribunal's consideration in the Draft Decision and, in the absence of any new evidence that would

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[328] Respondent's Reply, ¶ 129.
[329] Draft Decision, ¶ 906, *maintained in* Decision on Jurisdiction and Liability, ¶ 909.
[330] Draft Decision, ¶ 906 *quoting from* **Exhibit CE-195**, *maintained in* Decision on Jurisdiction and Liability, ¶ 909.
[331] Draft Decision, ¶ 907, *maintained in* Decision on Jurisdiction and Liability, ¶ 910.
[332] Respondent's Reply, ¶ 130.

demonstrate any wrongdoing on the part of BHP in that regard, the Tribunal does not see any reason to deviate from the conclusion it reached in that Decision.

402. In conclusion, based on a detailed review and evaluation of the indirect evidence adduced by Respondent in the context of the CHEJVA and the 1994 Relaxations, the Tribunal does not consider that there is any "*solid*" and "*persuasive*" evidence that would justify the conclusion that Respondent's allegation of corruption in that context has been proven with "*reasonable certainty*." Consequently, this allegation is dismissed.

b. Allegations Relating to the March 2000 Addendum

403. Second, the Tribunal will address Respondent's allegation that the March 2000 Addendum has been procured by the making of illicit payments.

i. Summary of Respondent's Position

404. Respondent alleges that BHP paid the following bribes totaling more than PAK Rs. 2 million to secure the 2000 Addendum (a condition precedent to its farm out arrangement with Mincor/TCC):

i. PAK Rs. 40,000 from Mr. Farooq to Mr. Tahir in November 1999 to prevent Mr Tahir from being a hurdle in the Addendum process;
ii. PAK Rs. 20,000 from Mr. Farooq to Mr. Juma in December 1999 to ensure quick vetting of the Addendum;
iii. PAK Rs. 2 million from Mr. Iqbal to Mr. Burq in February/March 2000 to sign the Addendum without requiring further approvals;
iv. PAK Rs. 500,000 of the amount paid to Mr. Burq was paid to Mr. Farooq in February/March 2000 which, together with the periodic payments to Mr. Farooq, ensured that Mr. Farooq did TCC's bidding, including taking steps to ensure the execution of the Addendum; and
v. An unknown amount by Mr. Lakhani/Mr. Arndt to Gov. Mengal to sign a letter authorizing the Chairman of the BDA to sign te Addendum on behalf of the GoB.[333]

405. Consequently, Respondent alleges that BHP succeeded in two respects: (i) it was able to rewrite the key terms of the CHEJVA in its favour through the Addendum; and (ii) the 2000 Addendum was executed despite failing to follow due process.[334]

(a) Re-write of Commercial Terms

406. Respondent rejects the claim that the 2000 Addendum was in all parties' interests and that its purpose was to "*clarify what had been [the] original intent [of the parties] all*

[333] Respondent's Post-Hearing Brief, ¶¶ 43-47; Respondent's Reply, ¶ 133.
[334] Respondent's Post-Hearing Brief, ¶ 48.

along."[335] BHP allegedly wanted to exit the project on the most favourable terms, so to secure an Addendum drastically rewriting the CHEJVA's key commercial terms (to BHP's benefit and to Balochistan's detriment), officials were bribed during the approval process.[336] Respondent maintains that these amendments allowed BHP to earn its 75% interest without honoring its original promises under the CHEJVA.[337] As a result, Respondent claims that Mincor, the "*mining minnow and novice"* was comfortably able to become involved in the project.[338]

407. As highlighted in its opening statement and corroborated by Claimant's witness Mr. Pierce, Respondent perceives that the amendments in GOB's favor cannot be considered of anything more than "*marginal importance and did not affect the project economics*."[339] However, some of the key amendments set out in detail in Annex 1 of the Reply, Respondent's perception of the motive behind them as well as how they allegedly "*shifted the contractual balance*" between the Parties are summarized below.[340]

(i) The Relaxation of the Requirements for BHP to Obtain a 75% Interest in the Joint Venture

408. Respondent argues that the amendment of Clause 3.2 of the CHEJVA was not a mere linguistic improvement.[341] The provision sets out the commercial bargain – BHP is not obliged to pay a lump sum to acquire a project stake, but can earn a 75% interest by financing and completing exploration work (including a Feasibility Study if required) within six years of the Commencement Date (*i.e.*, by 20 January 2000).[342]

409. Respondent submits that Article 5 of the Addendum removed the Feasibility Study requirement and stipulated that BHP must obtain ten Prospecting Licences to earn its interest (notably, which it had already done).[343] Not only did this relax the conditions, requiring only the completion of Stage One and Two activities, but also operated retroactively, implemented two months after the 20 January 2000 deadline.[344]

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[335] Respondent's Reply, ¶ 136 *referring to* Claimant's Opposition, ¶ 122.
[336] Respondent's Reply, ¶¶ 135-136; Respondent's Post-Hearing Brief, ¶ 42, 49 *referring to* Transcript (Day 1), p. 55 line 18 to p. 56 line 2.
[337] Respondent's Reply, ¶ 138.
[338] Respondent's Reply, ¶ 136, 233.
[339] Respondent's Post-Hearing Brief, ¶ 62 *referring to* Transcript (Day 1), p. 64 line 21 to p. 65 line 2 *and* Transcript (Day 8), p. 2000 lines 11-18.
[340] Respondent's Reply, ¶ 138.
[341] Respondent's Post-Hearing Brief, ¶¶ 58-61 *referring to* Transcript (Day 1), p. 56 lines 9-15 and Claimant's Rejoinder, ¶ 18.
[342] Respondent's Reply, ¶ 139.
[343] Respondent's Reply, ¶ 142 *referring to* **Exhibit CE-2**, Recital C.
[344] Respondent's Reply, ¶ 143.

410. Respondent further maintains that Claimant's comparison of the original and amended wording (presented in its opening statement), omitted certain wording and thus Respondent asks the Tribunal to disregard Slide 119 (which is incorrect and misleading) and instead refer to its demonstrative RD-7.[345]

(ii) Increased Scope of Activities to Which the GOB Was Obliged to Contribute

411. Respondent explained that Clause 9.3 of the CHEJVA reflected the understanding that the BDA would not need to contribute to any exploration costs anywhere in the Exploration Area.[346] However, through Article 8 of the Addendum, the GOB became obliged to contribute to all exploration costs in any area which was the subject of a "*Mining Venture.*"[347] Where previously, this burden lay with BHP, Respondent maintains this commitment was reduced leaving the GOB with significant cost obligations and altering an integral part of the original bargain.[348]

(iii) BHP's Narrowed Financing Commitment to the GOB

412. Through Clause 12.4 of the CHEJVA, Pakistan submits, BHP was obliged to finance development in full; the GOB incurred no costs until the project generated revenue which could then be used to repay debt.[349] Yet, pursuant to Article 9 of the Addendum, Pakistan maintains, the GOB's right not to contribute was confined to:

i. the GOB's capital assets not covered by external project financing;
ii. the capital costs of a Mining Venture (as opposed to the operating costs which would have been proportionally paid); and
iii. the costs of the first Mine Development only (as opposed to the costs of any Mining Venture).[350]

413. Specifically regarding the first Mine Development, Respondent submits that the GOB became liable for a share of the third-party financing as arranged by BHP on a "*best endeavours*" obligation, becoming solely responsible for any subsequent Mining Development.[351] Moreover, Respondent maintains that initially the repayment of BHP's loan to the BDA depended on the venture's performance and BDA was obliged to allocate only 50% of the gross revenue for these purposes. However, Respondent alleges that

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[345] Respondent's Post-Hearing Brief, ¶ 60 *referring to* TCC's Opening Slides at p. 119 *and* **Demonstrative RD-7**.
[346] Respondent's Reply, ¶¶ 144-145.
[347] Respondent's Reply, ¶¶ 146-149.
[348] Respondent's Reply, ¶¶ 144-149.
[349] Respondent's Reply, ¶ 148.
[350] Respondent's Reply, ¶ 152.
[351] Respondent's Reply, ¶ 154.

through Article 9 of the Addendum, BHP's obligation to pay funds to the GoB was conditional upon agreement on the percentage of the "*Available Cashflows*" to be used for repayment purposes.[352] Respondent notes that Mr. Pierce confirmed that the removal of this cap could have resulted in the GOB receiving "*no cash flow at all for eight years.*"[353]

(iv) Other Favorable Changes for BHP

414. Respondent rejects Claimant's allegations that retrospective "*clarifications*" to the role of the BDA as the GOB's agent (Articles 2.1, 2.2 of the Addendum), the GOB's blanket confirmation of the BDA's past actions in relation to the CHEJVA (Clause 2.2 of the Addendum), or its acceptance of the work performed by BHP as of the date of execution of the Addendum as valid performance under the CHEJVA (Clause 2.4 of the Addendum), were in the GOB's interests.[354] Respondent maintains that the real implications were that the GOB assumed liability for the BDA's past actions, waiving any potential claims against BHP. Given BHP's performance issues to date, Respondent considers these amendments to be startling.

(b) Failure to Follow Due Process

415. According to Respondent, witness and documentary evidence purportedly demonstrates anomalies in the approval process, contrary to claims of "*extensive negotiation*" and a "*robust internal review*".[355] Respondent dismisses claims of constant communication relating to negotiations since no amendments were made to BHP's July 1998 draft until signing in 2000.[356] These anomalies were purportedly accompanied by bribes paid on behalf of BHP to ensure harmony by key decision-makers and a fast passage through Balochistan bureaucracy, the ultimate aim being swift entry of Mincor into the project.[357]

416. While Respondent acknowledges the Tribunal's decision that Mincor's insistence on the Addendum's conclusion as a condition to taking over from BHP does not constitute illegality in relation to the CHEJVA, it argues that the impact of this condition on BHP is relevant background to considering the steps BHP was willing to take to push through the Addendum by any means.[358]

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[352] Respondent's Reply, ¶¶ 156-159.
[353] Respondent's Post-Hearing Brief, ¶ 56 *referring to* Transcript (Day 8), p. 1976 lines 7-9.
[354] Respondent's Reply, ¶ 164.
[355] Respondent's Reply, ¶ 169 *referring to* Claimant's Opposition, ¶ 127; Respondent's Post-Hearing Brief, ¶¶ 65-66.
[356] Respondent's Post-Hearing Brief, ¶ 66 *referring to* Pierce, ¶ 74.
[357] Respondent's Reply, ¶¶ 166-169; Respondent's Post-Hearing Brief, ¶¶ 63-71.
[358] Respondent's Reply, ¶ 167 *referring to* Draft Decision, ¶ 683.

417. Respondent maintains that the first anomaly concerned the Summary for the Chief Minister, submitted by the BDA on 20 May 1999. While it contained BDA's concerns about Clause 12.5 of the CHEJVA, it omitted various departments' objections (including the Law Department, the Industries Department and the Director of the Directorate of Mineral Development ("**DMD**")) which were raised verbally to Mr. Farooq.[359] Mr. Farooq then admitted that he and the Additional Chief Secretary (Development) purposely excluded the Secretary of Finance from negotiations in June 1999 due to his strong opposition to the contents of the Addendum.[360]

418. Respondent alleges that acting on Mr. Arndt's initiative and contrary to the GOB Rules of Business 1976, in August 1999, the Additional Chief Secretary (Development) submitted a request for the Governor to sign an authorization allowing the BDA Chairman to sign the Addendum (subject to Law Department vetting).[361] Respondent maintains that the Governor nonetheless refused to grant the authorization, instead requesting that Finance Department approval be sought.[362]

419. Respondent submits that the second anomaly concerned the Law Department opinion of 21 August 1999, in which the Secretary refused to provide vetting for various reasons including Article 2.4 of the Addendum, which was "*totally against the state/Province interest.*"[363] Respondent claims that, in its opening statement, Claimant cherry-picked these objections, dismissed them as "*silly*" and misrepresented that vetting was eventually obtained.[364] Respondent emphasizes the abrupt approval and the lack of explanation why the Law Department's objections were abandoned (which, according to Mr. Tahir, was not the usual vetting process).[365] Respondent alleges that not only does this demonstrate irregularity, but it supports the contention that a corrupt payment was made to assist this (with Mr. Farooq confirming that he paid Mr. Juma, the Law Department's Section Officer to vet the Addendum quickly).[366]

420. Respondent maintains that the Finance Department also raised objections in relation to the new Clause 12.5 on 12 October 1999.[367] Claimant allegedly misrepresents: (i) that the Finance Department eventually provided due vetting; and (ii) that its objections ended

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[359] Respondent's Reply, ¶ 170 *referring to* Farooq II, ¶ 21(a).
[360] Respondent's Reply, ¶¶ 170-171.
[361] Respondent's Reply, ¶ 172 *referring to* Farooq II, ¶ 21(c), Iqbal, ¶ 20 *and* **Exhibit RE-20**, rule 8(1), 14, 7(3).
[362] Respondent's Reply, ¶ 172 *referring to* Farooq II, ¶ 21(c).
[363] Respondent's Reply ¶ 173 *referring to* **Ex RE-58(VI)(an)**, pp. 33-34.
[364] Respondent's Post-Hearing Brief, ¶ 70 *referring to* Transcript (Day 1), p. 250 line 9.
[365] Respondent's Post-Hearing Brief, ¶ 70 *referring to* Tahir II, ¶ 14.
[366] Respondent's Reply, ¶ 179; Respondent's Post-Hearing Brief, ¶ 44 *referring to* **Demonstrative RD-1** item 2, *further referring to* Farooq II, ¶ 21(h) and Respondent's Reply, ¶ 133(d), 182, **Exhibit RE-58(VI)(an)**, pp. 39-40, 36 and 55.
[367] Respondent's Reply, ¶¶ 176-178.

with the signing of the Addendum. Respondent submits that, realizing its error, Claimant now argues that these objections were addressed in its letters to the BDA Chairman of 12 October 1999 and 11 November 1999 and claims that "*compromise was reached in negotiations about that.*"[368] In fact, Respondent argues that two months after signing, the Finance Department voiced its concerns to the BDA, thus purportedly demonstrating that its observations were ignored despite their importance for Balochistan.[369]

421. Respondent dismisses Claimant's fall-back argument, that in any event, the Finance Department approval was not required under the Balochistan Rules of Business. Respondent acknowledges that if the concerned departments disagree, the case can be submitted to the CM and as martial law applied, the Governor was the responsible individual, not the CM.[370] It maintains, however, that Claimant ignores the requirement that the "*final views of the other departments concerned shall be obtained before the case is submitted.*"[371] Respondent notes that documentary and witness evidence demonstrates that neither the Governor nor the BDA sought the final views of the Finance Department.[372]

422. Moreover, Respondent alleges that in a meeting in early November 1999 between Mr. Arndt and Mr. Farooq, it was once again agreed that Mr. Arndt would press for the new Governor (Gov. Mengal) to sign a letter authorizing the BDA Chairman to sign the Addendum on the Governor's behalf, despite not actually approving the Addendum (witnesses describe this as an attempt to generate pressure on the Law and Finance Departments to vet the agreement), whilst Mr. Farooq would ensure that such vetting was obtained.[373] Mr. Arndt allegedly promised Mr. Farooq that he would be "*rewarded with a lot of money*" for this, while Mr. Farooq paid Mr. Tahir PAK Rs. 40,000 out of his own pocket to prevent him informing the GOB's Planning and Development Department that these two vettings had not been obtained (thus being a hurdle in the approval process).[374]

423. Respondent submits that in early December 1999 following a meeting at Gov. Mengal's house, Mr. Lakhani admitted to Mr. Farooq that "*he had paid out so much money on this project so far, about US$ 5 million, and that he had had to pay more money to the*

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[368] Respondent's Post-Hearing Brief, ¶ 68 *referring to* **Exhibit RE-58(VI)(an)**, pp. 28-30, TCC's Opening Slides at p. 105 *and* Transcript (Day 1), p. 249 lines 11-17.
[369] Respondent's Reply, ¶ 185; Respondent's Post-Hearing Brief, ¶ 68.
[370] Respondent's Post-Hearing Brief, ¶ 69 *referring to* Transcript (Day 1), p. 251 line 7 to p. 252 line 21, relying on **Ex RE-20**, Government of Balochistan Rules of Business 1976 at rule 8(2).
[371] Respondent's Post-Hearing Brief, ¶ 69 *referring to* **Exhibit RE-20**, rule 8(2).
[372] Respondent's Post-Hearing Brief, ¶ 69.
[373] Respondent's Reply, ¶ 172, 180 *referring to* Farooq II, ¶ 21(c) *and* Iqbal, ¶ 20.
[374] Respondent's Post-Hearing Brief, ¶ 43; Respondent's Reply, ¶ 179 *referring to* Tahir I, ¶ 7, Tahir II, ¶ 16 *and* Farooq I, ¶ 8, 28.

Governor."[375] Respondent maintains that this helps to explain why the authorization letter was signed on 24 December 1999. Respondent recognizes that the Tribunal has already acknowledged the oddities in the form of the aforementioned letter in its Draft Decision, but suggests that the circumstances surrounding its execution are fundamental here.[376]

424. Furthermore, Respondent alleges that at the beginning of 2000 when Mr. Burq took over as BDA Chairman, feeling that the relevant Addendum approvals were incomplete, Mr. Arndt and Mr. Iqbal made another illicit payment to secure the execution.[377] Respondent maintains that the suggestion that Mr. Burq had no choice but to sign the Addendum given that the Governor had already determined it should be signed, is entirely unproven.[378] Mr. Farooq clarified in his testimony that Mr. Burq "*had no objection on the signing of the Addendum; he had objection on the approval of the Addendum. That it had not gotten approval.*"[379] Respondent also highlights that Mr. Farooq also testified that he was given a cut of this bribe for his assistance in ensuring the pushing through of the Addendum contrary to due process.[380]

(c) The Role of Mr. Arndt

425. Respondent questions Claimant's suggestion that evidence regarding Mr. Arndt's employment status "*conclusively establishes that none of this could have happened"* (since he was not working for BHP nor TCC at the time of the alleged payments) for two main reasons.[381] As a preliminary issue however, Respondent emphasizes that the question of his involvement is collateral and can in no way detract from the evidence of bribery – the broader evidence suggests his involvement in the project at the time of the relevant bribes (including not only the payment for Mr. Burq to sign the Addendum, but also the payment in relation to the certification of BHP's interest – addressed below).[382]

426. Respondent's first argument is that Claimant's story of the emergence of Respondent's witnesses regarding Mr. Arndt, *i.e.*, that Mr. Farooq was forced to falsely testify to the NAB and implicated Mr. Iqbal in paying cash bribes, leading Mr. Iqbal to invent Mr. Arndt's bribery scheme and Mr. Farooq to then change his testimony after spontaneously remembering Mr. Arndt's role, is unsubstantiated and illogical.[383] Respondent submits

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[375] Respondent's Reply, ¶ 180 referring to Farooq II, ¶ 21(g).
[376] Respondent's Reply, ¶ 180 *referring to* Draft Decision, ¶ 740.
[377] Respondent's Post-Hearing Brief, ¶ 45.
[378] Respondent's Post-Hearing Brief, ¶ 46 *referring to* Transcript (Day 1), p. 253 lines 6-16.
[379] Respondent's Post-Hearing Brief, ¶ 46.
[380] Respondent's Post-Hearing Brief, ¶ 47 *referring to* Farooq I, ¶ 8, Farooq II, ¶ 21(i), Transcript (Day 3), p. 697 lines 3-16 *and* Respondent's Reply, ¶ 133(b), 183.
[381] Respondent's Post-Hearing Brief, ¶ 323 *referring to* Claimant's Rejoinder, ¶ 298.
[382] Respondent's Post-Hearing Brief, ¶¶ 322-344.
[383] Respondent's Post-Hearing Brief, ¶ 324 *referring to* TCC's letter to the Tribunal dated 2 November 2016, pages 2 and 5.

that various elements of the story do not add up, including why the NAB would need evidence of Mr. Farooq's participation in the broader kickback scheme to use as leverage to implicate Mr. Iqbal when it already had evidence of his corruption and why Mr. Farooq would accuse Mr. Iqbal rather than Mr. Arndt directly, leading to Mr. Farooq's so-called "*spontaneous,*" fabricated memory as to Mr. Arndt's role in the corruption.[384]

427. Secondly, Respondent refers to an abundance of evidence which it argues strongly suggests that Mr. Arndt was involved at the time of the relevant bribes including the following:

428. Respondent maintains that Mr. Arndt had both the motive and the means to be involved. After his formal retrenchment from BHP in August 1999, he was allegedly promised a lead role in the project following farm-out to Mincor (with Mr. Skrzeczynski confirming that no Addendum/certification - no farm out - no job) and, as confirmed by Mr. Williams, he was in possession of "*well over two years' pay*" and thus a "*substantial amount of money*" with which to fund the bribes.[385]

429. Respondent further alleges that e-mails, progress reports on the project received and distributed by Mr. Arndt and the evidence of Mr. Hargreaves indicates that he remained the 'go to' source of information about the project for his former colleagues notwithstanding his official retrenchment.[386] Respondent submits that Mr. Arndt seemingly remained closer to events on the ground than Mr. Hargreaves who professed to be "*overseeing BHP Minerals as Country Manager for BHP in Pakistan*" from 1997.[387]

430. Respondent submits that the suggestion that he was replaced with Mr. Skrzeczynski and Mr. Schloderer is contradicted by witnesses confirming that after his retrenchment in August 1999, Mr. Arndt continued his work as no one else had the requisite "*experience of contract negotiation and dealing with government officials*" as he did to get the Addendum over the line.[388] Respondent emphasizes that Mr. Skrzeczynski admitted that he was not actually involved in Addendum negotiations and that between August 1999 and the signing of the Addendum and related documents, Mr. Schloderer was not actually located in Pakistan, but in Peru.[389]

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[384] Respondent's Post-Hearing Brief, ¶¶ 324-325.
[385] Respondent's Post-Hearing Brief, ¶¶ 327-328 *referring to* Ex. RE-518, E-mail from Saad Husain to Chris Arndt, subject: Update at p. 2, Transcript (Day 8), p. 2123 lines 17-18, Transcript (Day 9), p. 2210 lines 6-9 and p. 2219 line 2.
[386] Respondent's Post-Hearing Brief, ¶¶ 329-330.
[387] Respondent's Post-Hearing Brief, ¶ 329 *referring to* Hargreaves I, ¶ 13.
[388] Respondent's Post-Hearing Brief, ¶¶ 331-333 *referring to* Transcript (Day 2), p. 333 lines 3-8 *and* p. 407 lines 14-18.
[389] Respondent's Post-Hearing Brief, ¶ 332 *referring to* Transcript (Day 8), p. 2129 lines 8-9, p. 2126 lines 4-5 and 19-22, p. 2133 lines 20-21, p. 2138 lines 8-13 *and* Transcript (Day 9), p. 2313 line 22 to p. 2314 line 2.

431. Finally, Respondent submits that Claimant's evidence of Mr. Arndt's non-involvement including his CV and the absence of his name in certain project minutes and correspondence, is unreliable.[390] Additionally, in relation to the e-mail exchange between Mr. Iqbal and Mr. Arndt from mid-May 2000 which seems to demonstrate Mr. Arndt's absence from the project, Respondent submits that it actually shows the complete opposite; he was being updated on the project from other sources and was seeking a permanent job back in Pakistan.[391] Maintaining that TCC possessed Mr. Arndt's personal e-mails as these were linked to TCC's Outlook due to his continuing involvement, Respondent also claims that TCC's witnesses are not credible given their limited knowledge of Mr. Arndt's whereabouts and limited role in negotiations.[392] Moreover, Respondent is unconvinced by Claimant's explanation of why it does not have more complete copies of some e-mail chains (particularly those of relevance to Mr. Arndt's role) since it perceives responding to personal e-mails in a new e-mail chain and deleting original e-mail messages in a reply e-mail not to be common practice.[393]

(d) TCC is Responsible for BHP's Past Conduct

432. Respondent dismisses the argument that "*under no circumstances could TCC be faulted for any wrongdoing by BHP,*" suggesting that TCC would avoid liability in respect of the "*pre-2006 wrongdoing.*"[394] Respondent considers it uncontested that the bribes paid in relation to the Addendum (and the 75% certification and Deed, as discussed below) are attributable to BHP and notes that Claimant did not contest that this conduct was attributable to TCC until its Rejoinder.[395]

433. Firstly, Respondent maintains that BHP's conduct is attributable to TCC given the continuity of personnel responsible for the corruption, many of whom transferred from BHP to TCC, and the corruption itself, which often involved the same agents (including Mr. Iqbal, Mr. Arndt, Mr. Schloderer and Mr. Lakhani).[396] Respondent maintains that Mr. Farooq remained the central figurehead of corruption on the GOB/BDA side for 14-15 years in relation to the 2006 Novation Agreements.[397] Respondent further submits that prior to the novation in 2006, Col. Khan and Mr. Dad (who would go on to be implicated

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[390] Respondent's Post-Hearing Brief, ¶¶ 334-341.
[391] Respondent's Post-Hearing Brief, ¶¶ 338-340 *referring to* **Exhibit CE-737**.
[392] Respondent's Post-Hearing Brief, ¶¶ 339-341 *referring to* Transcript (Day 8), p. 2108 line 21 to p. 2109 line 1, Hargreaves II, ¶ 15, Moore, ¶ 55 *and* Transcript (Day 9), p. 2236 lines 6-9.
[393] Respondent's Post-Hearing Brief, ¶ 340 *referring to* Pakistan's letter to the Tribunal dated 22 November 2016, p. 2 *and* TCC's letter to the Tribunal dated 28 November 2016, p. 1.
[394] Respondent's Post-Hearing Brief, ¶¶ 345-346 *referring to* Claimant's Rejoinder, ¶ 143 *and* Transcript (Day 1), p. 204 lines 1-3 and lines 17-19 and p. 203 lines 21-22.
[395] Respondent's Post-Hearing Brief, ¶ 346.
[396] Respondent's Post-Hearing Brief, ¶ 353.
[397] Respondent's Reply, ¶ 245.

in TCC's corruption case) came to be employed by TCC and there was also crossover between Mincor and TCC (Mr. Moore for example transferred in his position as Managing Director in 2000).[398]

434. Secondly, Respondent submits that TCC had direct knowledge of the fraudulent certification of the 75% interest (discussed below), since Mincor/TCC assumed responsibility for exploration work which BHP would already have had to be performed by January 2000 for the interest to be earnt under CHEJVA.[399]

435. Thirdly, Respondent notes that the commercial relationship between BHP and TCC pursuant to the Option and Alliance Agreements was such that they operated as a joint venture; the farm-out did not mean that BHP exited the project completely, but remained party to the CHEJVA for the next six years responsible for BHP as its partner in the project.[400] Respondent maintains that both parties expected to profit from the project; TCC by eventually becoming party to the CHEJVA and BHP by exercising its clawback right vis-à-vis TCC if a significant discovery was made.[401]

436. Respondent dismisses Claimant's reliance on *Yukos* and *Saluka* given that they did not involve the claimant's legal predecessor's corrupt conduct or the claimant's knowledge of such corruption.[402] Respondent also argues that Claimant entirely misses the point by distinguishing the *World Duty Free* case, ignoring the finding that an individual's continued involvement, knowledge and conduct in relation to two organizations created a common link justifying attribution of his knowledge of corruption and his corrupt conduct to both of them. Thus, given the continuity of personnel addressed above, and applying this reasoning, Respondent argues that the aforementioned individuals' knowledge and conduct must be treated as knowledge and conduct of both BHP and TCC.[403]

(e) Lack of Diligence Is Legally Significant

437. Even if the Tribunal did not impute the conduct of BHP to TCC, Respondent asserts that TCC's failure to conduct due diligence in a high-risk environment is enough to make it responsible for that misconduct and prevent it from raising Treaty claims.[404]

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[398] Respondent's Reply, ¶¶ 243-244.
[399] Respondent's Post-Hearing Brief, ¶ 347(a).
[400] Respondent's Post-Hearing Brief, ¶ 347(b), 355.
[401] Respondent's Post-Hearing Brief, ¶ 355 *referring to* Transcript (Day 9), p. 2199 lines 10-15 *and* Transcript (Day 8), p. 2175 lines 13-15.
[402] Respondent's Post-Hearing Brief, ¶ 352 *citing to Yukos Universal Limited (Isle of Man) v. the Russian Federation*, PCA Case Nos. 227, Final Award, 18 July 2014 [**CA 178 / Exhibit SS**-18] *and Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 [**CA 44 / RLA-106**].
[403] Respondent's Post-Hearing Brief, ¶¶ 350-354; Respondent's Reply, ¶ 452.
[404] Respondent's Post-Hearing Brief, ¶ 347(c), 371-383.

438. Respondent submits that there is no evidence that TCC carried out proper due diligence in accordance with Pakistani and anti-corruption law and alleges that it entered into the Alliance and Novation Agreements without requiring BHP to make any representations regarding the absence of corruption in the project. Respondent submits that the significance of corruption in Pakistan, the mining industry generally, as well as the involvement of corrupt individuals like Mr. Farooq, strongly suggests TCC's knowledge and acquiescence in corruption.[405]

439. Respondent cites *Anderson v Costa Rica* ("*an important element of such due diligence is for investors to assure themselves that their investments comply with the law"*) and *MTD v. Chile* where the host state was not held responsible for the consequences of unwise business decisions or lack of diligence of an investor.[406]

440. Respondent argues that the *Churchill Mining* case (where the tribunal denied treaty protection to claimants because various mining licences were fraudulent) is particularly relevant for two main reasons.[407] Firstly, the tribunal's reasoning centered on: (i) the seriousness of the fraud; and (ii) "*the claimants' lack of diligence overseeing the licencing process and investigating allegations of forgery.*"[408] Respondent draws similarities in that just as "*the claimants were aware of the risks involved in investing in coal mining industry in Indonesia,*" Claimant here was aware of the same in Pakistan.[409] Secondly, just as claimants failed to exercise due diligence when "*indications of forgery first came to light,*" Pakistan alleges that TCC "*deliberately closed its eyes to evidence of serious misconduct,*" something which its witnesses accepted at the Hearing.[410] Respondent considers these 'red flags' also relevant in relation to: (i) whether BHP had earnt its 75% interest; (ii) the Law Department's review of the Novation Agreements; (iii) Mr. Farooq's role in securing the airstrip lease despite his known corrupt reputation; (iv) Mr. James' hands-off approach with the Surface Rights Lease; and (v) the lack of investigation of suspect aspects of the lavish 'educational' trips.[411]

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[405] Respondent's Reply, ¶ 457.
[406] Respondent's Reply, ¶ 454 *citing to Alasdair Ross Anderson et al v Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010 [**RLA-132**], ¶ 58 *and MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 [**RLA-131**], ¶ 167.
[407] Respondent's Post-Hearing Brief, ¶ 377.
[408] Respondent's Post-Hearing Brief, ¶ 379 *citing to Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016 [**RLA-334**], ¶ 509.
[409] Respondent's Post-Hearing Brief, ¶ 379 *citing to Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016 [**RLA-334**], ¶ 517.
[410] Respondent's Post-Hearing Brief, ¶ 377, 379, 381 *citing to David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014 [**RLA-299**], ¶ 163 *and Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016 [**RLA-334**], ¶ 524.
[411] Respondent's Post-Hearing Brief, ¶ 382 *referring to* Transcript (Day 9), p. 2250 line 19 to p. 2251 line 1, p. 2360 lines 12-15 and p. 2426 lines 4-5, James II, ¶ 14, Hargreaves I, ¶ 63 *and* Hargreaves II, ¶ 59.

441. In summary, Respondent alleges that Claimant failed to act as a reasonably prudent investor would be expected to; that is to diligently ascertain and protect the soundness of its investment. As a result, the consequence should be the dismissal of its claims as a matter of jurisdiction, admissibility or on the merits.[412]

ii. Summary of Claimant's Position

442. Claimant argues that Respondent's allegations fail to meet the burden of proof.[413] The aspects of Respondent's narrative which are subject to objective verification are alleged to be false but even if they were creditable, Claimant maintains that they are ill-conceived given the robust Government process that attended the Addendum negotiations; corruption could thus not have been the 'but-for' cause of its consummation.[414] Additionally, Claimant notes that neither of the two individuals fundamental to such allegations, Mr. Burq and Governor Mengal who allegedly received bribes, were produced as witnesses to this arbitration.[415]

443. Claimant also argues that these allegations make no sense as the Addendum was executed in the interests of all parties at the time.[416] More specifically, Claimant identifies two apparently "*fatal flaws*" in Respondent's argument: (i) the Government officials whom Pakistan allegedly corruptly influenced did not have decision-making power to influence the process; and (ii) documentary evidence clearly shows that the Addendum was correctly vetted.[417]

(a) The Lack of Decision-making Power Possessed by Those Allegedly Bribed

444. Claimant suggests that even if BHP had bribed BDA officers, that could not have procured the Addendum since through Article 173 of Pakistan's Constitution and the Balochistan Development Authority Act, the BDA was the GOB's agent.[418] Claimant explains that the GOB retained decision-making authority with respect to the CHEJVA and foundational agreements; therefore, the alleged bribes would not be sufficient to demonstrate that they procured the foundational documents themselves.[419]

445. Claimant refers to the chronology of the GOB's review process, as evidenced by the documentary record, in order to demonstrate that while Mr. Burq was indeed the

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[412] Respondent's Post-Hearing Brief, ¶ 383.
[413] Claimant's Opposition, ¶ 122.
[414] Claimant's Opposition, ¶¶ 122-131.
[415] Claimant's Post-Hearing Brief, ¶ 73.
[416] Claimant's Opposition, ¶¶ 121-122.
[417] Claimant's Rejoinder, ¶ 361.
[418] Claimant's Opposition, ¶ 103.
[419] Claimant's Opposition, ¶ 104.

individual who affixed his signature to the Addendum, he did so on the Governor's specific directions.[420]

446. Claimant also rejects the allegations advanced in Respondent's Reply.[421] Firstly, Claimant submits that Mr. Farooq's suggestion that he engineered the Law Department's vetting of the Addendum by personally convincing the Secretary of Law to approve the draft Addendum by paying "*a small amount*" to Mr. Juma, the Section Officer of the Law Department who subsequently processed the matter, is inherently suspect.[422] Given the specificity with which Mr. Farooq had testified about numerous payments over the years, Claimant alleges that it is inconceivable that he would have forgotten such a fundamental payment until the Reply stage of proceedings.[423] Secondly, Claimant rejects the argument that BHP's corruption extended to a level of seniority higher than Mr. Burq through Mr. Arndt of BHP and Mr. Lakhani of Mincor both paying a bribe to Governor Mengal in December 1999, in exchange for authorizing BDA to sign the Agreement, noting that both individuals were not employed by BHP at the time.[424]

(b) Role of Mr. Arndt

447. Claimant asserts that Mr. Arndt's employment at BHP ceased in August 1999 and he did not join TCC until late 2003. It argues that Mr. Arndt has been used by Respondent as a convenient scapegoat to fill key evidentiary gaps in its case – Claimant maintains that the "*tale of Mr. Arndt*" has been entirely "*tailor-made for Pakistan's immediate purpose.*"[425] Claimant maintains that it is therefore impossible that he made promises to Mr. Farooq in November 1999, arranged a bribe for Governor Mengal in December 1999 or approved the bribe to Mr. Burq in February 2000 as alleged.[426]

448. Claimant maintains that, on recognizing that the nonexistent bribes would not appear on BHP nor TCC's books, Mr. Iqbal conveniently invented the tale of "*Secret Agent Arndt,*" responsible for the key foundational bribes – knowing that he could not deny the accusations as he was no longer alive.[427]

449. Claimant argues that, not only is there indisputable documentary and witness evidence to demonstrate that this did not happen, but this fiction became glaringly false during the

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[420] Claimant's Rejoinder, ¶ 361; Claimant's Opposition, ¶ 135 *referring to* **Exhibits RE-58(VI)(an)** *and* **CE-2**, p. 9.
[421] Claimant's Rejoinder, ¶ 362.
[422] Claimant's Rejoinder, ¶¶ 362-363 *referring to* Farooq II, ¶ 21(h).
[423] Claimant's Rejoinder, ¶¶ 362-363.
[424] Claimant's Rejoinder, ¶¶ 362, 364 *referring to* Farooq II, ¶ 21(g).
[425] Claimant's Post-Hearing Brief, ¶¶ 54-65; Claimant's Rejoinder, ¶ 26.
[426] Claimant's Rejoinder, ¶ 364.
[427] Claimant's Rejoinder, ¶ 299; Claimant's Post-Hearing Brief, ¶ 54 *referring to* Transcript (Day 2), p. 408 lines 1-3.

Hearing at which Mr. Iqbal and Mr. Farooq struggled to explain the nature of Mr. Arndt's continued working relationship with the company that had just laid him off.[428]

450. Additionally, Claimant submits that the records of official meetings and correspondence both serve to substantiate the fact that Mr. Schloderer replaced Mr. Arndt as the project's Chief Executive in August 1999 – he was the individual running negotiations, not Mr. Arndt.[429] Claimant argues that documentary and witness evidence (including Mr. Arndt's CV) both serve to demonstrate that after he left BHP in August 1999, he went on to work for a series of companies on different projects, casting doubt on Mr. Iqbal and Mr. Farooq's "*incredible*" testimonies.[430]

451. Additionally, Claimant maintains that nothing in the aforementioned e-mail exchange gives any indication that Mr. Arndt was secretly travelling around the country delivering bribes for his former employer, but instead depict a geologist in Western Australia, e-mailing friends to search for work.[431] According to Claimant, these private e-mails came into TCC's possession as Mr. Arndt "*uploaded those e-mails to the TCCA system sometime after he joined TCCA in November 2003.*"[432]

452. Claimant submits that the fiction can be discredited by looking at the objective circumstances; why would a cash-squeezed BHP going to pay bribes to exit a project it was willing to walk away from?[433] Claimant disputes that Mr. Arndt had the motive and the means to make the payments; in its view, this argument does not solve any of the problems with the incredibility of Respondent's claims, but also ignores the fact that even if he did use his own money to further his own interests, this would not be attributable to BHP or TCC.[434] Moreover, Claimant relies on witness testimony from Mr. Schloderer and Mr. Skrzeczynski to demonstrate that the alleged promised job for Mr. Arndt simply did not exist and was in fact contrary to Mr. Arndt's own employment expectations and prospects.[435]

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[428] Claimant's Rejoinder, ¶ 27, 298; Claimant's Post-Hearing Brief, ¶ 56 *referring to* Transcript (Day 2),p. 388 lines 2-5 and Transcript (Day 3), p. 772 lines 2-4.
[429] Claimant's Post-Hearing Brief, ¶ 56 *referring to* Transcript (Day 2), p. 444 line 18 to p. 445 line 1 *and* p. 382 lines 9-19.
[430] Claimant's Post-Hearing Brief, ¶ 57 *referring to* **Exhibit CE-510**, p. 1, Skrzeczynski, ¶ 19, Moore, ¶ 55, Hargreaves II, ¶ 15 *and* Respondent's Letter to the Tribunal dated 26 October 2016, ¶ 13.
[431] Claimant's Post-Hearing Brief, ¶¶ 58-61.
[432] TCC's letter to the Tribunal dated 2 November 2016, p. 6.
[433] Claimant's Rejoinder, ¶ 28.
[434] Claimant's Post-Hearing Brief, ¶ 62.
[435] Claimant's Post-Hearing Brief, ¶ 63 *referring to* **Exhibit CE-858**, p. 1, Transcript (Day 8), p. 2120 line 18 to p. 2121 line 1 and p. 2122 line 14 to p. 2123 line 10.

453. Ultimately, Claimant submits that the Tribunal can have no doubt that Mr. Arndt was not involved in the project at the relevant time and much less acting as some kind of secret agent delivering bribes for BHP to obtain the 2000 instruments.[436]

(c) Role of Mr. Lakhani

454. Claimant emphasizes that Mr. Moore and Mr. Hargreaves both testified that Mr. Lakhani did not become involved with TCC until late 2000 and even then only as a seed investor.[437] Mr. Moore went so far as to say that it was "*utterly incredible*" that Mr. Lakhani had any prior association with the project, since when the pair met in April/May 2001, Mr. Lakhani mentioned no such prior involvement.[438]

455. Claimant maintains that this employment discrepancy, coupled with the fact that no one at BHP nor Mincor had access to funds as much as the alleged USD 5 million which Mr. Lakhani purportedly told Mr. Farooq he had paid out in bribes on the project (allegedly a sudden and convenient recollection made in Mr. Farooq's second witness statement), makes it implausible that either individual would have paid out this much money by December 1999.[439]

(d) Documentary Record

456. Claimant maintains that there is documentary evidence to corroborate the two year-long negotiation of the Addendum, during which time five drafts were considered, various meetings were convened involving at least twenty high ranking government officials, multiple correspondences were exchanged by the GOB and independent corporate counsel's legal advice sought, all in connection with the approval process.[440]

457. Claimant described the negotiation process as: (i) "*thorough*", evidenced by the GOB obtaining legal advice from independent legal counsel; and (ii) "*transparent and appropriate*," referring to the Chief Minister's praise of the GOB's development of a special committee to ensure finalization of the document.[441] Claimant explains that Respondent's own witness, Mr. Tahir even acknowledged that the approval process was subject to normal bureaucratic deliberation.[442]

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[436] Claimant's Post-Hearing Brief, ¶¶ 54-65.
[437] Claimant's Post-Hearing Brief, ¶ 70 *referring to* Moore, ¶¶ 52-53 *and* Hargreaves II, ¶ 14, 19.
[438] Claimant's Post-Hearing Brief, ¶ 72.
[439] Claimant's Post-Hearing Brief, ¶¶ 69-74, 93 *referring to Respondent's* Reply, ¶ 133(e), 180 *and* Farooq II, ¶ 21(g); Claimant's Rejoinder, ¶ 364 *referring to* Skrzeczynski, ¶ 21 *and* Hargreaves, ¶ 19.
[440] Claimant's Opposition, ¶¶ 124-126.
[441] Claimant's Opposition, ¶¶ 124-125 *referring to* **Exhibits RE-58(VI)(an)**, p. 8 *and* **RE-58(VI)(aj),** pp. 160-164.
[442] Claimant's Post-Hearing Brief, ¶ 76 *referring to* Respondent's Reply, ¶ 135 *and* Transcript (Day 2), p. 340 lines 17-22.

458. Claimant particularly draws the Tribunal's attention to the alleged payment from Mr. Arndt and Mr. Iqbal of PAK Rs. 2,000,000 to Mr. Burq in February or March 2000. In doing so, Claimant firstly refers to the Tribunal's Draft Decision where it rejected the argument that there were *"several oddities relating to the authorization of the Governor of Balochistan permitting the Chairman of the BDA to sign on his behalf."*[443] Ultimately however, Claimant relies on the documentary record (which demonstrates that two BDA Chairmen preceding Mr. Burq openly supported the Addendum) to show that that execution consummated a long-standing institutional imperative and to reject Respondent's allegation that there was any need for this alleged corrupt payment in order to prevent him being an obstacle in the approval process.[444]

459. Claimant also refutes the alleged bypassing of both the Law Department and the Finance Department on the basis of the following documentary (and/or witness) evidence.

(i) Law Department

460. Claimant submits that the documentary record shows that: (i) on 28 December 1999, the BDA Chairman specifically requested that the Addendum be vetted by the Law Department which was returned "*duly vetted*" three days later; and (ii) this Department was actively engaged in the approval process during the course of the two-year negotiation.[445]

461. Claimant submits that there are inconsistencies in Respondent's witness statements in relation to the alleged payment made by Mr. Farooq to Mr. Tahir to prevent him pointing out that Law Department approval had not been obtained.[446] In Mr. Farooq's first witness statement and indeed in Mr. Tahir's statement, it was stated that this payment was made from the money Mr. Farooq received in January 2000 from BHP, however this made little sense since Law Department approval was in fact obtained on 31 December 1999.[447] Claimant maintains that unsurprisingly, Mr. Farooq had to change his testimony to suit these dates and subsequently testified that he actually paid Mr. Tahir in November 1999 out of his own pocket before he received payment from BHP.[448]

(ii) Finance Department

462. Claimant dismisses Mr. Tahir's insinuation that "[a] *number of further concerns*" raised by the Finance Department were ignored, relying on further documentary evidence to

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[443] Claimant's Opposition, ¶ 127 *referring to* Respondent's Application, ¶ 37 *and* Draft Decision, ¶ 682.
[444] Claimant's Opposition, ¶ 127 *referring to* **Exhibit RE-58(VI)(an)**, pp. 10, 14, 54.
[445] Claimant's Opposition, ¶ 129 *referring to* **Exhibits RE-58(VI)(an)**, p. 55 *and* **RE-56**, p. 2.
[446] Claimant's Post-Hearing Brief, ¶ 81.
[447] Claimant's Post-Hearing Brief, ¶ 81 *referring to* Farooq I, ¶ 8, Farooq II, ¶ 21(i) *and* Tahir I, ¶ 7.
[448] Claimant's Post-Hearing Brief, ¶ 81 *referring to* Farooq I, ¶ 8 *and* Farooq II, ¶ 21(i).

show that by at least February 1998, the Finance Department was actively engaged in the process and remained so throughout.[449] Claimant specifically maintains that various letters were exchanged between the Finance Department, the BDA and BHP between September and December 1999 addressing particular concerns the Finance Department had, including clarification that these concerns had indeed "*already been discussed in detail at various meetings with the high officials of GOB/BDA.*"[450]

463. Claimant questions why Mr. Iqbal would have recommended that the Government retain an independent financial consultant to review the Finance Department's objections if he was attempting to circumvent due process through a bribery scheme.[451] Similarly, Claimant draws the Tribunal's attention to Mr. Iqbal citation of the Balochistan Rules of Business in an attempt to claim that the Governor's approval was not valid without sign-off from all relevant departments.[452] However, when confronted with the exact text on cross-examination, he then admitted his neglect to mention a number of rules which stipulate situations in which approval is not required, therefore demonstrating the purported "*lengths that* [he] *would go to concoct testimony*".[453]

464. Moreover, Claimant submits that the fact that these departments raised concerns about the Addendum does not suggest that it was somehow improper due to deficiencies in the approval process. Claimant talks of the irony of Mr. Iqbal's testimony stating that these concerns indicate a deficiency in the process since he himself actually perceived such concerns to be meritless at the time.[454]

(e) The Alleged 'Re-write' of the Commercial Terms

465. Claimant maintains that even if the Addendum were one-sided (something which is disputed), this would not be enough to establish that corruption took place.[455] To constitute circumstantial evidence of corruption, Claimant maintains that the contract would have to be patently without any benefit to Balochistan.[456] Claimant submits that in any event, the underlying premise that the contract was one-sided was blatantly false if one considers the long negotiating history and plainly reads the Addendum. In Claimant's

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[449] Claimant's Opposition, ¶ 131.
[450] Claimant's Opposition, ¶ 131 *referring to* **Exhibit RE-58(VI)(an)**, p. 5, ¶ 3, 22 (letter dated 23 September 1999), 26, 28-30, 41-42 (reflecting September 1999 meeting involving the Finance Department), 50.
[451] Claimant's Post-Hearing Brief, ¶ 79 *referring to* Transcript (Day 2), p. 357 lines 18-22.
[452] Claimant's Post-Hearing Brief, ¶ 80 *referring to* Iqbal, ¶ 22.
[453] Claimant's Post-Hearing Brief, ¶ 80 *referring to* Transcript (Day 2), p. 359 line 8 to p. 363 line 12 and p. 363 line 13 to p. 364 line 10 *and* **Exhibit RE-20**, rule 8(2), at 10 and Rule 46, at 23.
[454] Claimant's Post-Hearing Brief, ¶ 78 *referring to* Transcript (Day 2), p. 351 lines 9-13.
[455] Claimant's Post-Hearing Brief, ¶ 83.
[456] Claimant's Post-Hearing Brief, ¶ 84.

view, it is clear that the entire commercial deal of the CHEJVA was not transformed as a result of the 2000 Addendum.[457]

466. Additionally, Claimant submits that Respondent fails to mention how several of the provisions introduced through the Addendum actually amended the CHEJVA in Balochistan's favor.[458]

467. Firstly, Claimant argues that through its Article 5, the Addendum clearly preserves the Operating Committee's ability to resolve and commission a Feasibility Study.[459] Claimant disputes that the parties originally intended this to be a condition in the manner suggested by Respondent, which was then was replaced with the requirement to obtain ten Prospecting Licences. Claimant argues that Respondent has ignored the negotiating history as explained by Mr. Pierce – this change was made because at the time, BHP was planning to trade in some of its current prospecting licences in exchange for new ones to the west.[460] He further explained that the amendment, which simply takes a concept from the CHEJVA and makes it a separate sentence, was intended merely to permit BHP to determine in the areas of which ten Prospecting Licences it would be required to complete Stage One and Stage Two activities.[461]

468. Secondly, Claimant maintains that the Addendum does not affect BHP's obligation to bear the costs of all exploration activities. Claimant submits that on a plain reading, it simply reinforces the original bargain, clarifying the extent to which Balochistan was in fact not obliged to pay for such activities over "*any part of the…Exploration Area which is not the subject of a Mining Venture.*"[462]

469. Thirdly, Claimant dismisses Respondent's allegation that the Addendum set the stage for Balochistan to get "*squeeze*[d] *out*" of profitable expansion projects by requiring it to fund its own portion of the capital cost of Mine Development after the first mine.[463] Claimant submits that this ignores a fundamental limit on BHP's financing commitment contained in the CHEJVA, namely that the commitment only extended until Minerals were produced – there was no perpetual agreement to fund Balochistan's interest contrary to Respondent's suggestions.[464]

470. Fourthly, Claimant relies on Mr. Pierce's testimony to explain that, far from increasing Balochistan's indebtedness as alleged, the introduction of external project financing was

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[457] Claimant's Rejoinder, ¶ 368; Claimant's Post-Hearing Brief, ¶ 85.
[458] Claimant's Rejoinder, ¶ 379; Claimant's Post-Hearing Brief, ¶ 86.
[459] Claimant's Rejoinder, ¶¶ 369-370 *referring to* **Exhibit CE-2**, Article 5.
[460] Claimant's Rejoinder, ¶¶ 369-371 *referring to* Pierce, ¶¶ 106-107.
[461] Claimant's Rejoinder, ¶ 370 *referring to* Pierce, ¶ 89, 106.
[462] Claimant's Rejoinder, ¶¶ 372-373 *referring to* **Exhibit CE-2**, Article 8.1 *and* Pierce, ¶¶ 51-52.
[463] Claimant's Post-Hearing Brief, ¶ 88 *referring to* Respondent's Reply, ¶¶ 150-163.
[464] Claimant's Post-Hearing Brief, ¶ 88 *referring to* **Exhibits CE-1**, Clause 12.4 *and* **CE-2**, new Clause 12.4.2.

simply intended to increase the available finance sources for the parties.[465] The only difference was that Balochistan would not be liable to BHP, but instead to a third party.[466] Claimant maintains that this does not change the fact that Balochistan was always obliged to repay its share of the costs.[467] Respondent's emphasis on BHP's "*best endeavours*" obligation is also alleged to be misguided since Claimant maintains that this had the potential to actually reduce Balochistan's indebtedness should the best terms be more favorable than those attached to the equity portion for which it was obliged to contribute.[468]

471. Lastly, in respect of the allegation that the Addendum threatened GOB's "*guaranteed cashflow of 50% gross revenues*," Claimant relies on Mr. Pierce's evidence to argue that this ignores the fact that Balochistan rejected a proposed 100% allocation outright and therefore this amendment actually reflected a compromise struck by the parties for the benefit of both sides.[469] Firstly, Claimant submits that it deferred the agreement of a specific percentage until after the decision to proceed with mine development meaning that Balochistan would have more concrete expectations of the future mine's profitability and prevailing copper prices, and secondly, the eight year repayment period aligned the arrangement with the standard among international financing guidelines for private sector projects.[470]

(f) TCC Is Not Responsible for BHP's Past Conduct

472. Claimant argues that there is no legal basis on which any acts of corruption committed by BHP employees can be attributed to Claimant given that BHP and TCC are distinct entities.[471] Both *Yukos* and *Saluka* are cited in support of Claimant's contention that an investor cannot be faulted for the wrongdoing of its predecessors, where the tribunals rejected arguments that the claimants should be faulted for illegalities of what were described as distinct entities/separate persons.[472]

473. Claimant submits that Respondent's arguments to the contrary are based on a misreading of the authorities – none of which establishes a rule which would make TCC responsible

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[465] Claimant's Post-Hearing Brief, ¶ 90; Claimant's Rejoinder, ¶ 374 *referring to* Pierce, ¶ 69.
[466] Claimant's Post-Hearing Brief, ¶ 90 *referring to* **Exhibits CE-1**, Clauses 12.4-12.5 *and* **CE-2**, new Clause 12.4.2.
[467] Claimant's Rejoinder, ¶ 374 *referring to* **Exhibit CE-1**, Clause 12.4.
[468] Claimant's Rejoinder, ¶ 374 *referring to* **Exhibit CE-2**, Article 9.
[469] Claimant's Rejoinder, ¶ 375 *referring to* Pierce, ¶¶ 64-66.
[470] Claimant's Rejoinder, ¶ 376 *referring to* Pierce, ¶¶ 66-69 *and* **Exhibit CE-507**, p. 1.
[471] Claimant's Rejoinder, ¶¶ 142-147; Claimant's Post-Hearing Brief, ¶ 39 *referring to* Transcript (Day 1), p. 203 line 19 to p. 205 line 3.
[472] Claimant's Rejoinder, ¶ 143; Claimant's Post-Hearing Brief, ¶ 40 *citing to Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 [**CA 178**] *and Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 [**CA 44 / RLA-106**].

for the actions of its predecessor.[473] Claimant distinguishes the *World Duty Free* case given that the facts were entirely different and TCC is clearly not the alter ego of BHP here, whereas in that award Mr. Ali was held to be the "*alter ego of both companies.*"[474]

474. Secondly, Claimant alleges that Respondent advances no explanation or authority to support its contention that a failure to conduct appropriate due diligence can result in attributing BHP's liability to Claimant.[475] Claimant submits that Respondent has not established that there is any legal obligation, under the Treaty or international law, to conduct due diligence.[476] In addition, Claimant distinguishes *MTD* based on the fact that lack of diligence was considered when assessing quantum and therefore was a straightforward application of contributory fault, not a new theory of attribution.[477] Claimant also distinguishes the *Anderson* and the *Churchill Mining* cases since what mattered there was not mere prior misconduct by third parties, but rather that the very source of Claimants' rights was illegal and fraudulent.[478] Moreover, Claimant argues that *Churchill Mining* cannot be compared since TCC not only had a strong anti-corruption culture, but Respondent has not proven any corruption, let alone foundational corruption which affected the "*entire project*" as was the case in *Churchill Mining*.[479] In its Post-Hearing Brief, Claimant also draws the Tribunal's attention to *Minnotte v Poland* in which the tribunal explained that it was not an investigative body and only had limited responsibility and powers to adjudicate the claims of an investor protected by the treaty.[480]

475. Claimant therefore argues that there is no support for Respondent's claim that TCC must forfeit its valid Treaty claims because of BHP's alleged past wrongdoing.

iii. Tribunal's Analysis

476. At the outset of its analysis of Respondent's allegations of corruption in the context of the 2000 Addendum, the Tribunal notes that there is common ground between the Parties that, as of 1998, BHP intended to farm out at least part of its interest in the Reko Diq project to a third party.[481] Mr. Pierce explained that "[a]*s a result of the concept study* [whose results did not meet BHP's financial criteria] *Reko Diq dropped from a high to a*

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[473] Claimant's Post-Hearing Brief, ¶ 41.
[474] Claimant's Rejoinder, ¶ 144 *citing to World Duty Free v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 [**RLA-36**] ¶ 168.
[475] Claimant's Rejoinder, ¶ 145.
[476] Claimant's Rejoinder, ¶ 145.
[477] Claimant's Post-Hearing Brief, ¶ 41(b).
[478] Claimant's Post-Hearing Brief, ¶¶ 41-42.
[479] Claimant's Post-Hearing Brief, ¶ 43.
[480] Claimant's Post-Hearing Brief, ¶¶ 44-45 *citing to* Minnotte Award [**RLA-299**] ¶ 155.
[481] *Cf.* Williams II, ¶ 9.

low priority in the budget cycle for 1999 (from mid-1998 to mid-1999). BHP had made the decision to spend only the minimum necessary to meet obligations within the joint venture agreement while looking for a partner …"[482]

477. While BHP initially negotiated with a large Australian mining company, Iscor Australia Pty. Ltd. ("**Iscor**"), in 1998, these negotiations did not lead to a successful close because, as explained by Mr. Moore, who led the negotiations on behalf of Iscor at the time, BHP could not fulfill the conditions precedent agreed on in an initial memorandum of understanding "*in a reasonable time frame*" and, thus, eventually "*withdrew from the deal*."[483] After Mr. Moore had created Mincor Resources NL ("**Mincor**") as a junior exploration company in 1999, with Iscor remaining the largest shareholder holding 40%, he again contacted BHP in order to revive the negotiations relating to the Reko Diq project. He added: "*It was clear to me that BHP, despite looking for a partner for at least two years, had been unable to find another partner interested in the project*."[484] This was confirmed by Mr. Skrzeczynski, who explained that "[t]*his was a speculative and risky exploration project, and Mincor faced no serious competition at the time to win it*."[485]

478. It is further common ground that the Option Agreement entered into by BHP and Mincor in April 2000 contained the following conditions precedent:

> "*5.1.1 BHP and the BDA have executed a binding and unconditional Addendum to the CHJV, which provides for:*
>
> *a) clarification of BHP's joint venture partner as the GOB acting through its agent the BDA;*
>
> *b) clarification of BHP's financing commitment to the BDA for construction capital and establishment of a repayment schedule, which is satisfactory to each of Mincor and BHP and which commitment will be accepted by Mincor;*
>
> *c] confirmation that BHP earned its 75% interest in the joint venture on completion of Stage 2 and selection of 10 PLs.*
>
> *5.1.2 The GOB and BDA have signed a written acceptance of the Parties' proposals as outlined in this Option Agreement.*
>
> *5.1.3 The GOB and BDA have executed a Deed of Waiver in terms of which they waive any pre-emptive rights which may affect the transfer of interests between BHP and Mincor as required by the Alliance Agreement.*

[482] Pierce, ¶ 23.
[483] Moore, ¶ 12.
[484] Moore, ¶¶ 7, 13.
[485] Skrzeczynski, ¶ 20.

> *5.1.4 BHP has received all regulatory, governmental or other approvals, notices or consents required or desirable to allow BHP to grant the rights to Mincor granted under the Alliance Agreement and for the Parties to fulfil their obligations contemplated under that Agreement.*"[486]

479. In its Draft Decision, the Tribunal found that Mincor's insistence on the conclusion of an addendum to the CHEJVA as a condition for becoming involved in the Reko Diq project does not constitute evidence that Claimant was aware of any illegal conduct in the context of concluding the CHEJVA but considered it as a reaction to the uncertainties that had surfaced in 1999 as to whether the GOB had validly become a party to the CHEJVA pursuant to the applicable internal laws of the GOB in 1993.[487] The Tribunal also found that while the 2000 Addendum was again signed by the Chairman of the BDA (as was the CHEJVA), this time the Governor of Balochistan had explicitly "*authorize*[d] *Chairman, Balochistan Development Authority to sign Addendum No. 1 to the* [CHEJVA] *… on behalf of the Government of Balochistan.*"[488]

480. It is now undisputed that an addendum to the CHEJVA was under negotiation between BHP and the GOB since 1998 and that, while several communications were exchanged with various departments of the GOB until early 2000, in fact, no further changes were made to the draft presented by BHP in July 1998 until it was signed by BHP and the Chairman of the BDA in March 2000.[489]

481. Respondent claims that the following bribes were paid "*to secure the Addendum*":[490]

i. PAK Rs. 40,000 by Mr. Farooq to Mr. Tahir in November 1999 "*to prevent Mr Tahir from being a hurdle in the Addendum process*," specifically to prevent him from informing the Planning & Development Department of outstanding vettings by the Law and Finance Departments;

ii. PAK Rs. 20,000 by Mr. Farooq to Mr. Ali Juma, Section Officer at the Law Department, in December 1999 "*to ensure quick vetting of the Addendum*" by the Law Department despite the objections that it had previously raised in August 1999 and maintained in October 1999;

iii. PAK Rs. 2,000,000 by Mr. Iqbal – out of funds provided by Mr. Arndt – to the new Chairman of the BDA, Mr. Burq in February/March 2000 "*to sign the*

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[486] **Exhibit CE-12**, Article 5.1.
[487] Draft Decision, ¶ 683, *maintained in* Decision on Jurisdiction and Liability, ¶ 686.
[488] Draft Decision, ¶ 741 *referring to* **Exhibit RE-58(an)**, p. 53, *maintained in* Decision on Jurisdiction and Liability, ¶ 744.
[489] *Compare* **Exhibit CE-504** *to* **Exhibit CE-02**. *See also* Pierce, ¶ 46 *and* Skrzeczynski, ¶ 14.
[490] Respondent's Post-Hearing Brief, ¶¶ 43-47; Respondent's Reply, ¶ 133.

Addendum without requiring further approvals" from the Law and Finance Departments, which, according to Respondent, were still outstanding at the time;

iv. PAK Rs. 500,000 by Mr. Burq to Mr. Farooq – out of the amount paid to Mr. Burq – in February/March 2000 "*to reward Mr Farooq for ensuring execution of the Addendum*" and pushing it through without following the proper procedures;

v. "*periodic payments to Mr Farooq*" to ensure, together with the payment of PAK Rs. 500,000, that Mr. Farooq "*did TCC's bidding, including by taking steps to ensure the execution of Addendum*";

vi. An unknown amount by Mr. Lakhani / Mr. Arndt to Governor Mengal in December 1999 "*to sign the letter authorizing the Chairman of the BDA to sign the Addendum on behalf of the GOB.*"

482. Even though the final two allegations, which Respondent has raised in its Reply, are not included in its Post-Hearing Brief, it is not entirely clear whether Respondent has abandoned these. Therefore, the Tribunal will also address these allegations in the following reasoning.

483. In support of its allegations, Respondent has presented witness testimony from Mr. Farooq, Mr. Iqbal and Mr. Tahir, which will be addressed in further detail below.

484. According to Respondent, the alleged bribes achieved the following results: (i) "*fundamentally rewriting key terms of the CHEJVA in BHP's favour through the Addendum*"; and (ii) "*obtaining execution of the Addendum despite failing to follow due process.*"[491] As for the first alleged result, Respondent primarily invokes a "*radical*" change of the financing arragenments that had been agreed under the CHEJVA. In addition, it argues that the amendment to clause 3.2 of the CHEJVA resulted in a "*substantive change in favour of BHP*" regarding the requirements for earning its 75% interest in the CHEJVA." By contrast, Respondent describes the amendments introduced by the Addendum to the GOB's benefit as "*insignificant*."[492]

485. As for the second alleged result, Respondent claims that the following "*anomalies in the documentary record*" corroborate the witness evidence of the alleged bribes: (i) "*a number of bribes were paid by or on behalf of BHP to ensure both buy-in by key decision-makers and swift passage through the Balochistan bureaucracy*"; (ii) the objections raised by the Law Department in 1999 were not acted upon and its vetting obtained within three days in December 1999 was "*irregular and fuelled by corruption*"; and (iii) the

[491] Respondent's Post-Hearing Brief, ¶ 48.
[492] Respondent's Post-Hearing Brief, ¶¶ 49-62. *See also* Respondent's Reply, ¶¶ 136-166.

objections raised by the Finance Department in 1999 and again in 2000 were ignored and it was effectively "*side-lined*" because its final comments were never sought.[493]

486. The Tribunal notes that the allegations of illegitimate payments set out above have been categorically rejected by Claimant and those of its witnesses that were involved in project at the time when the 2000 Addendum was negotiated and/or executed, specifically by Mr. Pierce, Mr. Skrzeczynski, Mr. Williams, Mr. Moore and Mr. Hargreaves (albeit the latter admitted during the hearing that he was not directly involved at the time). In order to evaluate the direct evidence of corruption presented by Respondent, *i.e.*, the witness testimony from Mr. Farooq, Mr. Iqbal and Mr. Tahir, the Tribunal will assess all circumstances of the case based on the contemporaneous documents in the record and also take into account the oral testimony of the witnesses from both sides, who were confronted with the opposing allegations and testimony of the other side during the hearing.

487. In that regard, the Tribunal will also analyze what Respondent has described as the "*results*" of the alleged bribes, *i.e.*, whether the 2000 Addendum indeed introduced significant changes into the CHEJVA that were largely to the benefit of BHP and/or to the detriment of the GOB and whether the manner in which the objections raised by the Law and Finance Departments were dealt with amounts to a failure to follow due process. Claimant denies both aspects of Respondent's arguments.

(a) The Changes to the CHEJVA Introduced by the 2000 Addendum

488. First, the Tribunal has reviewed the terms of the CHEJVA and those of the 2000 Addendum, in particular in the context of the financing arrangements for exploration and mining activities. In this regard, the Tribunal agrees with Respondent that in particular Article 9 of the Addendum by which Clauses 12.4, 12.5 and 12.6 of the CHEJVA were replaced, included significant changes to the financing terms agreed under the CHEJVA. First, the new Clause 12.4.1 (second sentence) by which the GOB's initial option under the CHEJVA "*not to contribute to the costs of such development* [activities and operations within a Mining Area] … *until such time as Minerals are produced from the Mining Area*" was limited under the Addendum to "*the Equity Portion of the capital costs of the first Mine Development in the Exploration Area*."[494]

489. Second, the new Clause 12.4.2 introduced the concept of project financing into the CHEJVA, providing that BHP was to "*use its best endeavours to arrange*" such project financing for the first Mine Development and, more importantly, that "[e]*ach*

[493] Respondent's Post-Hearing Brief, ¶ 64; Respondent's Reply, ¶¶ 169-187.
[494] *Compare* **Exhibit CE-1**, Clause 12.4 (second sentence) *to* **Exhibit CE-2**, Article 9 (new Clause 12.4.1 (second sentence)).

Participating Party shall be liable for the interest on, and repayment of, such financing from its portion of gross revenues, in proportion to its Participating Interest." In addition, each Participating Party was to "*provide on a several basis in proportion to their respective Participating Interests any completion guarantees required by lenders with respect to such project financing*."[495] As the option for the GOB not to contribute to the development costs until the mine became operational related only to the equity portion, it could not opt out of carrying upfront the costs for the debt portion (including for the provision of completion guarantees) on terms that were to be arranged by BHP "*in consultation with the GOB.*"

490. A third significant change concerned the terms on which the GOB was to repay its debt to BHP in case it elected not to contribute to development costs upfront (to the extent this was still permitted under the new Clause 12.4.1). Initially, Clause 12.5 of the CHEJVA provided that repayment was to be made "*by means of fully allocating fifty percent (50%) of the BDA's entitlement to gross revenues derived from the Mining Venture*."[496] By contrast, the new Clause 12.5.2(b) provided that the percentage of gross revenues to be allocated to repayment was to be determined "*within 15 days after the date when the GOB elects not to contribute to the Equity Portion of the capital cost of the first Mine Development*" either by mutual agreement between BHP and the GOB or, failing such agreement, pursuant to the dispute resolution mechanism provided in the CHEJVA, and at "*a percentage which ensures that the Equity Debt is repaid within 8 years after commencement of commercial production from the Joint Venture Area*."[497] While Claimant argues that this provision reflected a compromise because the GOB did not accept BHP's initial request that 100% of the gross revenues be allocated to repayment and adds that the percentage could also be fixed at below 50%,[498] the Tribunal is not convinced by these arguments. Claimant itself has emphasized the need for a change of the initial provision by noting that on the model used by BHP in 1998, even the allocation of 100% of gross revenues to repayment would result in a repayment period of over 24 years.[499] Therefore, an allocation of less than 100% - and certainly of less than the initially foreseen 50% - would have been possible only if the estimated grade of ore which BHP had identified and on which it had based its model would significantly improve.

491. The Tribunal is aware that Claimant also makes reference to certain obligations of the GOB under the CHJEVA to provide services at its own expense, which were eliminated

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[495] **Exhibit CE-2**, Article 9 (new Clause 12.4.2).
[496] **Exhibit CE-1**, Clause 12.5.
[497] **Exhibit CE-2**, Article 9 (new Clause 12.5.2(b)).
[498] *Cf*. Claimant's Rejoinder, ¶¶ 375-376.
[499] Claimant's Rejoinder, ¶ 375 *referring to* **Exhibit CE-636**. *See also* Pierce, ¶ 70.

under the Addendum. However, Mr. Pierce confirmed during the hearing these "*were certainly minor when you compare them in context with the financing arrangements.*"[500]

492. Apart from the financing terms, Respondent also makes reference to Article 2.4 of the Addendum by which the parties to the Addendum agreed, most importantly, to "*accept the work performed by GOB, BDA or BHPM up until the date of this agreement as valid performance under the Agreement.*"[501] The Tribunal agrees that while on its face this provision applied equally to both joint venture partners, BHP as the party performing the majority of the work under the CHEJVA was naturally the main benefitting party in that context.

493. Respondent further claims that Article 5 of the Addendum, by which Clause 3.2 providing for the requirements for BHP to earn its 75% interest under the CHEJVA was amended, eliminated the requirement to complete a feasibility study – if resolved by the Operating Committee that one be completed.[502] Respondent also emphasizes that this change was introduced two months after the six-year deadline for completing the requirements of Clause 3.2 had already expired, and argues that there was "*absolute no reason*" for the GOB to allow BHP to benefit from this restrospective change to the CHEJVA rather than to enter into a new deal with Mincor.[503]

494. The Tribunal is aware that Claimant disputes that it was ever intended under the CHEJVA that BHP was to complete a feasibility study before earning its 75% interest.[504] In the Tribunal's view, it is not necessary to reach a definite conclusion on this issue. In any event, as confirmed by Mr. Pierce during the hearing, the new wording, which created a separate sentence for the feasibility study, made it clear that it was not (or no longer) a requirement for earning BHP's 75% interest.[505] Consequently, any ambiguity that may have existed before was now eliminated, which was to the benefit of BHP.

495. Finally, Respondent also invokes a change made to Clause 9.3 of the CHEJVA and claims that the scope of activities to which the GOB was obliged to contribute was thereby increased.[506] Clause 9.3 originally provided that the BDA was not obliged to contribute "*to any Joint Venture Expenditure required in association with the Exploration Programme*" but, upon completion of this Programme, would have to contribute "*to all*

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[500] Transcript (Day 8), p. 2000 lines 17-18 *referring to* **Exhibit CE-1**, Clauses 5.7.2, 7.2(c) *and* 7.2(f). *See also* Claimant's Rejoinder, ¶ 379.
[501] **Exhibit CE-2**, Article 2.4.
[502] *Compare* **Exhibit CE-1**, Clause 3.2 *to* **Exhibit CE-2**, Article 5.
[503] Respondent's Reply, ¶ 143.
[504] *Cf.* Claimant's Rejoinder, ¶ 370; Pierce, ¶ 105.
[505] Transcript (Day 2), p. 2011 lines 2-22.
[506] Respondent's Reply, ¶¶ 144-147.

further Joint Venture Expenditure" in proportion to its 25% interest.[507] Article 8.1 of the Addendum replaced this provision and provided that the GOB was not be obliged to contribute "*to any costs of exploration, pre-feasibility studies or feasibility studies over any part of the area comprised in the Exploration Area which is not the subject of a Mining Venture established in accordance with Clause 11.7*," but, upon establishment of such Mining Venture, would have to contribute "*to all further Joint Venture Expenditure in respect of any Mining Area*" in proportion to its 25% interest.[508]

496. While Respondent claims that through this change, the GOB became obliged to contribute to all exploration costs in any area which was subject of a "*Mining Venture*," including the costs for the most detailed exploration works such as a Feasibility Study, Claimant argues that, to the contrary, the new provision "*reinforce*[d] *the original bargain*" by clarifying that the GOB was not obliged to contribute to any exploration costs where BHP had conducted such activities but decided not to establish a Mining Venture.[509] This understanding was also confirmed by Mr. Pierce.[510]

497. In the Tribunal's view, the major difference between the two provisions relates to the event as of which the BDA or GOB would be required to contribute "*to all further Joint Venture Expenditure*." Under the CHEJVA, the triggering event was the completion of the Exploration Programme, *i.e.*, the completion of Stage One through Stage Four activities as set out in Schedule A. Under the 2000 Addendum, the relevant event was the establishment of a Mining Venture but the obligation to contribute was then limited to the Mining Area covered by that specific Mining Venture. The Tribunal notes that pursuant to the procedure set out in Article 11 of the CHEJVA, a Mining Venture was to be established only after a Feasibility Study, *i.e.*, the final Stage Four activities of the Exploration Programme, had been completed and delivered to the Joint Venture partners and both sides had elected to participate in the development of the mineral deposit as a Mining Area.[511]

498. While Respondent argues that Clause 11.4.1 of the CHEJVA, which allowed BHP to proceed on its own if the GOB decided not to participate, put BHP in control whether a mining development would proceed, it does not claim that this right was introduced through the 2000 Addendum but rather describes the reference made to that right in Article 7 as a "*clarification*" and a "*reminder to the GoB.*"[512] In addition, the Tribunal understands that if BHP decided to pursue mining development without the participation of the GOB, there would not have been a Mining Venture in respect of that specific

[507] **Exhibit CE-1**, Clause 9.3.
[508] **Exhibit CE-2**, Article 8.1.
[509] Claimant's Rejoinder, ¶¶ 372-373.
[510] Pierce, ¶¶ 52-53.
[511] *Cf.* **Exhibit CE-1**, Clauses 11.3.1, 11.3.2 and 11.7.
[512] Respondent's Reply, ¶ 147.

deposit(s) and thus no obligation to contribute would have arisen on the part of the GOB under the new Article 8.1 of the 2000 Addendum. In any event, the Tribunal is not convinced by Respondent's argument that under Article 8.1, the GOB could have been obliged to contribute to the substantial costs of a Feasibility Study, given that a Mining Venture was to be established only upon completion of that Study for the specific Mining Area and the obligation to contribute was limited to further expenditures within that Mining Area.

499. In conclusion, the Tribunal agrees with Respondent that the Addendum introduced several changes into the CHEJVA that were favorable to BHP and some of them, in particular those relating to the financing terms, were unfavorable to the GOB. The Tribunal also recognizes that the change or clarification to Clause 3.2 was made retroactively, *i.e.*, after the six-year period had expired. However, this does not yet mean that the Addendum was necessarily procured by corruption. To the contrary, it appears to the Tribunal that there may have been entirely legitimate considerations on the basis of which the GOB agreed to the amended terms, bearing in mind that these were one of the conditions precedent agreed between BHP and Mincor.

500. Respondent argues that it was not in the interest of the GOB that Mincor, which it described as "*a mining minnow and novice compared to BHP*," would be introduced into the project with the ultimate view to replace BHP as a party to the CHEJVA.[513] However, the Tribunal recalls that BHP had decided already in 1998 that the project did not meet its internal financial criteria and therefore no longer allocated significant funds to the project. It is undisputed that BHP was under no contractual obligation to develop the project but could have abandoned the project if it was not possible to farm out its interest to a third party.[514] Mincor, on the other hand, was eager to develop the project and Respondent also does not dispute that it was the only seriously interested party at the time. In the words of Mr. Skrzeczynski:

> "*We made clear to the GOB that BHP was not going to continue doing more work at Reko Diq, and if work was to continue another party would have to do it. Those deposits did not meet BHP's hurdle rates at the time. We were not aware of any other companies who were interested in doing the work necessary to take the project further at the time. Mincor was the only option for the project to continue, which is what the GOB wanted at the time. So it made sense that the GOB would, for entirely legitimate reasons, want to support the Mincor farmout by signing conventional documents that any investor would expect to get before investing*."[515]

[513] Respondent's Reply, ¶ 233.
[514] *Cf.* Skrzeczynski, ¶ 18; Williams, ¶ 10.
[515] Skrzeczynski, ¶ 22.

501. In addition, Mr. Moore, the founder of Mincor, explained the reasons why he considered Mincor to be "*a better partner for the GOB than BHP was at that time*" as follows:

> "*Mincor also had excellent credentials. As the CEO of Mincor, I had a background in geology and nearly 20 years of experience with mining projects around the world at Shell/Billiton and Iscor. I also had direct hands-on experience in porphyry copper systems, and the importance of this to the people who managed BHP's Reko Diq project, who were primarily geologists, should not be under-stated. Mincor offered a small startup's flexibility and willingness to take risks, strong technical credentials, known and trusted individuals who already had a good knowledge of the Reko Diq Project, and the added heft of a major mining company as controlling shareholder. For all of these reasons, Mincor was also a better partner for the GOB than BHP was at that time.*"[516]

502. Consequently, it may well be that in the interest of taking the project forward, the GOB was ready to accept the changes introduced by the Addendum without being incentivized by illegitimate payments. In addition, the Tribunal notes that what it has determined above is that the financing terms under the Addendum included significant changes compared to those under the CHEJVA. However, this does not entail a finding that those changes were not reasonable and aimed at reflecting industry practice and thus making the project bankable – in particular, taking into account that the only interested party was a junior mining company that would be not be able to raise sufficient equity to finance the entire project on its own.

503. For example, Mr. Pierce explained that the eight-year repayment period for the GOB's debt to its joint venture partner remains, to his knowledge, international financing standard.[517] He further testified that when first studying the CHEJVA, he was "*struck by the generous terms of the CHEJVA in favor of the GOB,*" specifically by the "*25% free carried interest through the initial exploration program*" which he considered "*significantly higher than the industrial norm.*"[518] Consequently, BHP stated as early as in a letter dated 30 September 1996 to the BDA that one of the items to be addressed in an addendum to the CHEJVA would be to "[b]*ring the financing clause up to date by putting a more realistic interest rate to reflect what it would cost BHP to provide a loan to BDA, and to have it repaid out of BDA's share of revenues.*"[519]

504. In conclusion, the Tribunal is therefore not convinced that the GOB's acceptance of the terms of the Addendum can be explained only by inferring the making of an illegitimate payment.

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[516] Moore, ¶ 61.
[517] Pierce, ¶¶ 67, 69.
[518] Pierce, ¶ 41.
[519] **Exhibit CE-495**, p. 2.

(b) The Process Leading Up to the Execution of the 2000 Addendum

505. Second, the Tribunal has reviewed the process leading up to the execution of the 2000 Addendum, which, according to Respondent, failed to follow due process. In this regard, Respondent refers in particular to: (i) the objections to the Addendum raised by the Law Department, which it "*abruptly and without explanation abandoned*" at the end of December 1999 even though its concerns had not been addressed;[520] and (ii) the objections raised by the Finance Department, which it maintained even after the Addendum had already been signed but which were "*ignored despite their importance for the Province of Balochistan*."[521]

(i) The Events Surrounding the Vetting by the Law Department

506. As to the objections raised by the Law Department, Respondent contends that these were at first raised verbally but "*purposefully omitted*" in a Summary for the Chief Minister dated 20 May 1999 that was prepared by the BDA. At the bottom of the Summary, the Chief Secretary requested that a committee be set up to reach final agreement with BHP, which would include, *inter alia*, the Secretary of Law.[522] As Respondent itself submits, the Secretary of Law participated in a meeting held on 18 June 1999 with various officials of the BDA to discuss the Addendum "*in detail*."[523]

507. It is undisputed that in its letter of 21 August 1999, the Law Department raised various objections to the draft addendum, which it maintained in a letter of 18 October 1999.[524] These objections were subject to discussions between BHP, the BDA and the GOB. In its letter dated 5 July 1999 (which was apparently rather written in September 1999), BHP addressed the objections raised by the Law Department and also attached an opinion which it had obtained specifically with regard to these objections from its external legal counsel, Kabraji & Talibuddin.[525] In return and after the Law Department stated that it still "*adhere*[d] *to its earlier advice*,"[526] the BDA sought an opinion on the objections and the opinion of BHP's counsel from its own external counsel, Shakil Law Firm, which was provided in November 1999.[527] Following a meeting that was apparently held, *inter alia*, between the Chief Executive of BHP and the Governor of Balochistan on 8 December 1999,[528] whose further participants and contents are in dispute between the Parties, on 24

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[520] Respondent's Reply, ¶ 182.
[521] Respondent's Reply, ¶ 185.
[522] Respondent's Reply, ¶ 170, *referring to* **Exhibit RE-58(VI)(an)**, pp. 5-8.
[523] Respondent's Reply, ¶ 171, *quoting from* **Exhibit RE-58(VI)(an)**, p. 10.
[524] **Exhibit RE-58(VI)(an)**, pp. 33-34, 36.
[525] **Exhibit RE-58(VI)(an)**, pp. 11-12, 15-17.
[526] **Exhibit RE-58(VI)(an)**, p. 36.
[527] **Exhibit RE-58(VI)(an)**, pp. 46-48.
[528] *Cf.* **Exhibit RE-58(VI)(an)**, p. 51.

December 1999, the Governor signed the letter by which the Chairman of the BDA was authorized to sign the Addendum.[529] In his letter of 28 December 1999 by which the Chairman re-submitted the Addendum for vetting to the Secretary of Law, he noted that the Governor had signed the authorization letter upon request from the Planning and Development Department and also referred to a meeting held between the Chief Executive of BHP and the Secretary of Law on 3 December 1999.[530] While Respondent considers the latter "*clearly an unusual step*,"[531] it does not raise any allegation of corruption with regard to this meeting. Three days later, on 31 December 1999, the Law Department returned the Addendum "*duly vetted*" to the BDA.[532]

508. Respondent claims that: (i) a payment in an unknown amount was made by either Mr. Lakhani or Mr. Arndt to the Governor during the meeting held in December 1999 so that he would sign the authorization letter; and (ii) a payment of PAK Rs. 20,000 was made by Mr. Farooq to Mr. Juma to sign the letter of 31 December 1999 despite the previously raised objections.

The Alleged Payment to the Governor of Balochistan

509. In support of the first allegation, Respondent relies on the testimony of Mr. Farooq, who stated in his second witness statement:

> "*Part way through the meeting, the Chairman and I were asked to leave. The meeting continued for another 15 or 20 minutes. After the meeting ended, on the way back to the BDA's offices, Mr Arndt told me that* 'this man knows how to do business' *and that the work will get done. Mr Lakhani followed me back to my office. When I was alone with Mr Lakhani, he told me in frustration that he had paid out so much money on this project so far, about US$ 5 million, and that he had had to pay more money to the Governor*."[533]

510. During the hearing, it became clear that Mr. Farooq's testimony was not that Mr. Lakhani had said that he *had already* paid any amount to the Governor but rather that he *would* have to pay "*more money to the Governor*" after having paid USD 5 million to a person or persons the identity of whom was not known to Mr. Farooq. He also clarified that he did not have any personal knowledge of any bribes being paid or offered to the Governor but only testified about a statement allegedly made by Mr. Lakhani and the impression he had from Mr. Arndt's alleged statement that "*this man knows how to do business*."[534] When specifically asked whether he personally accused the Governor of accepting a bribe to sign the Addendum, Mr. Farooq stated:

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[529] **Exhibit RE-58(VI)(an)**, pp. 52-53.
[530] **Exhibit RE-58(VI)(an)**, p. 54.
[531] Respondent's Reply, ¶ 182.
[532] **Exhibit RE-58(VI)(an)**, p. 55.
[533] Farooq II, ¶ 21 lit. g.
[534] Transcript (Day 3), p. 714 line 9 to p. 722 line 17.

> "*I am not saying that, that he has taken bribe. Mr. Lakhani … said that he had to give the money. And that's what I have said in my statement. …*
>
> *I'm not saying that. It is just Chris Arndt said to me after coming out of the meeting, saying that Governor is this and that. He knows how to do business. He can do this.*
>
> *And he gave us the impression, Chris Arndt, that the Governor takes the money as well. This is where we got the impression from, and we became aware that the Governor was also asking for the money.*"[535]

511. While the Tribunal considers it doubtful that this testimony, even if taken at face value, could be sufficient to establish an illegitimate payment made by BHP to the Governor of Balochistan, Claimant also denies that Mr. Lakhani and Mr. Arndt were even present during the relevant meeting with the Governor. As for Mr. Lakhani, Claimant submits that "*Mr. Lakhani was never associated with BHP and did not become associated with TCC until late 2000.*"[536] In this regard, Claimant relies on the witness testimony of Mr. Moore and Mr. Hargreaves, who both replied to Mr. Farooq's written testimony. Mr. Moore stated:

> "*Muslim* [Lakhani] *first became interested in the Project only in late 2000, after Tim Hargreaves introduced him as a possible seed investor. It was only in May 2001 that I invited him to join the company in an operational role and appointed him TCC's Representative in Pakistan. So it is simply impossible that Muslim paid $5 million – or any amount – in bribes in or before 1999, prior to his involvement in the Project*."[537]

512. Mr. Hargreaves testified in this regard:

> "*I know for a fact that Mr. Lakhani had no involvement until later. In November 2000, while I was working in Egypt, Geoff Allen, the ex-Australian High Commissioner to Pakistan who was assisting David Moore of Mincor first contacted me about the opportunity to invest in TCC and asked me about other potential investors who might be interested. In turn, I introduced the investment proposal to Mr. Lakhani and another investor both of whom were also working in Egypt at the time. To the best of my knowledge, Mr. Lakhani did not even know of Reko Diq before that contact and certainly had no role or financial interest in it. The investment commitments were made in December 2000 and shares issued in January 2001 when Mr. Lakhani became a TCC investor after which I introduced him to David Moore some time during the first half of 2001*."[538]

513. When asked during the hearing when he had first come across Mr. Lakhani, Mr. Moore confirmed that "*it must have been September, October, November, of 2000*." He further

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[535] Transcript (Day 3), p. 721 line 20 to p. 722 line 17.
[536] Claimant's Rejoinder, ¶ 300; Claimant's Post-Hearing Brief, ¶ 70.
[537] Moore, ¶ 52.
[538] Hargreaves II, ¶ 19.

confirmed Mr. Hargreaves' testimony by stating that "*I think it was Tim Hargreaves who put forward his name because I was looking for seed finance*."[539] In response to the question whether it was possible that Mr. Lakhani already had an interest and association with the project beforehand of which Mr. Moore was not aware, he answered:

> "*It seems utterly incredible to me because I met Muslim in May 2001, April or May. We sat and talked it through. We talked through the Project, what we were going to do, what our plans were. I asked him about his background, what his personal life was. At no stage during any of that time did he mention that he had ever had any involvement in the Reko Diq Project*."[540]

514. Mr. Hargreaves was not questioned during the hearing about his testimony regarding Mr. Lakhani. On that basis, the Tribunal considers that Respondent has failed to establish that Mr. Lakhani was involved in the Reko Diq project in December 1999 and, specifically, that he participated in the meeting with the Governor held on 8 December 1999 and that he made a statement to Mr. Farooq that he had paid bribes for the project and that he would have to pay more money to the Governor to sign the authorization letter for the Addendum.

515. As for Mr. Arndt, who is also implicated in Mr. Farooq's statement, the Tribunal is is satisfied that he was not involved in the project and not participating in meetings on behalf of BHP in December 1999. His alleged role will be addressed in further detail below. In any event, the Tribunal does not consider it established that any illegitimate payment was made to the Governor to authorize the signing of the Addendum.

The Alleged Payment of PAK Rs. 20,000 to Mr. Juma

516. In support of its second allegation, *i.e.*, a payment of PAK Rs. 20,000 made by Mr. Farooq to Mr. Juma at the Law Department, Respondent again relies on the witness testimony of Mr. Farooq, who stated in second witness statement:

> "*A few days after the Governor signed the authorisation letter, I met (on 28 December 1999) with the Secretary of Law to provide him with a note from the Chairman of the BDA that again requested Law Department vetting of the 2000 Addendum. I asked him to vet the agreement and, after some discussion of the Law Department's objections, he wrote the comment on the bottom of the note for his staff to* 'kindly do the needful'. *Over the next day or so I pursued the matter with the Section Officer, Ali Juma, who was reluctant to provide vetting in light of the observations previously raised, but who was in a difficult position given the comment of the Secretary of Law. I paid Mr Juma a small amount, around Rs. 20,000, in his office, which he was demanding to*

[539] Transcript (Day 9), p. 2289 lines 11-15.
[540] Transcript (day 9), p. 2295 lines 4-11.

> *process the matter quickly. Mr Juma confirmed the Law Department's vetting of the 2000 Addendum on 31 December 1999.*"[541]

517. The Tribunal notes that while Respondent alleges that "*the Secretary of Law stood by his existing objections*" when Mr. Farooq came to see him on 28 December 1999 and that "*he was convinced by whatever Mr. Farooq said to him, and presumably by what was said to him during his meeting with BHP's CEO a few weeks earlier, to instruct his staff to* 'kindly do the needful'," neither Respondent nor Mr. Farooq raise any specific allegation that a bribe was paid to the Secretary of Law himself. The allegation rather relates to Mr. Juma, who was instructed by his superior to vet the Addendum and, on Mr. Farooq's testimony, demanded payment in order "*to proceed the matter quickly.*" Even if established, this payment did thus not contribute to obtaining a right or benefit related to the investment, given that the Secretary of Law had already made the decision that the Addendum was to obtain the vetting by the Law Department.

518. Finally, the Tribunal further notes that neither Respondent nor Mr. Farooq state that the alleged payment was made on instruction or with knowledge of BHP. While Mr. Iqbal testifies that when he spoke with Mr. Farooq about the vetting, Mr. Farooq told him that "*the Law Department* 'just vetted it' *due to its efforts,*"[542] this would not establish that the payment itself occurred with knowledge of BHP – regardless of whether knowledge of Mr. Iqbal could be attributed to BHP.

519. In conclusion, the Tribunal is therefore not convinced by Respondent's allegation that the vetting obtained from the Law Department was "*irregular and fuelled by corruption.*"[543]

(ii) The Events Surrounding the (Lack of) Vetting by the Finance Department

520. As to the objections raised by the Finance Department, Respondent again contends that these were initially raised in a verbal manner but "*purposefully omitted*" in a Summary to the Chief Minister dated 20 May 1999.[544] Respondent further notes that, contrary to an instruction from the Chief Secretary on the same Summary, the Financial Secretary was not present during the meeting held on 18 June 1999 and claims that the Secretary was "*purposefully excluded*" by Mr. Farooq and the Development Department given the Finance Department's strong objections to the draft addendum.[545]

521. It is undisputed that in its letter of 12 October 1999, the Finance Department raised objections to the draft addendum.[546] It is further undisputed that the final approval of this

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[541] Farooq II, ¶ 21 lit. h.
[542] Iqbal, ¶ 21.
[543] *Cf.* Respondent's Post-Hearing Brief, ¶ 64.
[544] Respondent's Reply, ¶ 170, *referring to* **Exhibit RE-58(VI)(an),** pp. 5-8.
[545] Respondent's Reply, ¶ 171, *referring to* Farooq II, ¶ 21 lit. b.
[546] **Exhibit RE-58(VI)(an)**, p. 28.

Department to the Addendum was never obtained. The objections raised by the Finance Department related to: (i) the mode and rate of repayment of the finance debt and related interest payments from the gross revenues under the new clause 12.5.1, which the Finance Department considered unclear; and (ii) the fact that it was left open in the new clause 12.5.2(b) which percentage of the GOB's gross revenues would be allocated to repayment of equity debt and that the 8-year repayment period, which could mean that "*the GOB/BDA may have to allocate all of its gross revenue towards debt repayment thereby getting noting in monitory* [sic] *terms during initial 8 years of the commencement of the project*." The Finance Department therefore recommended "*to settle this issue in such a way that the restriction of 8 years is withdrawn.*"[547]

522. In its response letter of 11 November 1999, BHP explained, *inter alia*, that it was not possible at that point to specify the mode and rate of repayment of finance debt because that would be known only once the debt would actually be incurred. As to the main objection regarding the 8-year repayment period, BHP stated that this was required by international financing guidelines and emphasized that "*the tonnage and grade of current geological resource at Reko Diq is not commercially viable for going into mining phase*," which is why it had been agreed that the exact percentage would be left open until that stage was reached.[548]

523. It is apparent from the record that the explanations provided by BHP did not solve the issue for the Finance Department. Following its inquiry of 29 December 1999 as to the opinion of the BDA on BHP's views,[549] Mr. Habibullah Baloch of the BDA wrote to the Finance Department on 16 February 2000 that the arrangement objected to by the Finance Department "*has already* [been] *agreed with BHP*" and added that "*the addendum has been vetted by the Law Department and approved by the Government and the Chairman BDA has been authorized by the Government to sign the addendum on behalf of the Government.*"[550] Following a further inquiry from the Finance Department on 24 March 2000 in which it requested that "*a summary in this connection may please be moved to get final approval of the Hon'able Governor of Balochistan*,"[551] Mr. Baloch informed it on 14 April 2000 that "*the addendum has already been signed by BDA and sent to BHP after its vetting by Law Department and approval by the Hon'ble Governor Balochistan*."[552] Nevertheless, the Finance Department reiterated its objections to clauses 12.5.1 and 12.5.2(b) of the Addendum, in particular to the 8-year repayment period, in a

[547] **Exhibit RE-58(VI)(an)**, p. 28.
[548] **Exhibit RE-58(VI)(an)**, p. 30.
[549] **Exhibit RE-249**.
[550] **Exhibit RE-58(VI)(an)**, p. 56.
[551] **Exhibit RE-58(VI)(an)**, p. 58.
[552] **Exhibit RE-58(VI)(an)**, p. 59.

letter dated 9 May 2000 and added that "*the interest of the Government of Balochistan must be protected while deciding introduction of third party MINCOR in pursuance of Clause 14.3 of addendum to the Joint Venture Agreement*."[553] It is thus clear from the record that the Finance Department did not approve the financial terms provided in the Addendum.

524. As pointed out by Claimant, Rule 8(2) of the 1976 Business Rules provides:

> "*If the various Departments concerned cannot reach agreement and the Minister after consultation with other Ministers concerned desires to press the case, the case shall be submitted to the Chief Minister or, with the Chief Minister's approval, to the Cabinet*.
>
> *Provided that where the Chief Minister is the Minister-in-Charge of the department, the final views of the other departments shall be obtained before the case is submitted*."[554]

525. Rule 46 of the 1976 Business Rules further provides:

> "*On Finance Department's refusal to accord concurrence to any case, the department may submit such case to the Chief Minister for decision*."[555]

526. As martial law had been imposed in October 1999, there was no chief minister at the time and the responsible official was thus the Governor of Balochistan.[556] While it is in dispute between the Parties whether the provisions of the 1976 Business Rules were complied with in respect of the involvement of the Finance Department, the Tribunal considers that it does not need to reach a decision on this issue. Even if there was a violation of these internal laws on the part of the BDA, this does not establish that such violation must be the result of corruption.

527. In this context, Respondent raises the allegation that: (i) Mr. Tahir was paid PAK Rs. 40,000 by Mr. Farooq in November 1999 to prevent him from informing the Planning & Development Department that two major vettings by the Law and Finance Departments had not been obtained; and (ii) Mr. Burq was paid PAK Rs. 2,000,000 by Mr. Iqbal in February/March 2000 to sign the Addendum despite outstanding approvals from the Law and Finance Departments.[557] In addition, Respondent claims that Mr. Farooq was paid PAK Rs. 500,000 by Mr. Burq (out of the amount he had received from Mr. Iqbal) and received "*periodic payments*" from Mr. Iqbal.[558]

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[553] **Exhibit RE-58(an)**, p. 60.
[554] **Exhibit RE-20**, Rule 8(2).
[555] **Exhibit RE-20**, Rule 46.
[556] *Cf.* Transcript (Day 1), p. 253 lines 6-11; Respondent's Post-Hearing Brief, ¶ 69. *See also* Draft Decision, ¶ 742.
[557] Respondent's Post-Hearing Brief, ¶¶ 43 and 45.
[558] Respondent's Reply, ¶ 133 lit. b; Respondent's Post-Hearing Brief, ¶ 47.

The Alleged Payment of PAK Rs. 40,000 to Mr. Tahir

528. In support of its first allegation regarding the alleged payment to Mr. Tahir, Respondent relies on the witness testimony of both Mr. Tahir and Mr. Farooq. In this regard, Mr. Tahir stated in his first witness statement:

> "*Considerable pressure was put on the BDA by BHP to get the Addendum executed. The role of the BDA in this process had been to get the draft Addendum vetted by the Law and Finance Departments. Mr Muhammad Farooq was the driving force at the BDA behind the approval of the Addendum. Mr Farooq gave me PAK Rs. 40,000, which he said had come from BHP. He was also very anxious to get the Addendum signed. Following his payment to me of PAK Rs. 40,000, I assumed that Mr Farooq was being paid by BHP to get the Addendum signed*."[559]

529. In his second witness statement, Mr. Tahir added:

> "*Mr Farooq paid me this money in a meeting in his office at around the time that Mr Farooq wrote to the Additional Chief Secretary (Dev.) requesting early approval of the Addendum in November 1999. My salary in November 1999 was approximately PAK Rs. 14,000 to 15,000. If I had not been paid, I would have informed the GOB's Planning & Development Department that two major vettings (from the Law Department and the Finance Department) had not been properly obtained. This would have prevented or at least delayed signing of the Addendum in its current form.*"[560]

530. The Tribunal further notes that Mr. Tahir initially testified in his first witness statement that both the Law and Finance "*Departments never approved the Addendum*" and that after the Governor had given "*his approval to the BDA Chairman in December 1999,*" Mr. Farooq did not agree with him that the Addendum should still be sent to the Law Department for vetting.[561] In his second witness statement, however, Mr. Tahir changed his testimony and, referring to the three-day period between the request from the BDA on 28 December and the vetting by the Law Department on 31 December 1999, stated that in his experience, "*this is not how the Law Department works.*" He further stated that Mr. Farooq showed him the letter from the Law Department but did not explain to him how he had managed to achieve the vetting.[562]

531. Even if it were true that Mr. Tahir did not inform the Planning & Development Department of the two vettings that were still outstanding when it sent its summary to the Governor in early December 1999 requesting him to authorize the signing of the Addendum, Mr. Tahir himself testified that he did inform the Chairman of the BDA of

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[559] Tahir I, ¶ 7.
[560] Tahir II, ¶ 16.
[561] Tahir I, ¶ 6.
[562] Tahir II, ¶ 14.

the outstanding vettings (apparently notwithstanding the Law Department's letter of 31 December 1999) in early 2000:

> "*When Mr Ameer Ali Burq came into office on 1 January 2000 as the new Chairman of the BDA, I briefed him on the Addendum. I told him that observations of the Finance and Law Departments remained outstanding. After a few days, Mr Farooq called me to reprimand me for speaking directly with the Chairman of the BDA and to remind me that he has already paid me to keep my mouth shut. When Chairman Burq agreed to sign the Addendum in March 2000 and I was asked by Mr Farooq and by Chairman Burq to sign as a witness, I therefore complied. I had already explained the process and issues to the best of my understanding to Chairman Burq and he still instructed me to witness the Addendum.*"[563]

532. This was also confirmed by Mr. Farooq who stated that "*Mr Tahir briefed Mr Burq on the missing approvals, which angered me given Mr Tahir had been paid not to be an obstacle.*"[564] Consequently, the Tribunal is not convinced that even if it were established that a payment was made to Mr. Tahir in November 1999, such payment would have contributed to BHP's earning of a right or benefit related to its investment - given that Mr. Tahir nevertheless informed Mr. Burq of the (allegedly) outstanding vettings before the 2000 Addendum was signed.

533. In any event, such payment would have come from Mr. Farooq rather than from BHP and Mr. Tahir only "*assumed that Mr Farooq was being paid by BHP to get the Addendum signed*." As a result, such payment could not be attributed to BHP. This conclusion is confirmed by Mr. Farooq's testimony on this particular allegation. In his first witness statement, Mr. Farooq testified that after he had been paid by BHP "*for facilitating the arrangement*" with Mr. Burq in January 2000 (which will be addressed further below), he was told by Mr. Burq to get the Addendum signed as soon as possible. He added: "*In order to do so, I remember using some of the money given to me by BHP to pay Mr. Tahir though I do not recall the precise amount.*"[565] In his second witness statement, Mr. Farooq corrected himself as follows: "*I said in my first statement that I used money given to me by BHP to pay Mr Tahir. I now recall that I paid Mr Tahir out of my own pocket before I received payment of Rs. 500,000 from BHP. I needed to pay Mr Tahir up-front to get his cooperation.*"[566]

534. Apart from the change in timing of the alleged payment (which would have been decisive regarding the possible impact it could have had on obtaining the Governor's authorization

[563] Tahir II, ¶ 18.
[564] Farooq II, ¶ 21 lit. i.
[565] Farooq I, ¶ 8. *See also* Farooq I, ¶ 28.
[566] Farooq II, ¶ 21 lit. i (note 26).

in December 1999), Mr. Farooq himself stated that he paid Mr. Tahir out of his own pocket, which would not render any such payment attributable to BHP.

The Alleged Payment of PAK Rs. 2,000,000 to Mr. Burq

535. As noted above, Mr. Tahir informed the new Chairman of the BDA, Mr. Burq, in January 2000 that relevant approvals were still outstanding. Respondent submits that despite the authorization by the Governor, Mr. Burq was still concerned about the outstanding approvals and claims he was thus paid PAK Rs. 2,000,000 by Mr. Iqbal to sign the Addendum despite his concerns.[567] In support of this allegation, Respondent relies on the testimony of Mr. Iqbal and Mr. Farooq.

536. In his first witness statement, submitted by Respondent shortly after filing its Application, Mr. Farooq testified:

> "*In January 2000, Ameer Ali Burq took over as Chairman of the BDA. During the early days of his Chairmanship, on my advice to Mr Iqbal, BHP paid to Mr Burq Rs. 2 million to ensure the Addendum was signed. This payment was made by Mr Iqbal in the office of the Chairman of the BDA in my presence. I was paid Rs. 500,000 for facilitating the arrangement. Mr Burq told me to get the Addendum signed as per BHP's requirements as soon as possible*."[568]

537. Mr. Iqbal, whose witness statement was submitted by Respondent together with its Reply, described the alleged event as follows:

> "*In around February/March 2000, Mr Arndt and I had a meeting with Mr Burq (Chairman of the BDA) and Mr Farooq to discuss the Addendum. Mr Arndt was angry at Mr Burq because he was refusing to sign the Addendum without it being cleared by the relevant departments. Mr Farooq took Mr Arndt to his office where they had a private discussion. Mr Arndt and I then returned to Karachi. Two days later, Mr Arndt gave me a briefcase that he said I should give to Mr Burq. Mr Arndt made a joke and told me the briefcase contained the Addendum. I went to the office of Mr Farooq first and then, with Mr Farooq, I went to the office of Mr Burq. I passed the briefcase to Mr Farooq who gave it to Mr Burq. The Chairman opened the briefcase and I saw that it contained money. The Chairman and Mr Farooq discussed in front of me how much money was in the briefcase, which was said to be 2,000,000 Rupees. It appeared that there had been a previous discussion about this sum of money, as this was what they were expecting. Mr Burq then said not to*

[567] Respondent's Post-Hearing Brief, ¶ 46.
[568] Farooq I, ¶ 8.

> *worry, that he would sign the Addendum, which he did soon after this meeting.*"[569]

538. In his second witness statement, which was also submitted together with Respondent's Reply, Mr. Farooq testified:

> "*In a meeting that I attended in around February 2000 with Mr Arndt, Mr Iqbal and Mr Burq, Mr Burq said that he was not ready to sign the agreement as the process of approving the agreement had yet to be completed. After the meeting, Mr Arndt came to my office. He was furious with Mr Burq's position given the time, effort and money spent on the 2000 Addendum already. I told him not to worry and that he should give Mr Burq money. I negotiated the amount – Mr Burq first wanted AU$ 100,000 but we eventually agreed that he would be paid Rs. 2 million. A couple of days later, Mr Iqbal came to my office with a briefcase. I and Mr Iqbal went to the Chairman's office, where Mr Burq took and opened the briefcase and counted the number of bundles to satisfy himself that it was Rs. 2 million. He then instructed me to do what was needed to be done to get the 2000 Addendum signed. The 2000 Addendum was signed a few days later in my presence. I was given Rs. 500,000 by Mr Burq for my efforts.*"[570]

539. As pointed out by Claimant, Respondent and its witnesses mentioned for the first time in the Reply and accompanying (second) witness statements the role that the deceased Mr. Arndt allegedly played in the context of the alleged payments made to Mr. Burq in connection with the Addendum and the certification of BHP's 75% interest (which will be addressed further below). In its Rejoinder, Claimant further pointed out that Mr. Arndt had been employed by BHP only until August 1999 and was employed by TCC only in November 2003.[571] In the following, there was an intense debate between the Parties as to the role of Mr. Arndt, if any, in the final phase of negotiations on the Addendum in early 2000.[572]

540. The Tribunal is aware that, in its Post-Hearing Brief, Respondent described the involvement of Mr. Arndt as "*a collateral issue which cannot detract from the evidence of bribery*," arguing that "[e]*ven without mentioning Mr Arndt's role in these corruption events, Pakistan had direct evidence of Mr Iqbal (whose affiliation with BHP and authority to act on its behalf at that time is undisputed) paying the bribes, as well as from the negotiator, facilitator and one of the recipients of these bribes, Mr Farooq.*"[573] However, it has to be taken into account that, as from the submission of Respondent's Reply, Respondent and its witnesses have described Mr. Arndt as the person who

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[569] Iqbal, ¶ 23.
[570] Farooq II, ¶ lit. i.
[571] Claimant's Rejoinder, ¶ 364.
[572] Claimant explained that Mr. Arndt died in April 2013. Claimant's Rejoinder, ¶ 98.
[573] Respondent's Post-Hearing Brief, ¶¶ 342-343.

negotiated and provided the funds for the alleged bribery payment to Mr. Burq.[574] Mr. Farooq testified during the hearing that Mr. Arndt "*was the main person—the doer*" and that he "*used to decide this much money has to be given. He used to approve that, and Mr. Zafar used to do the delivery of money*."[575] In light of this particular emphasis on the role of Mr. Arndt, the Tribunal considers it decisive in the evaluation of the evidence, in particular in assessing the credibility of the testimony given by Mr. Iqbal and Mr. Farooq, whether Mr. Arndt's involvement has been established.

541. In his witness statement, Mr. Iqbal testified that when he joined BHP in September 1997, Mr. Arndt was the General Manager at the Reko Diq site. Mr. Iqbal further stated that in early 2000, he was told by Mr. Schloderer and Mr. Arndt that he could join Mincor, and in July 2000, he entered into an employment contract with TCC. With respect to Mr. Arndt, he testified:

> "*At that time, the key individuals dealing with the project were Mr Schloderer (BHP, who was seconded to TCC at around the time that I joined), Bob Skrezeczynski (Commercial Manager at BHP Australia), David Moore (Mincor/TCC) and Mr Arndt (BHP, who joined TCC at around the time that I joined). I reported to Mr Arndt, who was the General Manager, both before and after I joined TCC.*"[576]

542. During the hearing, Mr. Iqbal corrected his testimony that Mr. Arndt had joined TCC "*at around*" the same time he joined to "*after*" that time.[577] When asked to respond to Claimant's submission that Mr. Arndt had been retrenched in August 1999 and was therefore not involved in the Project until 2003, Mr. Iqbal testified:

> "*A. In fact, BHP retrenched all of its employees, including myself, in phases and some of the employees were retrenched in early 1999. I was retrenched in May 1999, and then I was asked to continue work without any formal contract, and I think a similar position is with Chris.*
>
> *Q. And so, what dealings did you have with him after you were retrenched and he was retrenched?*
>
> *A. There was minimum office work after the work was closed down, and my interaction with Chris mainly were for the approval of the Addendum and approval for the 75 percent interest and the--and for the Deed of Waiver – two or three big tasks. That was my main engagement with him on these matters.*
>
> *Q. And why was he involved in those matters?*

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[574] *Cf.* Respondent's Reply, ¶ 183.
[575] Transcript (Day 3), p. 771 lines 6-16.
[576] Iqbal, ¶ 7.
[577] Transcript (Day 2), p. 331 lines 13-16.

> *A. I think that there was no other senior person of BHP there, and I was a junior accountant, I only had just started my career, and Chris was the only person who has experience of contract negotiation and dealing with government officials, so that's why he remained there for these matters.*
>
> *Q. And when did he stop being involved?*
>
> *A. He stopped working with us for a period of time when Mincor took over this Project in July 2000.*"[578]

543. When Claimant pointed out that Mr. Arndt's name was not included in the minutes of a meeting held with the Chief Secretary in April 2000, which was instead attended on BHP's side by Mr. Skrzeczynski, Mr. Schloderer and Mr. Iqbal,[579] and suggested that this meant that Mr. Skrzeczynski and Mr. Schloderer had replaced Mr. Arndt in his role at negotiating the Addendum, Mr. Iqbal acknowledged that Mr. Arndt had not attended the meeting but denied that he had been replaced.[580] He stated:

> "*I think he was behind all those things because he was a person who had contact with the Government officials, and he was running this process. John Schloderer was a pure geologist and he had no connection and no expertise with dealing with the Government. Bob Skrzeczynski just visited Pakistan first time when I saw him bringing these letters. He didn't come back again in Pakistan.*
>
> *So, it was the only visit in my presence in Pakistan.*
>
> *So, these two people were--probably were not engaged in these type of working with Government of Balochistan, sir.*"[581]

544. Finally, when asked why he continued to engage in the alleged secret business with Mr. Arndt – having confirmed that Mr. Arndt had told him to keep the alleged bribes a secret[582] – even after Mr. Schloderer had replaced Mr. Arndt as Chief Executive, Mr. Iqbal responded:

> "*Because he was continuing to be in Pakistan around us. He used to sit in our office, and I don't know what arrangement he had with BHP, but the work was continued as it was before August of '99, so there was no change in it. And just on the paper for the corporate matters, the name of Chief Executive--was changed to John Schloderer, and, therefore, I was doing some other corporate--for the corporate purpose, John Schloderer was replaced as the Chief Executive in Pakistan. So, this was just on the paper. Otherwise, John Schloderer didn't have any participation in this type of work ever.*"[583]

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[578] Transcript (Day 2), p. 332 line 10 to p. 333 line 11.
[579] *See* **Exhibit RE-58(ap)**, p. 22.
[580] Transcript (Day 2), p. 402 lines 9-19.
[581] Transcript (Day 2), p. 403 lines 2-14.
[582] Transcript (Day 2), p. 407 lines 19-22.
[583] Transcript (Day 2), p. 409 line 12 to p. 410 line 1.

545. Mr. Farooq was also confronted with Claimant's submission that Mr. Arndt had left BHP and the project in August 1999. He responded:

> "*… He's been working with us in relation to the Addendum from the start, from '98. He was working with us for the approval of Addendum. He attended the meeting in August, June. In November, December he had a meeting with the Governor. He attended a meeting with the Additional Chief Secretary too.*
>
> *He has attended so many meetings with us. How can we say that he was not on their payroll --or that he had left. He had been attending the meetings with us. You can ignore it once or twice. You can't ignore 10 times that he has been with us. 10 times he's been dealing with us.*
>
> *He has attended the meetings. And if we say that he's not there--we can't say that. According to our knowledge, he was there. He was present. He was physically present.*"[584]

546. When asked whether the letter from Mr. Schloderer to Mr. Farooq of 6 October 1999, which was signed by Mr. Schloderer as "*Chief Executive,*" meant that he had replaced Mr. Arndt as CEO at the site, Mr. Farooq stated:

> "*This letter was not signed in Pakistan. It was sent from outside. And the work was closed at the site back then. Mr. Schloderer--Mr Chris, his duties used to change. Sometimes he was a site in-charge; sometimes he would become a geologist; sometimes he was in charge of the office. His duties used to change. He was not permanent on one specific aspect.*
>
> *This is the first time I've seen John Schloderer stated as Chief Executive.*
>
> *Q. Mr. Farooq, this letter is written to you, is it not?*
>
> *A. Correct.*
>
> *Q. So, you were dealing with Mr. Schloderer as Chief Executive, were you not?*
>
> *A. Correct.*
>
> *Q. So, does this refresh your recollection that Mr. Schloderer replaced Mr. Arndt as Chief Executive Officer when Mr. Arndt left BHP in August 1999?*
>
> *A. That's not correct. I cannot say this, whether Chris Arndt had left. Chris Arndt was present there, and all the dealings were through him--you are just spinning around the questions and asking me, that just because he wrote Chief Executive, he became the Chief Executive. The thing is that. Chris Arndt was working with us. What capacity he was working in, I don't remember but once I see the papers, I can tell you. His designation would change from time to time. In some ways--he, Arndt Chris was present there, and there is no suspicion about that. I'm hundred percent sure Christopher was present there, and I have explained it at length in the statement. That's why there was a*

[584] Transcript (Day 3), p. 773 line 10 to p. 774 line 2.

> *need--the Opposition Statement, of TCC--they were not trying to accept this, our answers to the question, then I thought--then why shouldn't I tell them about Addendum? About how the Addendum happened and how much work went into it, and how much Chris Arndt helped us. How we gave money. How it happened*."[585]

547. Claimant's witnesses also testified on the alleged involvement of Mr. Arndt in the alleged illegitimate payment to Mr. Burq in early 2000. Mr. Skrzeczynski stated in his witness statement:

> "*I knew Chris and he would not have done any such thing. Also, Chris had no access to that kind of cash, and it could not have just gone missing in our accounts. In any event, by August of 1999 Chris was no longer working on Reko Diq or with BHP Minerals at all. He had no involvement with Reko Diq while I was managing the project and obtaining all the necessary consents from the government and completing the deal with Mincor*."[586]

548. Mr. Skrzeczynski further stated with regard to the negotiations on the Addendum:

> "*We succeeded in getting the Addendum signed by entirely honest means. We had good reasons for the amendments to the CHEJVA, all of which had been extensively negotiated before I arrived. So our approach was simply to explain these reasons whenever questions were raised. It took patience, and we sometimes had to explain the same thing over and over again because the people we were dealing with had changed and were not always familiar with agreements of this kind. I traveled to Pakistan several times, and I, and other BHP employees, personally met with various GOB officials to address questions and explain the documents and the benefits of finalizing them. All this took a long time but that was similar to my experience in India, where I have also worked on deals and transactions.*"[587]

549. During the hearing, when pointed to a meeting held with the Chief Secretary on 11 April 2000 in which the Chief Secretary had asked various questions about the Addendum at a time when it had already been signed, and when asked whether he was concerned that Mr. Arndt and Mr. Iqbal may not have properly explained the Addendum during the negotiations in 1999, Mr. Skrzeczynski responded:

> "*A. I wasn't concerned. I didn't believe there was a problem. What I can tell you is I didn't negotiate changes to the Addendum. I was not there. I don't know that individuals in the BDA or the Government of Balochistan that they spoke to, who attended meetings. That was something I had no knowledge on. But when I would have gone there for this particular meeting, I would have been interested to try and clear up the situation so the matter could be finalized and we could proceed. That's the approach I would have taken.*

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[585] Transcript (Day 3), p. 780 line 7 to p. 781 line 22.
[586] Skrzeczynski, ¶ 19.
[587] Skrzeczynski, ¶ 15.

> *I'm not involved in those initial negotiations nor the terms. I just wanted the matter concluded and those two conditions precedent met. That was my job to get it done. So, what other people said, who they met, I have no knowledge.*
>
> *Q. Let's see what you said at Paragraph 15 of your Witness Statement about how you got this done.* [quoted above in paragraph 383]
>
> *But to be clear then, in fact, you never were involved in the negotiation of the Addendum or the explanation of the Addendum itself?*
>
> *A. Right."*[588]

550. Upon the suggestion that his oral testimony did not accord with his written statement, Mr. Skrzeczynski explained:

> "*Well, I find it difficult to see the nuance here. I said I don't know how many meetings I specifically had. I don't think it was many. I only went to Pakistan maybe three or four times. I needed to get the Addendum signed. I met with the officials. I explained their concerns. I can't--and I may have explained it in many different ways--that's what I'm getting a--until they were satisfied and they understood and we were on the same page. Joint Ventures are cooperative agreements. They are not adversarial agreements. So, we had to be--I had to make sure they were comfortable that we were doing something for our joint benefit. And that's why, when I say I had to go over it many times, I may have gone over it many times in different ways so that they could see that it was a win-win situation for both of us to get this done and signed. That's all I can say.*"[589]

551. Mr. Moore testified with regard to the role of Mr. Arndt:

> "*I obviously cannot provide any information about the time when Chris* [Arndt] *and Zafar* [Iqbal] *worked together at BHP, but from what I do know, Zafar's testimony is not accurate. Zafar claims that Chris joined TCC around the same time he did, which was in July 2000 as a carry-over from BHP in Karachi. But TCC did not hire Chris until over three years later, in November 2003, after TCC listed on the Australian Stock Exchange and had the resources to increase our personnel. Between August 1999 and November 2003, Chris was not involved in the Reko Diq Project. He would not, and certainly could not, have been meeting with government officials on TCC's behalf during that time period, much less ordering Zafar to deliver cash payments to government officials.*"[590]

552. During the hearing, Mr. Moore confirmed that he was not involved in the negotiation of the Addendum and had no firsthand knowledge of how it was procured.[591]

553. Further, Mr. Hargreaves stated in his second witness statement:

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[588] Transcript (Day 8), p. 2129 line 7 to p. 2130 line 17.
[589] Transcnript (Day 8), p. 2132 line 11 to p. 2133 line 5.
[590] Moore, ¶ 55.
[591] Transcript (Day 9), p. 2236 lines 1-9.

> "[N]*either Mr. Arndt nor Mr. Lakhani were involved with Reko Diq at the time the bribes were alleged to have been made.*
>
> *From August 1999 until late 2003 when he joined TCC, Mr. Arndt was not involved with BHP Minerals, and to the best of my knowledge was not working on Reko Diq in any capacity. I had worked at BHP Petroleum when Mr. Arndt was the Health Safety and Environment (*'HSE'*) Advisor for BHP Petroleum from December 1998 to August 1999. After August 1999, he continued to have some involvement, mostly from outside the country, with the Zamzama gas field discovery for BHP Petroleum as well as with its partner Premier-Shell on a nearby petroleum exploration license. From early 2002 to 2003, Mr. Arndt took up a demanding role with Clough Engineering developing the Sawan Gas Field in Sindh about 100 km away from Zamzama*."[592]

554. In addition, Mr. Hargreaves testified that he was "*shocked*" by the allegations regarding Mr. Arndt as they were "*completely out of character and so fundamentally inconsistent with what* [he] *knew of Mr. Arndt*."[593]

555. When asked about Mr. Iqbal and whether both he and Mr. Arndt were laid off or retrenched in the course of 1999, Mr. Hargreaves stated:

> "*Yes, they were, but they were seconded. Chris was seconded for a while to Petroleum, to help out with some health, safety, and environment issues, and Zafar continued, I guess, as a contractor to BHP Petroleum.*
>
> *… I don't know whether that's strictly correct, whether he still was on a Minerals payroll, but we had a contract between Minerals and Petroleum, whereby Petroleum paid for a number of Minerals people to work at the Zamzama site, and Zafar administered that contract from Karachi.*
>
> *So, what his actual formal status with Minerals was, I don't know*."[594]

556. Mr. Hargreaves further confirmed that during the period from August 1999 until later 2003, he had no personal involvement in the Reko Diq Project.[595]

557. During the hearing, Mr. Williams stated that he knew Mr. Arndt very well. When asked to describe his relationship with him, he said:

> "*A. … Chris and I were friends and colleagues for something over 45 years. I attended his wedding. I knew his wife. I knew his children. I knew his brother, I knew his sister, who were both respected professionals in their respective fields. Chris also worked directly for me for about six years as my chief geologist when I was the exploration manager for the western--BHP's western region in Australia. I guess I could describe him as my closest confidant in that period. So, we knew pretty much everything about what the*

[592] Hargreaves II, ¶¶ 14-15.
[593] Hargreaves II, ¶ 16.
[594] Transcript (Day 9), p. 2318 line 21 to p. 2319 line 12.
[595] Transcript (Day 9), p. 2321 line 19 to p. 2322 line 6.

> *other guy was thinking and what the business practice and behavior was. So, yes, I knew Chris extremely well. I had a lot of regard for him. I was also at his funeral.*
>
> *Q. And do you have any opinion or view as to Chris Arndt's integrity?*
>
> *A. Impeccable would be the only point that I would make. Chris was a careful and thorough geologist, had a lot of experience in Australia and overseas. I would trust him implicitly to carry through the company's behavior wherever he went. He was a very honorable fellow, high standards, and I guess I would have to say he demanded it of those around him.*"[596]

558. In support of its submissions and the testimony of its witnesses that Mr. Arndt was hired by TCC only in November 2003, Claimant further relies on: (i) an e-mail sent from Mr. Schloderer to Mr. Moore on 23 October 2003 to which he attached Mr. Arndt's CV and "*recommend*[ed] *hiring Chris for a position as Manager Pakistan Operations on a fly-in fly-out basis*," noting that he was "*currently managing the Clough* [Engineering] *Karachi office*";[597] and (ii) a memorandum sent by Mr. Moore to Mr. Lakhani, Mr. Schloderer and Mr. Brian Lynn on 10 November 2003 in which Mr. Moore stated with regard to Mr. Arndt:

> "*We will hire Chris Arndt, initially on a daily basis until we all feel comfortable with him. He will be hired in a technical role as a geologist reporting to John. There may have been some misunderstanding about his role. He is not an office manager or logistics manager or anything like that. He is a geologist, who will mostly be based at Nok Kundi or Reko Diq. In the setting up phase however he will assist us in putting in place some of the infrastructure that we will need.*"[598]

559. According to Mr. Arndt's CV that was attached to the October 2003 e-mail, Mr. Arndt was employed at BHP Minerals, in the position of Chief Geologist, South Asia and Chief Executive in Pakistan, from February 1998 to August 1999. Mr. Arndt's description of his work experience included "*Local administration of the project – negotiations with Baluchistan Government on amendments to Joint Venture*."[599] During the relevant time period, his CV further listed engagements with: (i) Premier/Shell for the Dureji Project (Pakistan) from April to July 2000; (ii) BHP Petroleum, specifically for the exploration and construction phase of a gas plant at Zamzama (Pakistan), from December 1998 to August 1999 and from August 2000 to March 2001, respectively; and (iii) Holly Mining for the tender for the lease of the Saindak copper/gold mine (Pakistan) from September

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[596] Transcript (Day 9), p. 2188 line 10 to p. 2189 line 10.
[597] **Exhibit CE-510**.
[598] **Exhibit CE-511**, p. 4.
[599] **Exhibit CE-510**, pp. 3 and 4.

2000 to May 2001. In addition, Mr. Arndt stated that his professional experience included consultant work at his own firm, CD Arndt and Associates, as from August 1999.[600]

560. In an e-mail dated 9 April 2001, Mr. Arndt wrote to sixteen recipients, among them Mr. Moore and Mr. Williams, with an update on his recent activities. He stated, *inter alia*:

> "*I have only been in Perth for two weeks since November. For most of this time I have been working in Pakistan for BHP Petroleum on their Zamzama gas project. My contract with them started in August, and finished in mid March with the completion of the gas plant which is now in production. …*
>
> *The other project I have been working on in Pakistan has been for Holly Mining. Holly Mining is a company that Bill Holly and I are using to bid for the lease of the Saindak porphyry copper/gold mine in far west Baluchistan.*
>
> *… Mincor is interested in using Saindak's infrastructure during their development of the H-4 deposit at Reko Diq and we would be keen to use some of Saindak's excess mining gear to toll mine at Reko Diq - eg contract stripping at H-4 or toll mining of the Western Porphyries.*"[601]

561. Following a response from Mr. Alan Moore in which he asked, *inter alia*, how it worked in terms of relationship with Holly Mining "[s]*ince you are still working for BHP*,"[602] Mr. Arndt answered on the same day:

> "*I get the impression from reading your response that you think I am still with BHP. Actually I was retrenched at the time of the big purge (finished in August 1999) and this BHP Petroleum job was a separate contract through my consultancy company.*"[603]

562. In its Post-Hearing Brief, Respondent acknowledges that Mr. Arndt was "*formally retrenched from BHP Minerals in August 1999*" but nevertheless argues that he had both the motive and the means to pay the bribes to Mr. Burq in early 2000 because: (i) he was looking for a permanent job, preferably in Pakistan, and wrote to his former colleage at BHP, Mr. Saad Hussain, in April 2000 that "*when the* [Chagai] *project does get going BHP have recommended* [me] *to Mincor to run the show in Pakistan*";[604] and (ii) he had received "*well over two years' pay in a lump sum*" when he was retrenched and, according to Respondent, apparently "*decided to invest a part of that money to secure his future lead role in the Reko Diq project.*"[605]

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[600] **Exhibit CE-510**, pp. 2-4.
[601] **Exhibit CE-738**, p. 3.
[602] **Exhibit CE-738**, p. 2.
[603] **Exhibit CE-738**, p. 1.
[604] Respondent's Post-Hearing Brief, ¶ 327 *quoting from* **Exhibit CE-518**, p. 2.
[605] Respondent's Post-Hearing Brief, ¶ 328 *quoting from* Transcript (Day 9), p. 2210 lines 6-9.

563. The Tribunal has reviewed in more detail the e-mail correspondence exchanged between Mr. Arndt and Mr. Hussain in April 2000 to which Respondent referred. On 2 April 2000, Mr. Hussain wrote in relevant part:

> "*All is well here. Have'nt heard from you guys for a while, so thought that I'd give an update from my side.*
>
> *I hear that BHP and Government of Balochistan have now signed the Addendum to the JV agreement and things will move ahead with Chagai, although funding is still not clear and a third partner is being finalized. Most of the staff working for the project has relocated. However, some staff like geos and drivers are without jobs and are having a tough time. Nobody was retrenched from BDA!"*[606]

564. In response to that e-mail, Mr. Arndt wrote in relevant part:

> "*I have been following the political happenings in Pakistan with great interest. As I mentioned to you in my last e-mail, I are still interested in getting together a group to have a go at restarting Saindak Mine. Saindak plan to advertise next week for expressions of interest from group who would like to mine Saindak. The political events in Pakistan might discourage many from applying which would make it easier for us! The government has said that they want someone to restart the mine but the government would write off the capital and cover the outstanding loans, so that all we would have to worry about is the operating costs and presumable some capital to replace deteriorated plant. Our thoughts are that we could start it up at current capacity to get to know the orebody and then if everything goes OK do an expansion to a reasonable production rate, (exporting concentrates).*
>
> *Apart from Pakistan I are still looking for work in Australia, applying for jobs and getting a few interviews, and looking for work as a consultant. I have just got my first job taking a delegation from Anglogold to China in May/June to look at opportunities in China. I hope the trip might generate more work with Anglogold. I have also heard rumours that North Ltd might want me to do a similar trip to China for them, which would be great! Tim Hargreaves did mention to me in December that he might want be back when they restart exploration at Dadu in June or July, but I have not heard anything from BHPP recently. Re Chagai, the contract for Mincor (Iscor) to farm in on the project was finalised a couple of months ago, then BHP Minerals appointed a new finance guy at a very high level who wants to see all contracts and when he saw the Chagai deal that Ski and John Schloderer had negotiated he said he wants changes. John and Ski (and Mincor) are tearing their hair out!! When the project does get going BHP have recommended me to Mincor to run the show in Pakistan.*"[607]

565. On 23 April 2000, Mr. Hussain responded in relevant part:

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[606] **Exhibit RE-518**, pp. 2-3.
[607] **Exhibit CE-518**, p. 2.

> "*I came across John Schloderer briefly at the Pearl Continental Hotel about a fortnight ago. He was confident that work would restart at Chagai in a few months. Lets hope so. Somehow, with another company getting involved, it seems to be complicated and the Govt of Balochistan is not simple to deal with.*
>
> …
>
> *We were hoping to see you in Pakistan soon. Keep in touch and let me know in advance when you plan to come here as I travel a lot*."[608]

566. When Mr. Skrzeczynski was asked about Mr. Arndt's statement that "*BHP have recommended me to Mincor to run the show in Pakistan*" and whether that suggested that he had been given an expectation that BHP would try to make sure that he would get the lead role in the project, Mr. Skrzeczynski answered: "*Maybe. But it certainly didn't come from me nor did I ever make that recommendation*." He further stated that he was not aware of such a recommendation being made.[609]

567. On 3 May 2000, Mr. Arndt wrote to Mr. Schloderer:

> "*How did your trip go? Make some progress? My work with Anglogold has been postponed for at least 6 months, but I am thinking of going to China next month anyway, to see Sara in Wuhan and to knock on a few doors in Shanghai and Beijing looking for work.*
>
> *We are putting in our* 'Expression of Interest' *for Saindak this week. (Have I send you the ad already?)*"[610]

568. Mr. Schloderer responded:

> "*I'm currently in Peru to help out on the porphyry program until activity begins on Reko Diq. The addendum has been signed and Mincor and BHP have a signed agreement. The Mincor proposal has been submitted to GOB and they have 90 days to match or accept. The chief secretary has promised that they will respond by the end of May. We'll see. I will be back in Pakistan on May 20 and back in Perth on May 30. Sorry to hear that the China trip got postponed. It must be frustrating. Note that Western Mining is active in China. Contact Howard Golden. I also received a call from Billiton regarding Tom Pollack. They are looking for a field person for China. Might be worth a call. My contact is David First in Melbourne but he is not dealing directly with the project. I don't have those contact numbers with me. Anyway it would be worth visiting the Billiton office if you go over. Thanks for the Saindak article. It will be interesting to see if they get any bids.*"[611]

569. Respondent further refers to an e-mail from Mr. Abdul Bashir to Mr. Arndt on 14 May 2000 in response to an e-mail from Mr. Arndt of the same day, which contained no text

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[608] **Exhibit CE-518**, p. 1.
[609] Transcript (Day 8), p. 2123 lines 1-10.
[610] **Exhibit CE-857**, p. 1.
[611] **Exhibit CE-857**, p. 1.

but an attachment with the file name "*Reko Diq.doc*." Mr. Bashir, who was working at the Zamzama camp at the time, wrote:

> "*First of all thanks for excellent information regarding Reko diq. As you know it is a Mother day gift for us. Every one in the camp is very happy specially those people who worked with BHP Minerals in Chagai and every one praying to start again Reko diq and we start work together. Everyone wishes work with you in Reko diq.*"[612]

570. On 13 May 2000, Mr. Arndt also wrote an e-mail with the subject line "*Reko Diq*" and an attachment to Mr. Hargreaves, stating "*fyi (in case you have not seen what's in the press).*" The next day, Mr. Hargreaves responded: "*Thanks. Good news – I think? It reads so well that I want to invest!*"[613]

571. Claimant, on the other hand, relies on e-mail correspondence between Mr. Iqbal and Mr. Arndt in support of its submission that Mr. Arndt was not involved in the Reko Diq project in any capacity during the relevant time period. Specifically, Claimant refers to an e-mail sent by Mr. Iqbal to Mr. Arndt's personal e-mail account on 16 May 2000 in which he wrote in relevant part:

> "*Its really nice hear from you after a long time. I hope you are doing well. It is unfortunate that you could not get a job but I am confident that you will get a good job soon. It would be fine if you can attract a group to bid for saindak, that can bring you in Pakistan again. Please let me know if I may be of any help, in my personal capacity, for your work for Saindak project.*
>
> …
>
> *As far as BHP is concerned, you would have heard that the GoB has signed the addendum and now we have submitted the Option Agreement to GoB for exercising its pre-emptive right under the Joint Venture Agreement. Everyone knows that GoB has to allow Mincor to come into the Project as GoB has no funds to buy and invest for BHP's share, but to describe this fact officially on paper by GoB will take time. The lazy beaurucratic* [sic] *system won't allow things to be happened at faster pace. Lets hope that GoB gives its consent for Mincor as soon as possible.*"[614]

572. This e-mail was written in response to an undated e-mail from Mr. Arndt, which reads:

> "*How are things going? It looks as if you could be getting a bit busier! I am still looking for work, but have a few things in the pipeline which could come off soon! One is trying to put together a group in Perth to tender for Saindak.*"[615]

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[612] **Exhibit RE-521**.
[613] **Exhibit RE-520**.
[614] **Exhibit CE-737**.
[615] **Exhibit CE-737**.

573. During the hearing, Mr. Iqbal testified that he wrote to Mr. Arndt "*It is good to see you after a long time*" because "*we didn't see each other for about a month*."[616] He also stated that his hope that "*it* [the Saindak project] *can bring you in Pakistan again*" meant that "*he come back for good for working in Pakistan because he didn't have any permanent job in Pakistan at that time*."[617]

574. In a further e-mail exchange shortly thereafter on 18 May 2000, Mr. Arndt informed Mr. Zafar that "*I have just received a phone call from Premier Oil. They want me start work for them ASAP. So it looks as if I could be in Karachi on the weekend of 4th June, or there abouts. … So I hope to see you in a couple of weeks!*" In response, Mr. Iqbal congratulated Mr. Arndt and stated that "[m]*yself and other members of our Karachi/Dadu offices are looking forward to see you soon in Karachi*."[618]

575. Claimant also relies on further e-mails, which confirm, in its view, that Mr. Arndt was not in Pakistan during the relevant time period. In an e-mail dated 18 February 2000, Mr. Zulfiqar Khan wrote from a BHP account to Mr. Arndt:

> "*Long time no see. This is to let you know that you are missed sometimes (when I visit the field) and remembered often (when I wear the boots you brought me). I was hoping to see you back in Pakistan along with Mrs. Arndt. What happened about your job with Premier? I hope you get this note. It will be nice to hear from you/ see you again.*"[619]

576. In an e-mail dated 18 March 2000, Mr. Sam Machmillan wrote to Mr. Arndt:

> "*I haven't heard from you in a while and thought I'd see how things are going. Do you have any plans to come to Pakistan? I will be working with Lasmo in Karachi up to the end of the month. How are the mining prospects moving for Baluchistan?*"[620]

577. On 23 April 2000, Mehmood wrote from BHP's Zamzama camp, in response to a Christmas card that Mr. Arndt had sent him, stating, *inter alia*, "*No news from your side since long.*"[621]

578. Claimant further points to two e-mail chains of May 2000 regarding Mr. Arndt's attempt to transfer an amount of PAK Rs. 5,000 to Quetta. On 2 May 2000, Mr. Arndt wrote to Mr. S. Iqbal Ali regarding a Saindak Advertisement for leasing and asked: "*Re the 5000 rp, I have not been able to find a bank in Australia that deals in Pakistan currency. Can*

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[616] Transcript (Day 2), p. 407 lines 1-3.
[617] Transcript (Day 2), p. 393 lines 8-12.
[618] **Exhibit CE-864**.
[619] **Exhibit CE-843**.
[620] **Exhibit CE-845**.
[621] **Exhibit CE-853**.

I send the money in any other currency (by telegraphic transfer)?"[622] On the same day, Mr. Arndt also wrote to Mr. Marcus Coghlan and Mr. Hargreaves, stating that "*if you can think of any way I can get the 5000 rps to Quetta it would be appreciated. I have tried all the Australian banks and none deal in Pakistan currency*." Mr. Hargreaves responded that he would organize the transfer "*from here*" and suggested that Mr. Arndt buy him a beer "*when we next meet (unless its in Pakistan!).*"[623]

579. Respondent argues that, despite his formal retrenchment, Mr. Arndt "*remained the source of up-to-date information about the project for former colleagues*"[624] and refers to an e-mail from Mr. Hargreaves, who considered investing into the Reko Diq project, to Mr. Arndt in November 2000 where he wrote in relevant part:

> "*… Are you still at Zamzama? Has anything happened with the China project?*
>
> *I have received an e-mail from Geoff Allen who is trying to assemble seed investors for Reqo Diq vi* [sic] *at he Tehtyan Coper* [sic] *Company's private placement. I and a couple of others are willing to have a punt, but I wanted to ask you first whether any of the BHPM people had put any of their own money into the project - which would signal greater confidence.*
>
> *Does BHP/Mincor have clear rights to export any copper or would they have to sell to the government and share the same risk of currency/payment as the gas sector? Has BHP/Mincor finally sorted out the tax/royalty issues or is it still something that would have to be negotiated with the Balochistan Government under the old provincial mining legislation?*"[625]

580. When asked about why he would ask Mr. Arndt about what was happening regarding TCC in a time period around the end of June/July 2000, Mr. Hargreaves answered:

> "*A. I guess there were a couple of reasons why I communicated with Chris. One was that Chis was a very good networker and kept contact with all of the ex-BHP people. So, he might have a sense of what was happening. But also at the time, Chris was looking at putting a bid to lease the Saindak Mine through a company called Holly Mining. So, Chris was actively involved in looking at copper business at Saindak, which is near Reko Diq. And I was asking himthings about taxes and royalties which he might have learned from, his work at Holly Mining.*
>
> *One of the concerns I had from my previous experience in Pakistan is that what were the hard currency restrictions going to be on any successful Mining Venture. That's why I asked those questions on currency payments.*

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[622] **Exhibit CE-855**.
[623] **Exhibit CE-856**.
[624] Respondent's Post-Hearing Brief, ¶¶ 329-330.
[625] **Exhibit RE-514**.

> *Q. But he wouldn't have known from his work on Holly Mining whether BHP Minerals people had put any of their own money into the Reko Diq Prject, would he?*
>
> *A. He might have known. Chris was an effective networker. But I don't recall that he ever answered this e-mail. And unless you've got a response to it, I certainly don't recall the Response. And I had to assume the non-response meant that he didn't know the answers to my questions."*[626]

581. Finally, Mr. Hargreaves was asked about Mr. Arndt's role as contracting consultant to BHP Petroleum at Zamzama:

> *"Q. So, you say it's north of Karachi. So, it's likely that he was traveling in and out of Karachi from time to time?*
>
> *A. Yes.*
>
> *Q. And you say that he kept contact with all the BHP people. So, your understanding is that he would have been in contact with BHP Minerals people at this period of time?*
>
> *A. Yes.*
>
> *… I probably should have said* 'BHP people,' *whether they were currently with BHP or formerly with BHP."*[627]

582. On the basis of the evidence set out above, the Tribunal is satisfied that Mr. Arndt was not involved in any illegitimate payments to Mr. Burq in early 2000 as alleged by Respondent and that the testimony given by its witnesses Mr. Iqbal and Mr. Farooq in that regard is false.

583. First, the Tribunal considers it noteworthy that Mr. Arndt's alleged involvement in a payment of PAK Rs. 2,000,000 to Mr. Burq was not mentioned by Mr. Farooq in his first witness statement but then addressed in detail in his second witness statement that was submitted together with Respondent's Reply and the witness statement of Mr. Iqbal. The Tribunal has not heard a convincing explanation from Respondent or its witnesses concerning the timing of the allegations implicating Mr. Arndt – regardless of whether or not this allegation was prompted by statements made in Claimant's Opposition, as suggested by Claimant.[628]

584. In addition, the Tribunal also considers it noteworthy that while Mr. Iqbal testified in his written witness statement that Mr. Arndt joined TCC "*around the time*" that he did and that he reported to Mr. Arndt as "*General Manager*" both before and after he joined TCC, he corrected such testimony during the hearing to the effect that Mr. Arndt joined TCC

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[626] Transcript (Day 9), p. 2329 line 1 to p. 2330 line 4.
[627] Transcript (Day 9), p. 2330 line 20 to p. 2331 line 17.
[628] *Cf.* Claimant's Rejoinder, ¶ 299.

only "*after*" he did and acknowledged that Mr. Arndt had in fact been retrenched in 1999 and, on Mr. Iqbal's testimony, stopped working for the project in July 2000.

585. Both Mr. Iqbal and Mr. Farooq further acknowledged during the hearing that Mr. Arndt was replaced by Mr. Schloderer as Chief Executive as of late 1999 and, even though they both claim that this replacement took place only on paper, it is undisputed that Mr. Schloderer signed the letters written by BHP as of October 1999 and that he participated in the official meetings after August 1999, including the meeting with the Chief Secretary in April 2000. In this regard, the Tribunal rejects the submission that Mr. Arndt continued to act and negotiate the 2000 Addendum in an unofficial capacity for BHP. While Mr. Skrzeczynski's testimony as to his own role in the explanation of the changes introduced by the 2000 Addendum to the GOB officials was not entirely clear, the fact remains that Mr. Schloderer was the Chief Executive in Pakistan at the time. It may have been interesting to hear Mr. Schloderer's testimony regarding his role in the final phase of negotiating the 2000 Addendum. However, even in his absence, the Tribunal cannot simply infer that his testimony would not have supported Claimant's position.

586. In the Tribunal's view, the contemporaneous documentary record further strongly indicates that Mr. Arndt was not acting in any capacity for BHP at the relevant time and that, in fact, he was not even in Pakistan. Contemporaneous e-mails and memoranda from Mr. Schloderer and Mr. Moore as well as Mr. Arndt's CV confirm that he was only hired by TCC in November 2003. Moreover, the various e-mails produced by Claimant from Mr. Arndt's personal e-mail account rebut Respondent's allegation regarding Mr. Arndt's alleged role in the final negotiation and execution phase of the 2000 Addendum. In the Tribunal's view, these e-mails demonstrate that Mr. Arndt remained very interested in the developments of the project, presumably because he hoped that he would be re-employed once the project progressed under Mincor, and therefore kept up-to-date regarding information available in the press and via his former colleagues at BHP.

587. In particular, if Mr. Arndt had indeed been the key person responsible for pushing the 2000 Addendum through by means of a bribe to the Chairman of the BDA, as alleged by Respondent, it is very unlikely that Mr. Schloderer would have informed him by an e-mail in early May 2000, *i.e.*, over a month after the signing, that the Addendum had been signed – in response to the question: "*Make some progress*?" Similarly, if Mr. Iqbal had been instructed by Mr. Arndt to pay a bribe for the signing of the Addendum, it is equally unlikely that he would have informed Mr. Arndt by an e-mail in mid-May 2000 that the Addendum had been signed – in response to the question: "*How are things going?*"

588. In addition, if Mr. Arndt had been constantly present during the negotiations of the Addendum and also in April 2000 in relation to the certification of BHP's 75% interest in the CHEJVA (which will be addressed in further detail below), it is not credible that Mr. Iqbal would have written in mid-May 2000: "*Its really nice to hear from you after a*

long time" and would have expressed his hope that Mr. Arndt would soon find a job that would bring him back to Pakistan. In particular, the Tribunal rejects Mr. Iqbal's explanation during the hearing that he had written this e-mail after he had not seen Mr. Arndt "*for about a month*" and hoped that he would "*come back for good*" to Pakistan. In addition, the e-mail from Mr. Zulfiqar Khan, another BHP employee, written in February 2000, in which he also wrote: "*Long time no see*" and "*I was hoping to see you back in Pakistan*" indicates that Mr. Arndt was not in Pakistan at that time.

589. Furthermore, while the e-mails that Respondent points to indicate that Mr. Arndt was hoping to find a job within the Reko Diq project once it continued with Mincor and may have been hoping "*to run the show in Pakistan*" for Mincor once the project "*does get going*," this expectation does not support Respondent's allegation that he was in fact already acting on behalf of BHP in an unofficial capacity, pushing through the Addendum to achieve that result. In fact, the Tribunal considers it highly unlikely that Mr. Arndt, while being officially not employed by BHP, would take it on himself to pay a significant amount out of his own lump sum payment that he received when his employment with BHP ended in August 1999, as alleged by Respondent in its Post-Hearing Brief – in the absence of any other explanation as to how he would have obtained the necessary sum of money.

590. Finally, the Tribunal wishes to emphasize that Mr. Williams' testimony, who was close friends with Mr. Arndt for more than 45 years, left a strong impression on the Tribunal and confirms its conviction that Mr. Arndt was not secretly bribing the Chairman of the BDA while hoping to be re-employed in connection with the Reko Diq project in the future.

591. As noted above, the Tribunal is of the view that in light of the emphasis placed by Respondent and its witnesses on the role of Mr. Arndt in the alleged payments to Mr. Burq in early 2000, the absence of any evidence supporting this allegation and, in fact, the conclusion that the contemporaneous evidence in the record strongly indicates the contrary, *i.e.*, that Mr. Arndt was not involved in any capacity with BHP at the time, is decisive in the Tribunal's evaluation of the evidence of corruption regarding the Addendum. As the Tribunal does not accept that Mr. Arndt negotiated and provided the funds for any bribery payment to Mr. Burq, it likewise does not believe Mr. Iqbal's evidence that he delivered the alleged amount to Mr. Burq in order to get the Addendum signed despite the outstanding approval of the Finance Department. The Tribunal cannot infer from the absence of such approval that a payment must have been made. In particular, given the fact that the Governor of Balochistan had authorized the Chairman of the BDA to sign the Addendum by letter of 24 December 1999 and also given the correspondence exchanged with the Finance Department regarding its objections, it rather appears to the Tribunal that it was decided to proceed with the signing of the Addendum on the basis of the authorization by the Governor and the vetting by the Law Department.

As noted above, the Tribunal does not need to decide whether this approach was in line with Business Rules of 1976. While the provisions cited by Claimant indicate that it was indeed possible to proceed without the approval of the Finance Department, even a violation of these Rules would not be sufficient to justifiy an inference of corruption.

The Alleged Payment of PAK Rs. 500,000 and Further "*Periodic Payments*" to Mr. Farooq

592. As the Tribunal does not accept that the alleged payment of PAK Rs. 2,000,000 to Mr. Burq occurred, it also rejects Mr Iqbal's evidence that Mr. Burq passed a share of this payment on to Mr. Farooq for his assistance in ensuring the execution of the Addendum.[629]

593. The Tribunal is aware that, in its Reply, Respondent further alleges that certain "*periodic payments to Mr Farooq*" were made to secure the Addendum.[630] While Respondent did not include a reference to specific evidence in this regard, Mr. Farooq testified in his first witness statement:

> "*After I joined the OC, BHP began to provide me with small cash payments ranging from Rs. 10,000 to Rs. 20,000 for my support on the OC. The money used to be paid to me in my office by Mr Zafar Iqbal, BHP's Chief Accountant and Country Representative. At this time, BHP's priority was to get as much land as possible under Prospecting Licenses, to have annual fees waived, and to negotiate concessions of the Balochistan Mining Concession Rules 1970. The payments that I received from BHP at this time were in return for me not raising any objections or creating any problems for BHP.*"[631]

594. In his witness statement, Mr. Iqbal testified as follows:

> "*Before my next trip to Quetta – in late 1998 or early 1999 – Mr Arndt gave me a sealed package to deliver to Mr Farooq. I took it with me when I went to meet Mr Farooq. Mr Farooq opened the package in front of me and I saw that it contained money. He did not count it in front of me, but I saw that it was a relatively small amount, probably 10,000 Rupees or so. I do not remember what we were asking Mr Farooq to do on this occasion, but I believe it would have been a routine matter such as customs clearance of machinery or the renewal of a licence.*
>
> *I was a bit astonished, as a young accountant, to see my manager giving money for a government official. When I got back to Karachi, I spoke to Mr Arndt. Mr Arndt explained to me that we were working in a region where to get the right results these things need to be done. He said to me that this sort of thing did not matter and that we needed to keep our eye on the goal, which*

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[629] *Cf.* Respondent's Post-Hearng Brief, ¶ 47.
[630] Respondent's Reply, ¶ 133 lit. b.
[631] Farooq I, ¶ 6.

> *was to get the mine running. He told me, this time and on other occasions, that this was between me and him and not to tell anyone else.*
>
> *Mr Arndt gave me packages to deliver to Mr Farooq on a number of other occasions. This did not happen every time I visited Quetta, but it happened on at least three or four other occasions. On some of these occasions the package was opened in front of me and I saw that there was money inside, and on other occasions Mr Farooq put the unopened package straight into his drawer. I did not always know the specific reasons why we were giving money to Mr Farooq – this was between Mr Farooq and Mr Arndt. I was never told where the money came from, but I always presumed that Mr Arndt brought it in US Dollars from abroad when he came back from his rota leave (and then exchanged it for Rupees in Pakistan).*"[632]

595. The Tribunal notes that in his second witness statement, Mr. Farooq did not refer to any specific payments that he allegedly received in that context nor did he confirm Mr. Iqbal's testimony on the alleged involvement of Mr. Arndt. He stated:

> "*While I was less influential and had less of an impact in the mid-1990s when I was a relatively junior officer, from the late 1990s I began to have an impact. There were many occasions, some of which are discussed below, where I pushed a decision through despite objections from relevant departments, where I side-stepped consultation by relevant departments and where I avoided proper application of the GOB Rules of Business or some other relevant rules. I also generally supported BHP/TCC in the OC meetings, for example by approving budgets even though in 1998-1999 I believed BHP were inflating their expenses (since I knew essentially no work was being carried out) and despite being the person that should question such documents as the General Manager Finance & Administration, BDA and then the Director of Finance, BDA. I acted in this way because I was being paid by BHP/TCC to favour them.*"[633]

596. The Tribunal notes that neither Mr. Iqbal nor Mr. Farooq's written testimony support Respondent's allegation that the alleged payments – other than the alleged payment to Mr. Burq in early 2000 – were made "*to ensure the execution of the Addendum*" (or any other of the 2000 instruments, which will be discussed further below). During the hearing, Mr. Iqbal confirmed with regard to the alleged first payment of about PAK Rs. 10,000 to Mr. Farooq that he did not know for which purpose it was made "*but the matter in which we usually deal with BDA was clearance of---customs clearance and clearance of foreigners to visit Reko Diq area and Licenses Applications like this.*" Mr. Iqbal further clarified that "[o]*ne of those payments* [on which he testified in his witness statement] *was in connection with that Addendum*," referring to the alleged payment to Mr. Burq in early 2000.[634] According to Mr. Farooq, the alleged payments were made in return "*for*

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[632] Iqbal, ¶¶ 13-15.
[633] Farooq II, ¶ 14.
[634] Transcript (Day 2), p. 338 line 19 to p. 339 line 14.

[him] *not raising any objections or creating any problems for BHP*" and for "push[ing] a decision through" or "generally support[ing] BHP/TCC in the OC meetings, for example by approving budgets."

597. In any event, the Tribunal has already found that the alleged involvement of Mr. Arndt in those payments did not happen. Mr. Iqbal did not specify in his witness statement when the alleged payments were made, in particular whether they were allegedly made before or after August 1999 when Mr. Arndt ceased to work at BHP. However, even if his testimony concerns, at least in part, a time period prior to August 1999, the Tribunal does not accept that Mr. Arndt asked Mr. Iqbal to deliver cash payments to Mr. Farooq on his behalf, justifying this conduct by saying "*that this sort of thing did not matter and that we needed to keep our eye on the goal, which was to get the mine running*" – at a time when BHP intended to farm out its interest in the project and cut down its budget for any further exploration work. On that basis, the Tribunal also rejects Mr. Iqbal's testimony that he delivered the alleged payments to Mr. Farooq.

598. In light of this conclusion, the Tribunal does not have to express an opinion as to whether any payment made by Mr. Iqbal and instructed by Mr. Arndt, if it had been established, would have been attributable firstly, to BHP and, secondly, to Mincor and Claimant. It suffices to note that Mr. Arndt was undisputedly not acting in any official capacity for BHP at the time and, on Mr. Iqbal's own testimony, only he and Mr. Arndt knew of the alleged payments. Consequently, the Tribunal would already have its doubts as to whether such payments could be attributed to BHP. In addition, the Tribunal would also have its doubts as to whether a payment, even if attributable to BHP, could be attributed to Mincor and Claimant on the basis of a continuity of personnel with knowledge of the alleged payment or lack of diligence.

c. Allegations Relating to the April 2000 Certification of BHP's 75% Interest

599. Third, the Tribunal will address Respondent's allegation that the certification of BHP's 75% interest in April 2000 was procured by the making of illicit payments.

i. Summary of Respondent's Position

600. On the basis of both Mr. Iqbal and Mr. Farooq's evidence, Respondent alleges that two bribes were paid to secure BHP's 75% interest in the JV despite BHP not having completed the steps required to earn such interest:

i. PAK Rs. 500,000 was firstly paid by Mr. Iqbal to Mr. Burq in April 2000 to approve the 75% interest letter by the BDA to BHP; and
ii. Out of this money, Mr. Farooq was then paid PAK Rs. 100,000 in the same month which, together with the periodic payments to Mr. Farooq, ensured

> he did Claimant's bidding and directed the issuing of the letter by Mr. Baloch (General Manager (Mines) at the BDA).[635]

601. Such funds were purportedly provided by Mr. Arndt and for the aforementioned reasons set out in Section VII.D.1.b above in relation to the Addendum, Respondent maintains that there is no convincing evidence to demonstrate that he was not involved in the project at this time.[636]

602. Clause 3.2 of the CHEJVA stipulates that to earn this interest in the project, BHP was required to complete, at a minimum, Stage One and Stage Two activities within six years of the Commencement Date (by 20 January 2000).[637] Respondent maintains that Stage One activities included examining existing data, collecting sediment samples from the Exploration Area, analysis of the samples and presenting the results in map form. Pakistan submits that Stage Two activities comprised a more detailed sampling of any anomalous gold areas, with Mr. Pierce recognizing that it is common practice to fly aeromagnetic surveys over covered areas to ensure identification of all such anomalies.[638]

603. Respondent highlights the alleged irregularity that although the Addendum was signed after 20 January 2000, it still contained a replacement Clause 3.2 of the CHEJVA which retrospectively sought to change the requirements for BHP to earn its 75% interest by replacing the need for BHP to complete a Feasibility Study first, with the need for BHP to acquire up to 10 Prospecting Licences, a step that it had already taken by that date.[639]

604. Nonetheless, even leaving aside this Feasibility Study issue, Respondent contends that there is substantial documentary and witness evidence demonstrating that despite these conditions not being met, BHP was able to nonetheless secure certification through to aforementioned bribes to key government officials.[640]

(a) "*Smokescreen*" Tactics - Downplay and Misstatement of Certification Requirements

605. As a preliminary issue, Respondent alleges that Claimant engaged in two "*smokescreen*" tactics to ultimately divert attention away from its failure to earn its interest under the CHEJVA:[641]

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[635] Respondent's Post-Hearing Brief, ¶ 72; Respondent's Reply, ¶ 188 *referring to* Iqbal, ¶ 27, Farooq I, ¶ 9 *and* Farooq II, ¶ 27.
[636] Respondent's Post-Hearing Brief, ¶ 73, 322-344.
[637] Respondent's Reply, ¶¶ 191-197.
[638] Respondent's Post-Hearing Brief, ¶¶ 77-78 *referring to* Transcript (Day 8), p. 2023 lines 2-17.
[639] Respondent's Post-Hearing Brief, ¶¶ 194-196.
[640] Respondent's Reply, ¶¶ 188-190.
[641] Respondent's Post-Hearing Brief, ¶ 92.

606. Firstly, Respondent submits that Claimant downplayed the importance of the certification requirement. Respondent argues that claiming that it was "*not a contractual document*," "*nowhere required under the CHEJVA,*" was not true; Respondent maintains that it was in fact vital to the foundation of TCC's investment and a condition precedent in the Option Agreement.[642]

607. Secondly, Respondent submits that Claimant repeatedly misstated the requirements for the earn-out, suggesting that BHP had completed the requisite activities by March 1998.[643] According to Respondent, Claimant's position is that although Stage One and Two activities had been completed, it chose not to inform Respondent in order to "*preserve its ability to apply for new prospecting licences to the west of the Joint Venture area*" (the "**Western Area**").[644] However, Respondent argues that this argument not only mischaracterizes the requirements, but is flawed for the following reasons:

608. Respondent submits that, as acknowledged by Claimant's own witnesses, the earn-out conditions under the CHEJVA were not contingent on exploration in just the ten Prospecting License areas, but the full Exploration Area.[645] Respondent maintains that this reference added as a result of the Addendum, simply referred to the maximum amount of Prospecting Licences BHP could hold at any one time.[646]

609. Respondent submits that Claimant cannot provide an explanation as to why communication of its purported completion would prevent BHP obtaining licences in the Western Area (in fact Mr. Pierce acknowledged that the only thing stopping the attainment was the existing license over part of the area held by another company).[647]

(b) The Record up to 20 January 2000 (the Deadline for Completion)

610. Pakistan draws the Tribunal's attention to the contemporaneous documentary evidence from 1997-1999 allegedly demonstrating that the status of BHP's works in this time period was not on schedule, including Operating Committee meeting minutes (showing postponement of the aeromagnetic survey, decreased drilling activity), BHP's Monthly Reports (showing that field work was still continuing) and a Summary prepared for the Chief Minister in relation to the Addendum (where it was noted that "*BHP is now trying to prolong the period of exploration programme and pre-feasibility by changing the*

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[642] Respondent's Post-Hearing Brief, ¶¶ 75-81 *referring to* Transcript (Day 1), p. 266 lines 4-10 *and* **Exhibit CE-12**, Article 5.1.1(c).
[643] Respondent's Post-Hearing Brief, ¶¶ 82-92.
[644] Respondent's Post-Hearing Brief, ¶ 83 *referring to* Claimant's Rejoinder, ¶ 384 *and* Pierce, ¶ 89.
[645] Respondent's Post-Hearing Brief, ¶ 84 *referring to* Transcript (Day 8), p. 2005 line 20 to p. 2006 line 1, p. 2013 lines 3-10, p. 2014 line 21 to p. 2016 line 14 and p. 2018 line 9 to p. 2019 line 9.
[646] Respondent's Post-Hearing Brief, ¶ 84.
[647] Respondent's Post-Hearing Brief, ¶ 88 *referring to* **Exhibit RE-246**, pp. 1-2.

original clause 3.2 of the JVA" – indicating that BHP felt it could not complete the works on time).[648]

611. Moreover, while Mr. Hargreaves suggested that both Stage One and Two activities were completed prior to January 2000, Respondent notes that he fails to identify a single minute or report which confirms the same.[649] Respondent argues that in fact, in direct contradiction with his account, Mr. Iqbal, Mr. Farooq and Mr. Tahir have all cast doubt on the timeliness of completion.[650] Whilst Mr. Iqbal stated that, at the time of the 75% interest letter in April 2000, he knew that BHP had virtually stopped exploration work for at least two years, Mr. Farooq (as a member of the Operating Committee) stated that the activities required to complete Stage Two had not been completed in time.[651] Respondent submits that Mr. Tahir in fact revealed that both he and his boss (the General Manager (Mines) at the BDA) knew that BHP had not met its exploration requirements.[652]

612. Respondent maintains that Claimant's reliance on a single letter from Mr. Schloderer to Mr. Farooq asserting that this milestone had been reached, should be treated with caution given the irregularities surrounding its background.[653] Pakistan submits that this letter was a response to Mr. Farooq's suggestion in October 1999 of a discussion of the exploration program in an Operating Committee meeting – Respondent thus perceives it as unlikely that three months before the deadline for the BHP to obtain its interest, the BDA's response would be to assert completion of the very activities BHP wished to discuss.[654]

613. Moreover, Respondent highlights the oddities in the fact that this letter was sent to Mr. Farooq who was not BDA Chairman at that time, Mr. Schloderer did not specify the date of or [the] event that led to BHP earning its interest and he did not seek the BDA's confirmation that the BHP had earnt this interest (but waited another six months to do so).[655] Respondent further questions the fact that Mr. Schloderer was not based in Pakistan at the time, no supporting documentation was attached to the letter and Mr. Schloderer acknowledged the fact that "*exploration will continue,*" something not easily reconcilable with his confirmation that Stage Two activities had been completed.[656]

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[648] Respondent's Reply, ¶ 200.
[649] Respondent's Reply, ¶ 201 *referring to* Hargreaves, ¶ 33.
[650] Respondent's Reply, ¶ 201 *referring to* Iqbal, ¶ 24, Farooq I, ¶ 9, Farooq II, ¶ 26 *and* Tahir II, ¶ 21.
[651] Respondent's Reply, ¶ 201 *referring to* Iqbal, ¶ 24, Farooq I, ¶ 9 *and* Farooq II, ¶ 26.
[652] Respondent's Reply, ¶ 201 *referring to* Tahir II, ¶ 21.
[653] Respondent's Reply, ¶¶ 198-203 *referring to* Claimant's Opposition, ¶ 180 *and* **Exhibit CE-433**.
[654] Respondent's Reply, ¶ 202.
[655] Respondent's Reply, ¶ 202.
[656] Respondent's Reply, ¶ 202; Respondent's Post-Hearing Brief, ¶ 97 *referring to* Transcript (Day 8), p. 2138 lines 8-13.

614. Respondent further maintains that the "*key*" document on which Claimant relies to argue that BHP had completed Stages One and Two by March 1998, the Information Memorandum, does not assist its case.[657] To the very contrary, Respondent argues that it shows that Stage Two work was not complete at PL-8 (Durban Chah), PL-1 (Ganshero), PL-2 (Koh-I-Sultan), and PL-6 (Shah Umah).[658] Moreover, despite Mr. Pierce referring to an unidentified geologist who had allegedly informed him that Stage Two was complete, Respondent maintains that he acknowledged that it was not clear from the Information Memorandum, or indeed any other documents on the record whether Stage Two had been completed.[659]

(c) The Record from Between BHP's Deadline for Completion (20 January 2000) and 14 April 2000 (the Date on Which the BDA Confirmed that BHP Had Earned Its Interest)

615. Respondent refers to a BHP authored document (February 2000) allegedly explicitly confirming Stage One to be complete and not stating the same for Stage Two.[660] Respondent maintains that when this report refers to ten licences (and indeed says that first-pass drilling has only been completed over five), it can only be referring to the Joint Venture's ten Prospecting Licenses given that BHP obtained licences in respect of the Western Extension in 2003.[661] Respondent submits that this not only supports the argument that Claimant has mischaracterized the requirements of the earn-out but also that Stage Two had not been completed, and the January deadline missed.

616. Respondent submits that Mr. Baloch's letter sent (March 2000) to the GOB's Director of the DMD regarding a Prospecting License clearly indicated that he perceived Stage Two activities to be continuing.[662] Moreover, Respondent maintains that the Joint Venture obtained renewals for two Prospecting Licenses on 19 November 1998 and a further Prospecting License on 21 February 2000 – the timing allegedly suggesting, with reference to Clause 7.1 of the CHEJVA, that exploration activities were continuing in these areas beyond January 2000.[663]

617. Respondent further maintains that the Addendum (March 2000) did not state that the requisite activities had been completed. Respondent rejects Claimant's suggestion that Article 2.4 of the Addendum should be interpreted so as to acknowledge that the GoB

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[657] Respondent's Post-Hearing Brief, ¶ 89 *referring to* Transcript (Day 8), p. 2044 lines 2-6.
[658] Respondent's Post-Hearing Brief, ¶ 90 *referring to* Information Memorandum, section 9.4, 9.5, 9.7 and 9.9.
[659] Respondent's Post-Hearing Brief, ¶ 91 *referring to* Transcript (Day 8), p. 2050 lines 7-19.
[660] Respondent's Post-Hearing Brief, ¶ 84 *referring to* **Exhibit RE-54**.
[661] Respondent's Post-Hearing Brief, ¶ 87, 92.
[662] Respondent's Reply, ¶¶ 205-206 *referring to* **Exhibits RE-54**, p. 2 *and* **RE-254**.
[663] Respondent's Reply, ¶ 206 *referring to* Draft Decision, ¶¶ 325-328.

"*accepted the work performed by…BHPM up until the date of this amendment as valid performance*", and points the Tribunal to a literal interpretation of the provision which states that not only have Stage One activities been completed, but talks of the Prospecting Licenses obtained "*in order to enable BHPM to conduct Stage Two activities.*"[664] Ultimately, Respondent questions why BHP would have insisted that reference be made to the Stage Two activities if they had in fact already been completed.[665] Respondent rejects Claimant's dismissal of this as a "*historical relic*" on the basis that it also existed in BHP's 29 July 1998 draft of the Addendum as nonsensical since on Claimant's case Stages One and Two were complete by March 1998, four months before this draft.[666]

(d) The Record After the Certification of BHP's 75% Interest (14 April 2000)

618. While Respondent asks the Tribunal to approach the Pre-Feasibility Study and the Feasibility Study (on which Claimant relies) with care since they were produced at the end of the 2000s, long after the event, it emphasizes that these documents actually undermine Claimant's arguments.[667] Respondent maintains that these documents in fact confirm the shutdown of the works from April 1998 to 1999, contradict the BHP monthly report (3 April 1998) which noted that "*field work…is continuing*" and made many other references indicating that Stage Two exploration works continued long beyond January 2000.[668]

619. Respondent also maintains that other documents after this point in time undermine Claimant's case, including Mincor's Quarterly Reports, Operating Committee Minutes and the Option Agreement (April 2000) through which BHP passed on exploration activities to Mincor and TCC – Respondent argues that had these been completed by BHP, there would have been no reason to pass them onto Mincor.[669]

620. Despite Claimant rejecting these documents as "*inapposite*," Respondent submits that it implicitly acknowledged that Stage Two had in fact not been completed by February 2000 when it stated that "*of all the documents cited, only the new Prospecting Licence granted on 20 February 2000 could serve to affirmatively rebut BHP's position that it completed Stage Two activities.*" This new license encompassed Prospecting License PL-4 within the Exploration Area. Therefore, Pakistan argues that even on Claimant's narrow

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[664] Respondent's Reply, ¶¶ 207-208 *referring to* **Exhibit CE-2**.
[665] Respondent's Reply, ¶¶ 207-208 *referring to* Claimant's Opposition, ¶ 181.
[666] Respondent's Post-Hearing Brief, ¶ 96 *referring to* **Exhibit CE-504**, Recital C, Transcript (Day 1), p. 269 line 19 to p. 270 line 4, TCC's Opening Slides, p. 138, Pierce, ¶¶ 98-102 *and* Claimant's Rejoinder, ¶ 384.
[667] Respondent's Reply, ¶ 209 *referring to* Claimant's Opposition, ¶ 181, **Exhibits CE-472** *and* **CE-99**.
[668] Respondent's Reply, ¶ 209(f) *referring to* **Exhibits RE-245**, p. 1, **CE-472**, p. 3-4 *and* **CE-99**, p. 4-4.
[669] Respondent's Post-Hearing Brief, ¶ 84.

interpretation of Clause 3.2 as identified above, the fact that this license was applied for in July 1999 rebuts the argument that activities relating to the Prospecting Licenses were completed by March 1998 – if they had been completed, there was no need to apply for another license over the same area of land.[670]

(e) Anomalies in the Process of Certification

621. Respondent argues that the abundance of evidence in relation to completion of Stages One and Two Activities and the array of anomalies in the record surrounding the certification of BHP's interest surrounding the fact that the BDA should have scrutinized BHP's claims that it had earnt its 75% interest, indicate that key BDA officials were in fact bribed to avoid scrutiny of the certification.[671]

622. Respondent perceives BHP's Mr. Skrzeczynski's letter to the BDA Chairman, Mr. Burq, requesting the confirmation from the Governor of Balochistan of certification to be "*suspicious.*"[672] Respondent argues that clearly in an attempt to avoid broader scrutiny, the letter failed to set out in a supplementary report or otherwise, how or when the interest was supposedly earned.[673] Additionally, Respondent argues that Claimant selectively neglected to mention that the letter attached a draft confirmation letter which BHP requested be put on the Governor's letterhead.[674] This represented a break from protocol, under which the Option Agreement envisaged such confirmation to be negotiated as part of the Addendum.[675]

623. Respondent maintains that despite knowing that the requisite activities had not been completed, Mr. Tahir and Mr. Baloch experienced extreme pressure from Mr. Farooq to provide certification as evidenced by a BDA file note dated 13 April 2000.[676] Respondent alleges that despite both expressing their concern of providing a false certification, Mr. Farooq and Mr. Tahir were concerned that they would lose their jobs if they did not do as Mr. Farooq requested.[677]

624. Respondent submits that Mr. Tahir was allegedly purposefully vague in his response and attempted to shield himself behind the Law Department given his views on the status of

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[670] Respondent's Post-Hearing Brief, ¶ 101 *referring to* Claimant's Rejoinder, ¶ 389 *and* Draft Decision, ¶¶ 325-328.
[671] Respondent's Post-Hearing Brief, ¶¶ 104-111.
[672] Respondent's Post-Hearing Brief, ¶ 105.
[673] Respondent's Reply, ¶ 213; Respondent's Post-Hearing Brief, ¶¶ 106-107.
[674] Respondent's Reply, ¶ 213.
[675] Respondent's Post-Hearing Brief, ¶ 105 *referring to* **Exhibit CE-12**, Article 5.1.1(c).
[676] Respondent's Post-Hearing Brief, ¶ 107 *referring to* Tahir II, ¶ 21, Respondent's Reply, ¶ 215 *and* Ex RE-256, BDA File Note dated 13 April 2000.
[677] Respondent's Reply, ¶ 214 *referring to* Tahir II, ¶ 22 *and* Farooq II, ¶ 26.

the work.[678] Respondent described this file note as "*incriminating*" since Mr. Tahir himself confirmed that "*I wanted the shelter of the law so I would not have to take – carry the responsibility of confirmation on my shoulders.*"[679] Claimant's suggestion that Mr. Baloch, as Mr. Tahir's superior in fact decided to reject his suggestion to consult the Law Department and confirm the certification is perceived as questionable by Respondent given Mr. Tahir's evidence that this was not a decision for Mr. Baloch to make.[680]

625. On 14 April 2000, Respondent maintains that Mr. Baloch signed off on the certification letter, which was countersigned by Mr. Farooq on the same day (despite his knowledge that work had not been completed and that MMDD and Law Department input had not been received).[681] Pakistan maintains that Mr. Burq, having said to Mr. Iqbal when he received his bribe of PAK Rs. 500,000 that he would "*see how the BDA could sign the letter,*" approved it on the same day.[682]

626. Respondent submits that theses anomalies which culminated in the certification within just three days of the letter, without involving scrutiny from any department outside the BDA, nor requesting evidence that the activities had in fact been completed, cannot be ignored. Respondent maintains that the only plausible explanation for the series of events is that it was motivated by corruption, which, Respondent alleges, direct witness evidence confirms.

627. To the contrary, Respondent questions the reliability of Claimant's witnesses. Respondent submits that Mr. Hargreaves and Mr. Pierce's respective testimonies fell apart in cross-examination, but also, the latter's replacement from December 1998 (Mr. Skrzeczynski) provides no concrete evidence to substantiate his opinion that Stage Two activities were complete.[683]

ii. Summary of Claimant's Position

628. Claimant argues that Respondent has failed to establish any of its allegations in relation to the certification.[684] As a preliminary issue, Claimant highlights that the main bribery allegation centers on the alleged payment from Mr. Iqbal (on Mr. Arndt's instruction) to

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[678] Respondent's Post-Hearing Brief, ¶ 107 *referring to* Respondent's Reply, ¶ 215 *and* Tahir II, ¶ 22(b).
[679] Respondent's Post-Hearing Brief, ¶¶ 108-109; Transcript (Day 2), p. 504 lines 6-9 *and* Tahir II, ¶ 22(c).
[680] Respondent's Post-Hearing Brief, ¶ 110.
[681] Respondent's Reply, ¶ 215.
[682] Respondent's Post-Hearing Brief, ¶ 107 *referring to* Iqbal, ¶ 27.
[683] Respondent's Post-Hearing Brief, ¶ 102.
[684] Claimant's Opposition, ¶¶ 178–181; Claimant's Rejoinder, ¶¶ 381–391; Claimant's Post-Hearing Brief, ¶ 96 *referring to* Transcript (Day 1), p. 266 line 4 to p. 273 line 7.

Mr. Burq in April 2000. Claimant maintains that at this time Mr. Arndt was simply not delivering cash envelopes for his former employer.[685]

(a) The Alleged Anomalies in the Certification Process

629. Claimant perceives Respondent's allegations of anomalies within the approval process as a desperate attempt to salvage its case. Claimant argues that the claims lack merit given that Respondent mischaracterizes the April 2000 certification letter – it was provided as Mincor came into the project and therefore tied into wider discussions on the status of exploration work.[686]

630. Moreover, Claimant argues the supposed anomalies in no way detracted from the legitimacy of BHP's Stage Two activities.[687] Claimant emphasizes that TCC witness Mr. Skrzeczynski testified that the speed of Balochistan's approval of the certification was nothing out of the ordinary given that it was a culmination of a series of meetings and communications.[688] Claimant further notes that Mr. Skrzeczynski denied that BHP's letter requesting confirmation required extensive supporting documentation because he would have explained the matter in meetings with any relevant official present.[689] Claimant emphasizes the frank and open testimony of Mr. Skrzeczynski and suggests that this exemplified the contrasting credibility of TCC's witnesses who emphatically denied any involvement in corruption, and those presented by Respondent.[690]

(b) Stage Two Activities Were Complete on Time

631. Furthermore, Claimant argues that, being unable to establish any corruption, Respondent tries to meet its burden by questioning the validity of BHP's Stage Two activities.[691] Claimant also highlights that even if Respondent were able to raise doubts as to the completion of these activities, this would be insufficient to establish that an underlying act of corruption actually occurred.[692]

632. Claimant argues that through an analysis of the witness testimony as well as documentary evidence (including periodic reports, various correspondence, the content of the Operating Meetings and the Information Memorandum which specifically detailed the extent of these activities), it is clear that contrary to Respondent's allegations, BHP had

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[685] Claimant's Post-Hearing Brief, ¶ 97.
[686] Claimant's Post-Hearing Brief, ¶ 98.
[687] Claimant's Post-Hearing Brief, ¶ 99.
[688] Claimant's Post-Hearing Brief, ¶ 99 *referring to* Transcript (Day 8), p. 2150 lines 10-15.
[689] Claimant's Post-Hearing Brief, ¶ 99 *referring to* Transcript (Day 8), p. 2142 lines 12-21 *and* p. 2152 line 9 to p. 2153 line 12.
[690] Claimant's Post-Hearing Brief, ¶¶ 98-100.
[691] Claimant's Post-Hearing Brief, ¶ 101.
[692] Claimant's Post-Hearing Brief, ¶ 101.

conducted the Exploration Program activities in accordance with the requirements of the CHEJVA.[693] BHP's exploration activities were allegedly "*undisputable facts.*"[694]

633. Claimant maintains that despite both parties agreeing at the time that the exploration work was satisfactory through the Addendum in which the GOB "*accepted the work* performed *by…BHPM up until the date of this amendment as valid performance,*" Claimant argues that Respondent seeks to go back and question the legitimacy of this work.[695] Claimant relies on the technical expertise and testimonies of both Mr. Skrzeczynski and Mr. Pierce who both confirmed that BHP had completed the work required to acknowledging the 75% interest.[696] Claimant submits that Mr. Skrzeczynski further explained that "*the officials at the time . . . also agreed that—with my point of view, that adequate work had been done, therefore, they were comfortable to sign the letter acknowledging a 75 percent interest.*"[697]

634. Claimant emphasizes the fact that Respondent's own witnesses had no answer to these undisputed facts and in particular focuses on the testimony of Mr. Iqbal who at one point conceded that he lacked expertise to opine of the completion of both Stage One and Stage Two activities and that he was not aware of contemporaneous documents showing progress of exploration works after July 1998.[698] Additionally, Claimant highlights that Mr. Tahir, who was responsible for monitoring the progress of BHP's work on the project, raised no technical challenges when asked whether Stage One and Two activities had been completed.[699]

(c) Respondent's Misplaced Challenge on BHP's Entitlement to Earn Its Interest

635. Claimant argues that, given that Respondent cannot deny the obvious completion of Stage Two activities, it then attempts to challenge BHP's entitlement to earn its 75% interest. It allegedly does this through relying on language in the Information Memorandum to claim that testing was not complete on the Prospecting Licenses, reading the recitals in the Addendum out of context and lastly, imposing on BHP a requirement to complete an

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[693] Claimant's Rejoinder, ¶ 383; Claimant's Post-Hearing Brief, ¶¶ 101-102.
[694] Claimant's Post-Hearing Brief, ¶ 102 *referring to* Transcript (Day 8), p. 2144 line 22 to p. 2145 line 7.
[695] Claimant's Post-Hearing Brief, ¶ 103 *referring to* **Exhibit CE-2**, Article 2.4.
[696] Claimant's Post-Hearing Brief, ¶ 103 *referring to* Transcript (Day 8), p. 2144 lines 7-15 *and* p. 2016 line 17 to p. 2017 line 1.
[697] Claimant's Post-Hearing Brief, ¶ 103 *referring to* Transcript (Day 8), p. 2144 lines 7–15.
[698] Claimant's Post-Hearing Brief, ¶ 104 *referring to* Transcript (Day 2), p. 365 line 15 to p. 367 line 3 *and* p. 367 line 18 to p. 369 line 9.
[699] Claimant's Post-Hearing Brief, ¶ 104 *referring to* **Exhibit RE-256**, p. 3.

aeromagnetic survey, all three facts which Mr. Pierce refuted at the December 2016 Hearing.[700]

636. Firstly, Claimant submits that although the Information Memorandum was a document designed to attract other geologists to the project by indicating that there was still "*open-ended potential*," Mr. Pierce explained that the BHP geologists had indeed determined that the company had fulfilled the Stage Two requirements.[701]

637. Secondly, Claimant alleges that Respondent construes the Addendum's recitals completely out of context to advance the argument that BHP failed to complete Stage Two activities. Respondent alleges that this preambular phrase (in which BHP acknowledged that Stage One activities had been completed, but Prospecting Licences were obtained in order to enable BHP to conduct Stage Two activities) was inconsistent with BHP's stalled operations by 1999 to 2000. Claimant however maintains that there is no such inconsistency given that the negotiating history of the Addendum demonstrates that this text remained the same from July 1998 and was entirely consistent with other contemporaneous documents at the time and was a remnant from earlier negotiations.[702]

638. Thirdly, Claimant alleges that Respondent disregards the straightforward obligations of the CHEJVA and attempts to impose an obligation on BHP to complete a Feasibility Study and an aeromagnetic survey.[703] Claimant maintains that such an obligation cannot be said to exist based on a plain reading of the Addendum and an understanding of both the intent and purpose behind the clause. Claimant submits that although BHP had initially planned to undertake an aeromagnetic survey, Mr. Pierce confirmed in his testimony that it cannot be ignored that the CHEJVA (as amended by the Addendum) did not prescribe such a survey – it simply gave BHP the discretion to determine and to use appropriate methods to carry out Stage Two activities.[704]

639. Moreover, Claimant deems Respondent's interpretation of the CHEJVA exploration obligations, namely that BHP was required to conduct the exploration works for the entire Exploration Area covering 13,000 square kilometers and that because the agreed exploration work for certain areas within the original Exploration Area was not yet finished, "*Stage Two was not complete*" when Mincor became involved, to be

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[700] Claimant's Post-Hearing Brief, ¶ 105 *referring to* Transcript (Day 8), p. 2047 lines 19-21 *and* Respondent's Reply, ¶¶ 200-201, 207-208.
[701] Claimant's Post-Hearing Brief, ¶ 106 *referring to* Transcript (Day 8), p. 2047 line 22 to p. 2048 line 8 *and* p. 2050 lines 7-9.
[702] Claimant's Rejoinder, ¶ 388 *referring to* Pierce, ¶¶ 99-100, **Exhibits CE-501** *and* **CE-503**; Claimant's Post-Hearing Brief, ¶ 106 *referring to* Transcript (Day 8), p. 2064 lines 11–17, **Exhibits CE-504**, Recital C *and* **CE-2**, Recital C.
[703] Claimant's Rejoinder, ¶¶ 386-387.
[704] Claimant's Rejoinder, ¶ 387 *referring to* **Exhibit CE-1**, Schedule A; Claimant's Post-Hearing Brief, ¶ 106 *referring to* Transcript (Day 8), p. 2078 line 17 to p. 2079 line 1.

"*commercially senseless.*"[705] Claimant submits that the framework of the agreement rested on BHP identifying those anomalies which justified further work, therefore as Mr. Moore testified, "[y]*ou couldn't possibly expect any exploration company to test every single target, because targets range in quality from strong, high quality targets down to very vague.*"[706]

640. Claimant further refers to Mr. Moore's explanation that ongoing exploration work after January 2000 does not suggest that Stage Two was not complete and therefore the interest was not earnt. As has been acknowledged previously, Claimant had significantly expanded the scope of the exploration program.[707]

641. Finally, Claimant specifically questions the documentary evidence used by Respondent to allege that exploration works continued in the period after January 2000.[708]

642. Claimant specifically argues that, of all the documents cited, only the new Prospecting License granted in February 2000 could serve to affirmatively rebut BHP's position that it had completed Stage Two activities. Claimant submits, however, that despite BHP's efforts from 1997, the DMD did not grant the requisite approvals to enable BHP to obtain this license by 20 January 2000.[709]

643. Claimant further submits that Respondent's reliance on the timing of two license renewals on 19 November 1998 is also misplaced.[710] Claimant asserts that in reality on 5 July 1999, BHP relinquished Prospecting License PL-2 and thus only kept one license.[711] Claimant maintains that the fact that BHP had decided to relinquish nine licenses strongly suggests that it had completed Stage Two activities for those areas and the findings did not support a decision to conduct Pre-Feasibility work.

iii. Tribunal's Analysis

644. At the outset of its analysis of Respondent's allegations of corruption in the context of the certification of BHP's 75% interest in the Joint Venture in April 2000, the Tribunal recalls that as of 1998, BHP intended to farm out its interest in the Reko Diq Project to a third party. After negotiations with Iscor had failed, the only interested party in 1999 and early 2000 was Mincor with which BHP had agreed on certain conditions precedent,

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[705] Claimant's Post-Hearing Brief, ¶¶ 107-108 referring to Transcript (Day 8), p. 2014 line 21 to p. 2016 line 4, Transcript (Day 9), p. 2257 line 16 to p. 2260 line 10 *and* p. 2255 line 2 to p. 2257 line 19.
[706] Claimant's Post-Hearing Brief, ¶ 108 *referring to* Transcript (Day 9), p. 2258 line 16 to p. 2259 line 6.
[707] Claimant's Post-Hearing Brief, ¶ 108 *referring to* Draft Decision, ¶ 227 *and* Transcript (Day 9), p. 2257 line 16 to p. 2259 line 6.
[708] Claimant's Rejoinder, ¶ 389 *referring to* Respondent's Reply, ¶¶ 205-208.
[709] Claimant's Rejoinder, ¶ 389.
[710] Claimant's Rejoinder, ¶ 390 *referring to* Respondent's Reply, ¶ 206.
[711] Claimant's Rejoinder, ¶ 390 *referring to* **Exhibit RE-58(VI)(al)**, p. 240.

which included, *inter alia*, a "*confirmation that BHP earned its 75% interest in the joint venture on completion of Stage 2 and selection 10 PLs*."[712] While Article 5.1 of the Option Agreement between BHP and Mincor, which set out the conditions precedent, contemplated that the confirmation would form part of the addendum to the CHEJVA, the confirmation was ultimately provided by the BDA in the form of a separate letter dated 14 April 2000, which was signed by. Mr. Habibullah Baloch six weeks after the signing of the 2000 Addendum. The confirmation letter made reference to BHP's letter of 11 April 2000 to which BHP had attached, *inter alia*, a draft letter seeking confirmation for the Governor of Balichstan that BHP had earned its 75% interest in the Chagai Hills Joint Venture, signed by Mr. Skrzeczynski,[713] and then provided:

> "*It is confirmed that M/s BHP Minerals International Exploration Inc. have earned secenty-five percent (75%) Percentage Interest in the above Joint Venture as defined in the JV Agreement pursuant to clause 3.2*."[714]

645. While Claimant initially took the position that the certification of BHP's 75% in the Joint Venture was a "*collateral matter*" that did not form part of the foundational elements of its investment,[715] it later included its submissions on the 75% interest in its discussion of what it referred to as its "*foundational rights*."[716] Taking into account that the confirmation of the 75% interest was one of the conditions precedent for the farm out of BHP's interest to Mincor and also taking into account the Tribunal's previous finding in its Draft Decision that Claimant's 75% interest in the CHEJVA and the Joint Venture that was thereby established was one of the two primary pillars of its investment,[717] the Tribunal agrees that Respondent's allegation of corruption regarding the certification of the 75% interest pertains to a crucial element of Claimant's investment.

646. Respondent claims that the following bribes were paid "*to obtain a 75% interest in the CHEJVA, despite BHP not having completed the steps required to earn that interest*":[718]

i. PAK Rs. 500,000 by Mr. Iqbal – out of funds provided by Mr. Arndt – to the Chairman of the BDA, Mr. Burq, in mid-April 2000 "*to approve the issue of the 75% interest letter by the BDA to BHP*";

ii. PAK Rs. 100,000 by Mr. Burq – out of the amount paid to him by Mr. Iqbal – in mid-April 2000 "*to reward him for taking steps to obtain the 75% interest letter for BHP despited the required works not having been completed including directing Mr Baloch (General Manager (Mines) at the BDA) to issue the letter*."

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[712] **Exhibit CE-12**, Article 5.1.1 lit. c.
[713] **Exhibit RE-255**.
[714] **Exhibit CE-193**.
[715] *Cf.* Claimant's Opposition, ¶¶ 167, 178-181.
[716] *Cf.* Claimant's Rejoinder, ¶¶ 343, 381-391; Claimant's Post-Hearing Brief, ¶¶ 53-65, 96-108.
[717] Draft Decision, ¶ 629, *maintained in* Decision on Jurisdiction and Liability, ¶ 632.
[718] Respondent's Post-Hearing Brief, ¶ 72; Respondent's Reply, ¶ 188.

iii. "*periodic payments to Mr Farooq*" to ensure, together with the payment of PAK Rs. 100,000, that Mr. Farooq "*did TCC's bidding, including by directing Mr Habibullah Baloch to issue the 75% interest letter to BHP*."

647. In support of these allegations, Respondent has presented witness testimony from Mr. Farooq, Mr. Iqbal and Mr. Tahir, which will be addressed in further detail below.

648. According to Respondent, the alleged bribes achieved the result that BHP was able to obtain a certification of its 75% interest in the Joint Venture even though it had not completed the work necessary to earn such interest under Clause 3.2 of the CHEJVA.[719] In that regard, the Parties are in dispute as to: (i) the scope of works that had to be completed under Clause 3.2 of the CHEJVA; and (ii) whether BHP had in fact completed that required scope of works within the six-year period provided by Clause 3.2. In addition, there is a dispute as to whether, even if it was established that BHP had failed to meet the requirements of Clause 3.2, this would be sufficient evidence to draw the conclusion that the certification was procured by corruption.

649. As to the direct evidence of corruption, *i.e*, the witness testimony of Mr. Farooq, Mr. Iqbal and Mr. Tahir, the Tribunal recalls its finding above that the emphasis Respondent and its witnesses have placed on the role that Mr. Arndt allegedly played in negotiating and providing the funds for the bribery payment to Mr. Burq renders the question of Mr. Arndt's role in the alleged corruption a decisive element in the Tribunal's evaluation of Respondent's witness evidence on the respective payments. This consideration equally applies to the alleged payment made to Mr. Burq as well as to his alleged passing on of a share of this payment to Mr. Farooq in relation to the certification of the 75% interest. Nevertheless, the Tribunal will review the witness testimony presented by Respondent on this matter in detail.

650. In this context, Mr. Farooq testified in his first witness statement:

> "*Soon after the Addendum was signed, BHP asked Mr Burq and me to give a written undertaking on the letterhead of the Governor of Balochistan that it had earned its 75% ownership rights of the Chagai Hill Joint Venture Agreement (**CHEJVA**). I knew that the CHEJVA required certain exploration work to be done by BHP in certain time frames, and that this had not been completed by BHP. This was also highlighted to me by the then General Manager, Mines, BDA, Habibullah Baloch and Mr Tahir. Instead of making any observations, forwarding it to Law Department, or initiating a summary for the approval of the Governor, I asked Mr Baloch to issue a letter stating that BHP was entitled to a 75% interest in the joint venture as per the CHEJVA. He did so and BHP's interest was certified. In return for ensuring this was done, Mr Iqbal paid Mr Burq and I Rs. 500,000, of which I received*

[719] Respondent's Post-Hearing Brief, ¶ 74.

> *Rs. 100,000. The money was paid to Mr Burq, in my presence in his office, by Mr Iqbal*."[720]

651. Mr. Iqbal, whose witness statement was submitted by Respondent together with its Reply, testified with regard to the alleged payment:

> "*I attended a meeting in Quetta with Mr Schloderer, Mr Skrezecynski, Mr Burq and Mr Farooq, where a draft letter regarding the certification of BHP's interest was handed over to the BDA (this was the letter that was later signed by the BDA). I recall that Mr Burq referred the issue to his technical team – Muhammad Tahir and Habibullah Baloch – who were of the opinion that Stage Two activities had not been completed. Following this meeting, Mr Farooq, Mr Arndt and I met for dinner at the Serena Hotel, Quetta, where Mr Farooq explained that he had a problem as his subordinates at the BDA had said that Stage Two had not been completed and he could not bypass their views. He also said that the certification could not be provided on the Governor's letterhead, as was being asked by BHP.*
>
> *Shortly after our meeting with Mr Farooq, Mr Arndt gave me a sealed envelope and told me to deliver it to Mr Burq. I understood what was inside the envelope. I gave the envelope to Mr Burq in front of Mr Farooq in Mr Burq's office. The Chairman counted the money in front of me, which came to 500,000 Rupees. He said that he would see how the BDA could sign the letter. The letter was signed shortly after*."[721]

652. In his second witness statement, which was submitted together with Mr. Iqbal's witness statement, Mr. Farooq gave the following description of the alleged payment:

> "… [D]*espite what I knew to be the truth, I told Mr Baloch and Mr Tahir to certify BHP's interest and I threatened Mr Baloch that if he did not agree to BHP's request I would send him back to his old employer, Saindak Metals. I discussed BHP's request with various representatives of BHP, including in a meeting in Mr Burq's office where we received the draft letters regarding BHP's 75% interest and the GOB's pre-emption rights and in a dinner meeting at the Serena Hotel where I told Mr Arndt and Mr Iqbal that Mr Burq would need to be paid to give the certification.*
>
> *Once BHP had Mr Burq's approval for certification of BHP's 75% interest, following the payment of Rs. 500,000 to Mr Burq, I instructed Mr Baloch to issue the letter as per the draft provided by BHP, without further approval by the Governor or CM or referring the matter to the Mineral and Law Departments. During the preparation of this statement, I was shown the BDA case file note that was produced at the time and which I signed on page 4. I can confirm that both Mr Tahir and Mr Baloch were telling me at the time that BHP had not completed the required work and that the input of the*

[720] Farooq I, ¶ 9.
[721] Iqbal, ¶¶ 26-27.

> *MMDD and the Law Department should be taken. This never happened and the file note was signed-off under my instruction.*"[722]

653. For the reasons set out in detail in the context of the 2000 Addendum above, the Tribunal is convinced that Mr. Arndt was not involved in any illegitimate payments to Mr. Burq in early 2000, neither to secure the 2000 Addendum nor to obtain the 75% interest certification, as alleged by Respondent and testified by its witnesses, Mr. Iqbal and Mr. Farooq. In the Tribunal's view, the absence of any additional evidence supporting this allegation and, in fact, the conclusion that the contemporaneous evidence in the record strongly indicates the contrary, *i.e.*, that Mr. Arndt was not involved in any capacity with BHP at the time, is again a decisive element in the Tribunal's evaluation of the evidence of corruption regarding the certification of the 75% interest. As the Tribunal is convinced that Mr. Arndt did not negotiate or provide the funds for any illegitimate payment to Mr. Burq, it likewise rejects the claim that Mr. Iqbal delivered the alleged amount to Mr. Burq in order to obtain the certification of BHP's 75% interest.

654. Nevertheless, the Tribunal will again also review the circumstantial evidence adduced by Respondent and assess whether such evidence may in itself justify drawing the conclusion that certain acts of corruption contributed to BHP's obtaining the 75% interest certification. In this regard, the Tribunal notes that Mr. Farooq's testimony regarding the concerns expressed by Mr. Baloch and Mr. Tahir regarding the completion of the so-called Stage Two activities is confirmed by the witness testimony of Mr. Tahir, who testified in his first witness statement:

> "*In April 2000, BHP sought certification from the Governor of Balochistan that it had earned its 75% interest in the CHEJVA. BHP provided a draft letter to this effect. I was asked by Mr Muhammad Farooq to expedite the processing of BHP's request. Part of my job description was to review the progress of the joint venture partner of BDA under the CHEJVA.*
>
> *Given the complexity of the CHEJVA, and my own doubts as to whether BHP had in fact met their exploration requirements, I suggested that we should seek the advice of the Law Department on whether to provide the requested certification or not. Mr Farooq refused to take this advice, and told me that the certification must be issued. Feeling uncomfortable with what Mr Farooq had asked me to do, I raised the issue with my immediate supervisor, the General Manager of Mines, Mr Habibullah Badini. Mr Badini processed the letter as requested by BHP, despite the fact that there was significant doubt as to whether it had earned the interest. This reinforced my belief that Mr Farooq was being paid to advance BHP's interests.*"[723]

655. In his second witness statement, Mr. Tahir added that when they received BHP's request on 11 April 2000, "*Mr Farooq became very agitated and said that it had to be done and*

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[722] Farooq II, ¶¶ 26-27.
[723] Tahir I, ¶¶ 8-9.

done quickly." He added that "*Mr Farooq continued to insist that we confirm that the stage one and two activities were complete and issue a certification letter as per the draft forwarded by BHP. Mr Farooq shouted at us, telling us not to question him on the matter and that we should not cause him any problems if we wanted to continue working at the BDA*."[724]

656. Mr. Tahir further testified that, contrary to Claimant's submission, "*BHP had not achieved the exploration requirements necessary to gain its 75% interest under the CHEJVA when it sought certification on 11 April 2000*."[725] Mr. Tahir further considered it "*highly irregular*" that the certification letter was issued by the BDA three days after receiving it and that it was not approved by the Governor.[726]

657. The Tribunal notes that there are two different aspects to be assessed in this regard: (i) whether the activites that needed to be completed pursuant to Clause 3.2 of the CHEJVA in order for BHP to earn its 75% interest were in fact completed; and (ii) whether, taking into account the result of the assessment under (i) but also the other surrounding circumstances, the issuance of the certification letter by the Chairman of the BDA within three days of receiving BHP's request consitutes sufficient evidence to infer that such letter was obtained by an act of corruption.

(a) The Fulfillment of the Contractual Requirements for Earning BHP's 75% Interest

658. First, the Tribunal will assess the evidence submitted by both Parties in relation to the question of whether the requirements of Clause 3.2 of the CHEJVA for earning BHP's 75% interest in the CHEJVA had been met when the contractually stipulated six-year period expired. At the outset, the Tribunal recalls that the Parties are in dispute as to whether the 2000 Addendum introduced substantive (or only linguistic) changes into Clause 3.2 of the CHEJVA, in particular whether it retrospectively eliminated the requirement of completing a feasibility study within the six-year period provided in Clause 3.2 (or only clarified its non-existence). This dispute has been addressed in the Tribunal's analysis of the 2000 Addendum above. However, while Respondent considers it "*clearly irregular and improper*" that the 2000 Addendum, which was concluded after the expiry of the six-year period, included an amendment to the requirements for BHP to fulfill in order to earn its 75% interest,[727] it does not argue that any of the parties involved raised this as an issue at the time or considered it necessary that a feasibility study had to be completed in order to issue the certification letter.

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[724] Tahir II, ¶¶ 20, 22.
[725] Tahir II, ¶ 24.
[726] Tahir II, ¶ 25.
[727] Respondent's Reply, ¶ 195.

659. In their further submissions, the Parties focused on the question whether the requirements as set out in the amended Clause 3.2 were fulfilled. Consequently, and taking into account that the certification was issued after the Addendum was signed and thus the new Clause 3.2 had come into effect, the Tribunal does not consider it necessary to examine the changes made to Clause 3.2 in any detail but will also limit its assessment to the amended provision as introduced in Article 5 of the 2000 Addendum. The new Clause 3.2 provides:

> "*BHPM shall earn a seventy five percent (75%) Percentage Interest in the Joint Venture by conducting within six (6) years of the Commencement Date, at its own expense (subject to Clause 7.2) the Stage One Activities and Stage Two Activities and acquiring up to a maximum of ten (10) Prospecting Licences (as finally determined by BHPM) in accordance with Clause 5.4 of the JVA. If the Operating Committee resolves that a Feasibility Study should be commissioned pursuant to Clause 11.2 BHPM shall complete such Feasibility Study at its sole cost within the time allowed by the Operating Committee for undertaking such Feasibility Study.*"[728]

660. There is common ground between the Parties that the Commencement Date referred to in Clause 3.2 was 20 January 1994 and thus that the six-year period for completing the activities ended on 20 January 2000.[729] Respondent further does not dispute that, by 20 January 2000, BHP had completed Stage One activities as described in Schedule A to the CHEJVA.[730] According to Mr. Pierce, Stage One activities had been completed "*well before 1998*" when he joined the Reko Diq Project.[731] Mr. Farooq confirmed in his second witness statement that the completion of Stage One activities had been agreed in the 2000 Addendum.[732] Finally, there is no dispute between the Parties – and Respondent explicitly recognizes – that BHP had acquired ten Prospecting Licenses before 20 January 2000.[733]

661. Consequently, the debate focused on the question whether BHP had completed Stage Two activities, which are also described in Schedule A to the CHEJVA:

> "*If any anomalous gold areas are established on the first pass sampling programme then detailed sampling of those areas would be carried out. This would initially involve repeat BLEG sampling (to confirm the anomaly) at a closer spacing, followed by any other geochemical techniques felt to be necessary to fully define the source of the anomaly/ies (including possible soil, ridge-and-spur and rock chip sampling). Small scale mapping may be necessary. Once the anomaly is more precisely defined the programme would be extended to establish the size and nature of the associated mineralisation*

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[728] **Exhibit CE-2**, Article 5 amending Clause 3.2 of the CHEJVA.
[729] Claimant's Opposition, ¶ 179; Respondent's Reply, ¶ 192 (with note 630).
[730] *Cf*. **Exhibit CE-1**, Schedule A.
[731] Pierce, ¶ 82.
[732] Farooq II, ¶ 26 *referring to* **Exhibit CE-2**, Recital C.
[733] Respondent's Reply, ¶ 192 *referring to* **Exhibit C-2**, Recital C.

> *by any techniques considered appropriate, including the possible use of geophysics, drilling, geochemistry and down-hole geophysics.*"[734]

662. In this regard, Mr. Iqbal testified:

> "*A month after the Addendum was signed the BDA signed a letter dated 14 April 2000 regarding BHP's earning of interest in the Joint Venture. At the time, I knew that BHP had virtually stopped exploration work for at least two years … and that in the Addendum signed just a month before, BHP had acknowledged that whilst Stage One was complete, Prospecting Licences were obtained to enable BHP to undertake Stage Two activities. In 1999, we had stopped doing almost all technical work on the project.*
>
> *To my knowledge, as Finance Manager at that time, no studies or firms were engaged, commissioned or paid to undertake a pre-feasibility study inside Pakistan. I was generally aware of the work that was going on, as I was in charge of putting together reports to the BDA, which included a technical section. I had general discussions with Mr Schloderer and others regarding the status and phase of the work throughout this period. For example, I knew that the aerial survey was a big part of Stage Two, and we were all very excited about this study, but from 1997 onwards it was postponed. To my knowledge, it did not take place before the Addendum was signed. Late in 1999, Mr Schloderer provided me with a thin document that was described as a pre-feasibility study, which he asked me to submit to the BDA. Before this date, I had not heard of this document and I do not believe that the team in Pakistan had anything to do with preparing it.*"[735]

663. While Mr. Farooq did not comment on the (lack of) completion of Stage Two activities in his first witness statement, he testified in his second witness statement:

> "*I received a letter from John Schloderer on 6 October 1999, which TCC refers to in its Opposition. Mr Schloderer said in the letter that Stage One and Stage Two activities had been completed, although he also said that further exploration work was required. I do not think I replied to this letter, although I do remember asking Mr Arndt why this letter had been written and saying that the matter needed to be discussed in detail at an OC meeting. No report or study was attached to the letter to justify this statement.*
>
> *I remember that a Pre-Feasibility Study (Stage Three work) was sent to the BDA, as is mentioned in Mr Schloderer's letter. This document consisted of some tables and maps without any mining, financial or development plans, and it was not taken seriously by the BDA. This document was also restricted to the Reko Diq Prospecting Licence and did not cover the larger CHEJVA area. I had raised the question of the Pre-Feasibility Study taking place during the 20 March 1999 OC meeting, where it was decided that the dates for a Pre- Feasibility Study was a matter for the OC; I do not remember a*

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[734] **Exhibit CE-1**, Schedule A.
[735] Iqbal, ¶¶ 24-25.

> *further OC meeting in 1999 where approval for commencing a Pre-Feasibility Study was discussed or given.*
>
> *So far as I am aware, the activities required to complete Stage Two had not been completed by 14 April 2000. BHP had been doing little work during 1998 and 1999 and my colleagues, Mr Habibullah Baloch (General Manager (Mines)) and Mr Muhammad Tahir (Additional General Manager (Mines)), expressed concern to me that Stage Two activities were incomplete. In fact, at the time that the 2000 Addendum was signed a few months later, we (the BDA and BHP) only agreed to state that Stage One activities had been completed.*"[736]

664. As quoted above in full, Mr. Tahir testified in his first witness statement that "*there was significant doubt as to whether [BHP] had earned the interest*."[737] In his second witness statement, Mr. Tahir explained:

> "*I am a geologist by profession and my immediate boss Mr Baloch was a mining engineer. We were the only two technical officers in the Mines Division of the BDA and were therefore solely responsible for monitoring progress. Under the CHEJVA, BHP had to complete certain* 'stage one' *and* 'stage two' *activities before it was entitled to earn a 75% interest in the joint venture. This was a technical matter and therefore Mr Baloch and I were also responsible for certifying whether the stage one and stage two activities were complete. When we received the letter from BHP on 11 April 2000, both of us knew that BHP had not completed these activities and that it had in fact found another party to farm out its exploration duties and rights to.*"[738]

665. In the contemporaneous file note of the BDA, Mr. Tahir prepared a note on 13 April 2000 in which he did not explicitly state whether or not Stage Two activities were in fact completed but rather suggested to obtain advice on the interrelation of the relevant legal provisions of the CHEJVA and the Addendum before confirming to BHP that it had earned its 75% interest in the CHEJVA.[739] In his note of 14 April 2000, Mr. Baloch then stated in relevant part: "*As AGM Mines confirmed … that BHP has completed the exploration works as per agreement during six years exploration programme, if approved the* [confirmation letter] *will be issued to BHP*."[740] Both Mr. Farooq and Mr. Tahir confirmed that Mr. Baloch's remarks were approved by the signatures of Mr. Farooq and Mr. Burq on the same date.[741]

666. Claimant takes the position that Stage Two activities were completed "*well in advance of the contractually determined date … for the ten areas over which BHP held Prospecting*

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[736] Farooq II, ¶¶ 24-26.
[737] Tahir I, ¶ 9.
[738] Tahir II, ¶ 21.
[739] **Exhibit RE-256**, p. 3.
[740] **Exhibit RE-256**, p. 4.
[741] Tahir II, ¶ 22 lit. d; Farooq II, ¶ 27.

Licenses" and that BHP had thus fulfilled its obligation to earn its 75% interest by 20 Jaunary 2000.[742] In this regard, Claimant relies in particular on the witness testimony of Mr. Pierce and Mr. Skrzeczynski.

667. Mr. Pierce testified in his witness statement that he had "*no doubt in* [his] *mind that BHP fulfilled its obligations well before 2000 and was entitled to its 75% interest*."[743] As to the disputed Stage Two activities, Mr. Pierce stated:

> "[B]*y March 1998, BHP had already conducted significant exploration activities, nearly completed a Concept Study, and prepared an Information Memorandum for prospective joint venture partners. The Information Memorandum set out in detail the Stage Two works performed by BHP. It was clear from this Memorandum that BHP had completed Stage One and Stage Two works for the ten prospecting licenses BHP held at the time*."[744]

668. Mr. Pierce made specific reference to section 9 of the Information Memorandum, which "*establishes that Stage Two activities were also completed … for each of the ten prospecting license areas*." According to Mr. Pierce, "[i]*t is clear that Stage Two does not require that all areas must be drill tested provided that BHP employed other appropriate techniques*." He further explained that "*BHP used various techniques within the scope contemplated by the Exploration Program to satisfy Stage Two activities*" and added that "[w]*hile an aeromagnetic survey would have been helpful, especially for the western extension area, it was not required as part of Stage Two activities in the original exploration area*."[745] Mr. Pierce further testified:

> "*Even though BHP had completed Stage One and Two activities for the ten PLs that it held at the time, in some correspondence we expressed to the BDA that Stage Two activities were* 'well advanced,' *which could suggest that they were not yet complete. The reason for that, as we explained several times to the BDA and the GOB, was that the results from Reko Diq indicated that there were potentially promising resources to the west of Reko Diq. BHP was keen to conduct additional testing if the BDA and GOB would agree to expand the scope of exploration and we hoped to swap out our existing prospecting licenses for new licenses over the expanded areas. If we were able to expand the Joint Venture's exploration activities to the west of Reko Diq and obtained new prospecting licenses, there would be additional Stage One and Stage Two works required for these new areas. However, as I mentioned earlier, the GOB did not respond, in a timely manner, to BHP's proposal. Since that left BHP with only the original ten PLs, in which BHP had already completed Stage One and Stage Two activities, BHP had earned its 75% interest*."[746]

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[742] Claimant's Rejoinder, ¶¶ 383, 391.
[743] Pierce, ¶ 75.
[744] Pierce, ¶ 85.
[745] Pierce, ¶¶ 87-88, 95.
[746] Pierce, ¶ 89.

669. The Tribunal is aware that the Parties are in dispute as to whether Stage Two activities had to be completed exclusively within the area covered by the ten Prospecting Licenses that BHP held as of 20 January 2000, as argued by Claimant,[747] or whether this requirement applied to "*any anomalous areas identified within the entire Exploration Area*" as alleged by Respondent.[748] During the hearing, Mr. Pierce first confirmed that Stage One activities applied to the full Exploration Area, which spanned 13,000 square kilometers. When asked whether "*Stage Two involves looking at all of those anomalous areas, which were identified under Stage One and doing more detailed sampling of those anomalous areas,*" he answered in the affirmative.[749]

670. Claimant argues that Respondent's interpretation of BHP's exploration obligations under the CHEJVA would "*contravene industry practice and be commercially absurd*."[750] In support of this argument, it relies on the testimony of Mr. Moore. Having confirmed that the Alliance Agreement between BHP and Mincor concluded in October 2002, concerned certain exploration activities for areas within the original Exploration Area and upon Respondent's suggestion that this meant that Stage Two activities had not been completed when Mincor became involved in the project in 2000, Mr. Moore answered:

> "A. … [N]*o, I don't think it does. You would carry out this sort of program on every target that you came across. So, there were lots of targets. And what BHP would have done, I presume, is test the very best targets. And then there were these other targets. And an exploration is always a range of targets in lower and lower ever lower priority.*
>
> *So, in an exploration program, what you have to do is prioritize and test your best targets first. And then sometimes if they don't pan out to you, that's when you lose interest and get someone else to come in and test the other targets at no cost to yourself, which is exactly what BHP did here.*
>
> *Q. So, are you suggesting that actually it was in BHP's discretion to decide what it considered financially the most promising target, and just to do Stage Two for that, and then leave Stage Two for the other items for later?*
>
> *A. You couldn't possibly expect any exploration company to test every single target, because targets range in quality from strong, high quality targets down to very vague, you know, maybe/maybe-not-type targets.*
>
> *So, yes, the exploration company, the person spending the money, must have the discretion as to when to stop spending money. It was the interest to find something if they think that the chance of finding something now by spending yet more money on this 5th or 6th or 7th priority target. If there is no value in doing that, they must be allowed to make that decision.*[751]

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[747] Claimant's Post-Hearing Brief, ¶ 103. *See also* ¶ 107.
[748] Respondent's Post-Hearing Brief, ¶ 78.
[749] Transcript (Day 8), p. 2005 line 20 to p. 2006 line 17.
[750] Claimant's Post-Hearing Brief, ¶ 108.
[751] Transcript (Day 9), p. 2257 line 16 to 9. 2259 line 6.

671. In light of the above, the Tribunal is not convinced that the requirement to carry out Stage Two activities within "*any anomalous gold areas … established on the first pass sampling programme*" as provided in Schedule A to the CHEJVA required BHP to complete those activities over areas outside of the areas covered by its ten Prospecting Licenses in order to earn its 75% interest. The Tribunal understands that in the absence of a Prospecting License, BHP was not permitted to carry out exploration works over a certain area, which is why BHP considered to swap some of its existing licenses for new licenses within an extended area.[752] Pursuant to Clause 5.3.1 of the CHEJVA, the Joint Venture was further not permitted to hold more than ten Prospecting Licenses at the same time.[753] The Tribunal also understands that, while BHP had applied for an extension of the Exploration Area within which it then intended to apply for new Prospecting Licenses (while relinquishing some of the original ones) in late 1997, the extension was granted only in February 2000 and Claimant was still holding the ten original Prospecting Licenses (even though it had relinquished nine of them by July 1999) when the six-year period expired on 20 January 2000.[754] Consequently, the Tribunal does not consider that Clause 3.2 of the CHEJVA should be interpreted to require BHP to carry out exploration works over areas that were not covered by the ten Prospecting Licenses it held and in which it was thus not even permitted to carry out any Stage Two activities at the time.

672. However, this question does not have to be answered conclusively if, as alleged by Respondent, BHP also did not complete the Stage Two activities within the areas that were covered by its ten Prospecting Licenses. In that regard, Claimant refers to the Information Memorandum that BHP prepared in the context of its intention to farm out its interest in the Reko Diq project to a third party in March 1998. According to Claimant and Mr. Pierce, this Memorandum confirmed that BHP had already completed Stage Two activities within the ten areas covered by the Prospecting Licenses by that time.[755] Mr. Pierce further testified that section 9 of the Memorandum resulted in "*recommendations to relinquish almost all of these licenses*" – except for Reko Diq.[756]

673. As pointed out by Respondent, the language used in the Information Memorandum in fact indicates that at least for some of the Prospecting Licenses, Stage Two activities may not have been complete in early 1998.[757] Specifically, as regards Prospecting License PL-8 at Durban Chah, section 9.4 describes the works carried out and concludes that "[t]*he prospect remains inadequately tested*."[758] As for Prospecting License PL-1 at Ganshero,

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[752] *Cf.* Pierce, ¶¶ 89, 106.
[753] **Exhibit CE-1**, clause 5.3.1. *See also* **Exhibit CE-2**, Article 5 amending Clause 3.2 of the CHEJVA.
[754] *Cf.* Pierce, ¶ 92; Respondent's Post-Hearing Brief, ¶ 86.
[755] Claimant's Rejoinder, ¶ 383 and Pierce, ¶ 85 *referring to* **Exhibit CE-500**.
[756] Pierce, ¶ 87.
[757] Respondent's Post-Hearing Brief, ¶ 90.
[758] **Exhibit CE-500**, section 9.4.

section 9.5 notes that "[t]*his system has not been drill tested*."[759] Regarding Prospecting License PL-2 at Koh-I-Sultan, section 9.7 notes that "[t]*he prospect is considered to have potential for both epithermal gold and porphyry copper mineralization*."[760] Finally, as for Prospecting License PL-6 at Shah Umar, section 9.9 notes that "[t]*his prospect has been briefly followed up*" but that "*the prospect has been adequately traversed and it is recommended that this program is completed*."[761] For four other Prospecting Licenses, the respective sections concluded that these Licenses were to be relinquished.[762]

674. When pointed to the language in section 9.4 during the hearing and asked whether this suggested that further testing would be needed, Mr. Pierce testified:

> "*I think you have to realize--that this in context. This was meant as--to attract other geologists to this Project, and to leave some open-ended potential was considered--is often done in these Information Memorandums. But specifically to this, the geologists would have determined that, based on their ground surveys, the results of those drill holes, that it is very unlikely we would find a deposit we were interested in.*
>
> *So, the decision was made not to do any further drilling, but we still didn't know exactly what was there. So, there is potential, but we had made a decision that we had completed the work, and we weren't going to do anything more on it.*"[763]

675. After he had explained that the geologists had recommended to do no further drilling on that specific Prospecting License in light of the comparison to the findings made at Reko Diq, Mr. Pierce was further asked the following:

> "*Q. And if you have a certain amount of resources to invest--a certain limited amount of resources to invest, why you might prioritize one or the other. But the question we're exploring here is whether, for the purpose of your contractual obligations and exploring the full Exploration Area, actually, you had done the adequate testing that was required.*
>
> *And the question was not whether Reko Diq is better, but was, rather, you had sufficiently ascertained what the resources were here to say that Stage Two is completed?*
>
> *A. Well, I guess it's also fair to say that I wasn't in on that decision-making. The geologist had criteria that they examined to prioritize further work, and it was determined that, with the information they had, there were other higher priority areas and, yes, there was potential.*

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[759] **Exhibit CE-500**, section 9.5.
[760] **Exhibit CE-500**, section 9.7.
[761] **Exhibit CE-500**, section 9.9.
[762] **Exhibit CE-500**, sections 9.2, 9.3, 9.6 and 9.8.
[763] Transcript (Day 8), p. 2047 line 22 to p. 2048 line 13.

> *It doesn't mean--but to the word of the Agreement, we believe we had fulfilled--the geologist told me they had fulfilled Stage Two. I wasn't part of that decision-making process.*
>
> *Q. So, the geologist informed you, you were done with Stage Two?*
>
> *A. Yes.*
>
> *Q. But, in fact, that's a decision that they've taken based on the information available to them?*
>
> *A. Correct.*
>
> *Q. And it's not clear on the information available to us, is it?*
>
> *A. No.*"[764]

676. Claimant further points to the fact that that BHP did relinquish eight of its ten Prospecting Licenses in December 1998 and a ninth one at Koh-I-Sultan in July 1999 and argues that this confirms that BHP considered Stage Two activities completed for these areas and decided that the findings did not support a decision to progress to Stage Three.[765] When asked about the documentation of the completion of Stage Two activities and the recommendation to relinquish all of the Licenses (except for Reko Diq), Mr. Pierce answered:

> "*A. I think, internally, there was discussion about that. I wasn't party to it because the drilling program was certainly complete. The full drilling program that was identified in the Fiscal Year 1998 had been completed by--I believe it had been completed by the time this Information Memorandum was completed.*
>
> *Q. So, in fact, you're saying it's not clear from the Information Memorandum, but there may be other documents that we haven't seen which show that?*
>
> *A. That drilling was completed or that--what's your question?*
>
> *Q. That Stage Two was completed for these 10 Prospecting Licenses by March '98.*
>
> *A. I'm not aware of any other documentation, no.*"[766]

677. Claimant also relies on a letter from Mr. Schloderer to Mr. Farooq dated 6 October 1999.[767] In that letter, Mr. Schloderer apparently responded to certain items of discussion suggested by Mr. Farooq in a letter of 4 October 1999 and stated in relevant part:

> "*The conduction of exploration program has been in accordance with the terms and conditions of our JV agreement and has been completed prior to the January 20, 2000 target date, which is six years from the commencement*

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[764] Transcript (Day 8), p. 2049 line 12 to p. 2050 line 19.
[765] Claimant's Rejoinder, ¶ 390 *referring to* **Exhibit RE-58(al)**, pp. 234, 240.
[766] Transcript (Day 8), p. 2056 lines 4-17.
[767] Claimant's Opposition, ¶ 180.

> *date. Stage One and Two activities have been completed for the Exploration Area and the final PL selection made.*
>
> …
>
> *We do not see any need for extension of the time period for the exploration. Exploration has been completed for the exploration area resulting in the final selection of the Reko Diq PL. Exploration will continue on the Reko Diq PL under the terms of the PL that has an initial period of 2 years with a 3-year renewal. This allows us 5 years from the granting of the PL to complete exploration and start a feasibility study within the PL.*"[768]

678. Respondent and its witness Mr. Farooq point out that Mr. Schloderer's statement that Stage One and Two activities had been completed was not supported by any documents such as a report or study that would confirm his conclusion.[769] Respondent further submits that the letter is contradicted by other contemporaneous evidence on the record and, making reference to OC meeting minutes from late 1997 to early 1999 a Summary for the Chief Minister dating from May 1999, claims that the status of BHP's works from 1997 to 1999 "*was not as it should have been.*"[770]

679. Mr. Hargreaves testified in this regard his first witness statement:

> "*BHP completed Stage One and Stage Two activities before 2000. BHP regularly reported the progress of its exploration activities in Operating Committee Meetings and to the Government of Balochistan in Quarterly and Annual Reports as well as reported in the Pre-Feasibility Study presented to the BDA. By a letter dated 6 October 1999, BHP reported to the BDA that it had already completed a detailed exploration program. Because BHP had completed the steps necessary to earn its 75% interest as provided in the CHEJVA, the government's certification of that interest was simply recognition of a contractual right BHP had already earned.*"[771]

680. As pointed out by Respondent, Mr. Hargreaves did not make reference to any specific OC meeting or any specific quarterly or annual report where the completion of Stage Two activities was reported or discussed. In fact, regarding the progress of exploration activities, Mr. Hargreaves made reference to: (i) an OC meeting of 10 October 1997 in which it was noted that "[m]*ajority of stage 1 activities have been comnpleted. Drilling and other exploration work is underway*";[772] and (ii) an OC meeting of 17 November 1997 in which the work program for June 1998 to May 1999 was discussed, which was to include "*geological mapping, stream and soil geochemistry, ground geophysical techniques such as magnetics and electromagnetics, drilling, ore reserve calculations,*

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[768] **Exhibit CE-433**.
[769] *Cf.* Respondent's Reply, ¶ 199; Farooq II, ¶ 24.
[770] Respondent's Reply, ¶¶ 199-200
[771] Hargreaves I, ¶ 33.
[772] **Exhibit CE-431**.

environment and socioeconomic studies, metallurgical tests, transportation studies, hydrological investigations, security analyses, etc."[773] The Pre-Feasibility Study that was apparently provided to the BDA at the time is not in the record and has not been discussed in any detail by the Parties.[774] As for the completion of such activities, Mr. Hargreaves' sole reference was to the 6 October 1999 letter from Mr. Schloderer.[775] Mr. Hargreaves did not comment further on this issue in his second witness statement. When asked about his statement during the hearing and whether this was within his personal knowledge, Mr. Hargreaves answered:

> "*A. Other than the fact that, after coming into Tethyan as an employee, I was able to discuss more fully and see the Reports and the results of the work that had been carried out.*
>
> *Q. But you weren't involved at the time, were you?*
>
> *A. No. But I think these statements refer to knowledge that I gained as--after mid-2005, when I became an employee of Tethyan*."[776]

681. In addition, Respondent relies on a report of BHP dating from February 2000 entitled "*BDA – BHPMIE CHAGAI JV, BALOCHISTAN, PAKISTAN*" in which the status of work is described as follows:

> "*A joint venture agreement was signed in 1993 between BHPMIE and the Government of Balochistan through Balochistan Development Authority (BDA). Stage One of the agreement i.e. regional reconnaissance over 13000 square kilometers (probably the largest porphyry belt held by any single N) has been completed using fly camps and field teams working in very remote areas. Access to some areas is very difficult and in some instances, field teams had to use camels and traverse on foot for several days. 10 prospects for Stage Two i.e. detailed exploration have been identified. Access tracks to these prospects have been developed.*
>
> *At the first prospect, Reko Diq where about 16800 meters have been drilled, we have hit mineralisation and encouraging assays have been obtained. Further drilling and surveys are necessary to delineate higher grade reserves which would make a mine viable. First pass drilling has been completed over five out of the ten prospects. Ground magnetic surveys, detailed geological mapping, surface sampling, topographic surveys, etc, are in hand. An aerial survey is planned in 1999. The N has exclusivity for this aerial survey area till February 2000.*
>
> *A cross cultural team has been developed at the project which is performing well under adverse climatic and logistic conditions*."[777]

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[773] **Exhibit CE-432**.
[774] *Cf.* Respondent's Reply, ¶ 203 (note 669). To the Tribunal's knowledge, the document was not mentioned in Claimant's Rejoinder or its Post-Hearing Brief.
[775] **Exhibit CE-433**.
[776] Transcript (Day 9), p. 2337 line 22 to p. 2338 line 7.
[777] **Exhibit RE-54**, p. 2.

682. Respondent also points out that Recital C of the 2000 Addendum, which was signed in March 2000 and thus after the expiry of the six-year period, provides:

> "*Pursuant to the terms of the JVA, BHPM, on behalf of the Joint Venturers, has completed Stage One Activities (as defined in sub-clause 1.1 of the JVA) and has identified certain anomalous mineralised areas in respect of which the BDA and BHPM have jointly obtained ten (10) Prospecting Licences in order to enable BHPM to conduct Stage Two Activities on behalf of the Joint Venturers*."[778]

683. In his witness statement, Mr. Pierce noted that this language had been included in the 19 July 1998 draft and testified that "[i]*t is clear that the language of the draft Addendum reflected our stated position in 1998, and its inclusion in the final Addendum of March 2000 was a remnant from our negotiations in 1998*."[779]

684. When asked during the hearing whether the language in Recital C suggested that Stage Two activities were not completed, Mr. Pierce answered:

> "*A. I can't disagree with that, but that wasn't my decision, whether Stage Two was finished; it was the geologist's decision.*
>
> *Q. But if the geologist had told you Stage Two was completed, why wouldn't you reflect that in the Addendum language?*
>
> *A. I believe it's because we had until January of 2000 to commit to that.*
>
> *Q. But we discussed earlier the importance of keeping a proper documentary record and updating your Joint Venture partner on progress on the exploration, didn't we?*
>
> *And we agreed that it would be important for you, apart from anything else, to show that BHP had done what it needed to, to have a proper documentary record, wouldn't it?*
>
> *A. Documentation is important, yes.*
>
> *Q. But, in fact, all the documentation that we have available suggests that Stage Two is not completed, doesn't it, at least at this stage?*
>
> *A. I'd have to agree with you, yes. It's not what I was told, but the documentation says that.*
>
> *Q. So, you agree with me that, on the basis of the documentation, including the Information Memorandum we looked at, it doesn't appear that Stage Two was completed at that stage, does it?*

[778] **Exhibit CE-2**, Recital C.
[779] Pierce, ¶ 100.

> *A. The answer is yes, but as I've also stated, I wasn't the decision-making point to declare Stage Two done. That was the responsibility of the geologists to declare Stage Two done, and they had verbally told me that."*[780]

685. Claimant considers Respondent's reference to documents dating from after 20 Jaunary 2000 "*inapposite*" and argues that, instead, "*only the new Prospecting License granted on 21 February 2000 could serve to affirmatively rebut BHP's position that it completed Stage Two activities.*"[781] As pointed out by Respondent, this new Prospecting License PL-14 encompassed the area covered by PL-4 as well as additional land.[782] According to Respondent, the only reason to apply for a new Prospecting License over the area covered by PL-4 was that Stage Two activities had not been completed for that area – given that it could have applied for an exploration license instead if it intended to proceed with Stage Three.[783]

686. Respondent also points out that the Option Agreement concluded between BHP and Mincor on 28 April 2000 provided for an Agreed Programme to be conducted by Mincor under the Alliance Agreement, which was concluded on 3 April 2002. Part 1 of this Agreed Programme consisted of "*Drill Testing Bukit Pasir, North Kohi-Dalil & SW Kohi Dalil*" as well as ground magnetics, trenching and sampling and reverse circulation drill testing. Part 2 consisted of an "*Airborne EM Survey*," "*Ground follow-up of EM Survey Results*" and "*Drill Testing of EM targets*."[784] Respondent submits that all of these activites formed part of Stage Two activities under the CHEJVA and also makes reference to the subsequent reports and documents authored by Mincor and Claimant, which, in its view, support that exploration works forming part of Stage Two activities were carried out years after the expiration date.[785] During the hearing, Mr. Moore confirmed that the areas of Bukit Pasir in North and Southwest Koh-e-Daleel were within the area covered by the Reko Diq license, *i.e.*, Prospecting License PL-14, which later became Exploration License EL-5.[786]

687. The Tribunal also notes that when BHP requested confirmation of its 75% interest by letter of 11 April 2000, it did not attach any documents that would confirm the fulfillment of the requirements under Clause 3.2 of the CHEJVA and, specifically, the completion of Stage Two activities. Mr. Skrzeczynski, who signed the letter on behalf of BHP, explained this as follows:

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[780] Transcript (Day 8), p. 2065 line 1 to p. 2066 line 11.
[781] Claimant's Rejoinder, ¶ 389.
[782] *Cf.* **Exhibit CE-502**.
[783] Respondent's Post-Hearing Brief, ¶ 101.
[784] **Exhibit CE-12**, Schedule 1; **Exhibit CE-15**, Schedule 1.
[785] Respondent's Reply, ¶ 209.
[786] Transcript (Day 9), p. 2256 line 2 to p. 2257 line 3.

> "*It would have been addressed--no, there was nothing attached to those letters, because it was addressed in the meetings that I had with the Chairman. I would have explained that, in my belief, we had justifiably earned our 75 percent interest. And that would have been core to the conversations, and they accepted it.*"[787]

688. When asked whether BHP's Joint Venture partner would have expected to see documents demonstrating that they had met their obligation, he testified:

> "*Yes. And, again, because I wasn't operating the Project, I can't speak to that. But in all Joint Ventures with BHP and any other major company, you provide annual reports. If the Joint Venture says quarterly reports, you provide quarterly reports. In those reports would be the expenditure statements. That is just routine, standard business.*
>
> *Now, those documents must exist because there is no doubt that they would have been provided. So, all that information would be available and recorded.*
>
> *The issue that I think you are concerned with is with the definition of* 'Stage Two,' *was it exactly ticked off to the letter. And the answer to that question is, the definition of Stage Two work from a professional explorationist like myself is loose at best.*
>
> *But BHP had done significant work. 20,000 meters of drilling is a lot of drilling for an exploration Project. $8 million spent in the ground is a lot of money. We had done all the regional kind of work required to define anomalies. We had done additional work on the anomalies.*
>
> *So, in my opinion, when I visited the Project, made a technical assessment, walked the rocks, visited all the prospects, I was absolutely satisfied that we had completed Stage Two conditions, and that's what I managed to agree with the Chairman or whoever was the officials at the time. They also agreed that--with my point of view, that adequate work had been done, therefore, they were comfortable to sign the letter acknowledging a 75 percent interest.*"[788]

689. Mr. Skrzeczynski further explained that the visit he was referring to was his first visit to Pakistan, together with Mr. Schloderer, which "*may have been towards the end of '98*" before Mr. Pierce left. He stated that, being an exploration geologist with over 45 years' experience, he would have gone and "*see the critical things*," noting that "[m]*ost of the work was done at Reko Diq where mineralization was discovered*." When asked whether he was thus relying on his personal assessment during that visit rather than any particular record that would demonstrate the completion to the BDA, he answered that "*I have no records I can point you to, but the project records would be there. John Schloderer is also as an experienced explorer as I am. So, it can't be made up; I mean, it's just fact*."[789] When asked whether he would not expect that a certification of BHP's 75% interest in

[787] Transcript (Day 8), p. 2142 lines 15-21.
[788] Transcript (Day 8), p. 2143 line 7 to p. 2144 line 15.
[789] Transcript (Day 8), p. 2144 line 22 to p. 2147 line 3.

the CHJEVA would be agreed and established on a proper documentary record before the interest was earned, he concluded:

> "*Not necessarily because, as I mentioned before, the term of Stage Two was a very general definition, a very general definition. There are no specific things like X number of meters, exactly how many dollars, exactly how many samples. There are no numerical numbers; it is descriptions of generalized work. And, as I explained to you before, we did 20,000 meters of drilling, which is enormous. We did all the follow-up sampling that was required. We spent $8 million on the ground.*
>
> *And that quantum of work, in light of the definitions of Stage Two requirements, virtually all those points had been hit. Now--and as I say, it is not a quantifiable definition there. So, in good judgment and in good faith with the two Joint Venture Parties, we agreed--we agreed that Stage Two had been completed and 75 percent had been earned based on the effort that went in; not on any other peripheral, based on the work that was done*."[790]

690. On the basis of the evidence set out above, the Tribunal is not entirely convinced that BHP had completed the Stage Two activities as agreed under the CHEJVA within the areas covered by the ten Prospecting Licenses it held at the time the six-year period provided in Clause 3.2 expired on 20 January 2000. Both Parties agree that the question of whether BHP had earned its 75% interest in the Joint Venture was a matter of fact rather than of regulatory discretion.[791] The Tribunal is aware that the evidence of Claimant's witnesses indicates that the question of whether Stage Two activities were completed nevertheless involved a certain commercial judgment to be made by BHP and, possibly, its Joint Venture partner, in particular as to whether further exploration work should be conducted to fulfill the requirement of "*detailed sampling of* [anomalous] *areas*."[792]

691. However, neither Claimant nor any of its witnesses, in particular Mr. Skrzeczynski who applied for the certification in April 2000, could point to any document or to any specific meeting in which the completion of Stage Two activities was discussed. While there were numerous documents confirming that progress was made regarding these activities, they all described certain Stage Two activities as still outstanding or ongoing. There is no contemporaneous, documentary evidence – except for the 6 October 1999 letter signed by Mr. Schloderer, which did not attach any supporting documents – to establish that the Joint Venture partners had reached the conclusion that Stage Two activities were in fact completed. Mr. Skrzeczynski's reference to a site visit with Mr. Schloderer as well as to

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[790] Transcript (Day 8), p. 2148 lines 3-21.
[791] Claimant's Rejoinder, ¶ 382; Respondent's Post-Hearing Brief, ¶ 76.
[792] **Exhibit CE-1**, Schedule A.

verbal statements made by BHP's geologists in this regard, both of which were not documented in any manner, did not convince the Tribunal.

692. It further appears from the record, and this is also indicated in Mr. Schloderer's letter of 6 October 1999, that further exploration work was to be carried out by Claimant in and after 2000 within the Reko Diq area, *i.e.*, the area covered by the new Prospecting License PL-14. It is not entirely clear to the Tribunal whether these works were carried out within the area that was also covered by the original PL-4 and/or within the additional area where BHP was permitted to carry out exploration work only after it had been granted the larger PL-14 in February 2000. However, in the absence of any evidence to the contrary, the Tribunal considers it reasonable to assume that works were carried out within the entire area for which BHP had applied for a new Prospecting License, which included the original PL-4.

693. Consequently, the Tribunal is not convinced that BHP had fulfilled the requirements of Clause 3.2 of the CHEJVA even when limiting the requirement of completing Stage Two activities to the areas covered by the ten Propsecting Licenses it was holding when the six-year period expired in January 2000. However, the possibility that the GOB might have refused the certification on that basis, does not exclude that the Joint Venture partners validly agreed in April 2000 that BHP had earned its 75% interest in the CHEJVA. Importantly, the record shows that even though Stage Two activities may not have been complete at the time, BHP had carried out a substantial amount of work. In the circumstances prevailing at the time, there may well have been legitimate reasons for the GOB to acknowledge BHP's interest in the CHEJVA. In this regard, the Tribunal recalls its findings above that the certification was one of the conditions precedent for Mincor to become involved in and further develop the project – at a time when BHP had decided that the project did not fulfill its internal requirement for further development. In the absence of any other interested parties, the GOB may well have been interested to have Mincor take over BHP's role in order to ensure the future development of the project.

694. Consequently, the above assessment does not support a conclusion that the certification of BHP's 75% interest must have been the result of illegitimate payments. Therefore, secondly, the Tribunal will assess whether the process by which the certification letter was issued indicates that illegitimate payments were made.

(b) The Process by Which the Certification Letter Was Issued

695. There is common ground between the Parties that the letter dated 14 April 2000 by which the BDA confirmed that BHP had earned its 75% interest in the CHEJVA, was issued three days after it had received the request from BHP seeking such confirmation on 11 April 2000. There is further common ground that BHP's letter did not attach any supporting documents that would confirm the completion of Stage One and Two activities but, instead, "*a draft of a letter seeking confirmation from the Governor of Balochistan*

that BHP has earned a 75% interest in the Chagain Hills Joint Venture" and asked that "*the government may provide* [BHP] *with its consent in accordance with the above referred draft letters on its letterheads.*"[793]

696. Respondent considers it "*suspicious*" that BHP asked for this matter to be dealt with in a separate letter rather than in the Addendum itself, as it had been contemplated in the conditions precedent agreed with Mincor in the Option Agreement.[794] However, while Respondent suggests that the purpose of this approach was to avoid broader scrutiny of the matter within the GOB, in particular by the Law Department,[795] the Tribunal notes that BHP did ask that the letter be issued on the Governor's letterhead rather than by the BDA itself. As with the authorization letter issued by the Governor in the context of the 2000 Addendum, it may well have involved such "*broader scrutiny*" if the BDA had followed up on this request and obtained the signature of the Governor. The Tribunal again does not have to express an opinion as to whether the approach that was ultimately taken by the BDA, *i.e.*, to issue the letter itself with the approval of its Chairman, was in compliance with the provisions of the 1976 Business Rules. Even a possible violation of these Rules by the BDA would not establish any wrongdoing on the part of BHP, including the making of an illegitimate payment.

697. Respondent further considers it "[a]*stonishing*[]" that it took only three days from BHP's request to the issuance of the letter by the BDA.[796] As testified by Mr. Iqbal, the letter was handed over by Mr. Skrzeczynski and Mr. Schloderer during a meeting with Mr. Burq and Mr. Farooq.[797] When pointed to the fact that no supporting documents were attached to the letter, Mr. Skrzeczynski testified that "*it was addressed in the meetings that I had with the Chairman. I would have explained that, in my belief, we had justifiably earned our 75 percent interest. And that would have been core to the conversations, and they accepted it.*"[798] The Tribunal considers it likely that Mr. Skrzeczynski did explain to the Chairman of the BDA during the meeting on 11 April 2000 the reasons why they considered that BHP had "*justifiably earned* [its] *75% interest*." It is also plausible that he explained that a confirmation of this interest was required under the Option Agreement with Mincor, the terms of which were outlined in a separate letter dating from the day before (to which a copy of the Option Agreement was attached).[799] When asked whether

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[793] **Exhibit RE-255**. At the same time, BHP also attached a draft letter „*seeking certain consents to ist pre-emptive right pursuant to the Chagai Hills Joint Venture*." This issue will be addressed in the section on the 2000 Deed of Waiver and Consent below.
[794] Respondent's Reply, ¶ 213.
[795] Respondent's Post-Hearing Brief, ¶ 105.
[796] Respondent's Reply, ¶ 216.
[797] Iqbal, ¶ 26.
[798] Transcript (Day 8), p. 2142 lines 16-21.
[799] **Exhibit CE-192**.

he was surprised that the certification from the BDA came in within 72 hours of requesting it, Mr. Skrzeczynski answered:

> "*Not necessarily. I think I must have done a good job, and I would have explained the need for urgency, and the need for urgency was so that we could get on, you know, and negotiate something which would be a win-win for both Parties. So, it's excellent that I got it back in that period of time. I couldn't predict how long it was going to take. I would have been very grateful*."[800]

698. When Respondent pointed Mr. Skrzeczynski to the description in his witness statement of the process required to obtain the 2000 Addendum and the certification of BHP's interest and his statement that "[a]*ll this took a long time*"[801] and suggested that this appeared to be "*an astonishingly fast exchange*," Mr. Skrzeczynski answered: "*Yes. But that was the conclusion of all of that process. That was the conclusion. It was agreed and the letter came back.*"[802] He further clarified that "*one of the important meetings*" he was referring to was with the Chief Secretary and, even though he could not remember the exact meeting, stated that "*I would have gone through as long and as detailed as necessary to explain to the gentleman why it was reasonable and just that we should reach agreement.*"[803] When pointed to the fact that the minutes of the meeting held between Mr. Skrzeczynski, Mr. Schloderer, Mr. Iqbal, the Chairman of the BDA, the General Manager (Mines) of the BDA and the Chief Secretary on 11 April 2000 did not make reference to any discussion of the certification of BHP's 75% interest, Mr. Skrzeczynski stated:

> "*No. It was a very—clearly, it wasn't a minuted meeting and it wasn't a Joint Venture meeting. It was probably—it was me. It was me as the new person trying to reach agreement with a third party explaining to the Chief Secretary what was happening. These must be the minutes that they produced, and I have no comment as to why they did it.*
>
> *But all those matters were obviously satisfied because they agreed to my proposed letters*."[804]

699. Even though there is no reference in the meeting minutes to any discussion of the 75% interest certification, Mr. Skrzeczynski maintained that "*that would have been a critical meeting*" and that "*there would have been discussions … largely because I was there*." He concluded that "*it could have been another meeting. But it believe that was probably that meeting that I would have given my full explanation*."[805]

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[800] Transcript (Day 8), p. 2150 lines 10-17.
[801] *Cf*. Skrzeczynski, ¶¶ 15, 16.
[802] Transcript (Day 8), p. 2151 lines 4-9.
[803] Transcript (Day 8), p. 2152 line 16 to p. 2153 line 12.
[804] Transcript (Day 8), p. 2154 lines 13-21.
[805] Transcript (Day 8), p. 2155 line 11 to p. 2156 line 8.

700. Respondent further places emphasis on the internal BDA file note concerning BHP's request, in particular the note prepared by Mr. Tahir on 13 April 2000, which has already been discussed above, and his corresponding witness testimony.

701. In his witness statement, Mr. Tahir described the process for issuing the certification letter as follows: Upon receiving an internal file note from Mr. Baloch, which he initiated "*under pressure from Mr Farooq*," Mr. Tahir was "*intentionally vague in* [his] *response*" and "*deliberately did not confirm whether the stage one and stage two activities had been completed*" but suggested that "*before confirming to BHP … advice from the Law department may please be solicited.*"[806] According to Mr. Tahir, he used this language in order to "*take shelter from the Law Department*" because he knew that the required activities had not been completed but was "*under a great deal of pressure from Mr Farooq*." Mr. Tahir further stated that, in his view, Mr. Baloch's subsequent statement on the same file note that "*AGM Mines confirmed vide Para 96-98 ante that BHP has completed the exploration works as per agreement*"[807] was a deliberate "*incorrect interpretation of [his] remarks*" by Mr. Baloch, which was then approved by Mr. Farooq and Mr. Burq.[808]

702. Mr. Tahir further testified it was "*highly irregular that the certification letter was provided by the BDA on 14 April 2000, just three days after it was requested by BHP on 11 April 2000.*" Mr. Tahir further considered it "*equally as irregular that this letter, which recognised for the first time that TCC had supposedly earned its 75% interest, a very significant milestone, was not put before the Governor of Balochistan for approval, as other issues of this importance were (for example, the Addendum) and as BHP had requested in its draft letter of 11 April 2000, where it asked that the certification be provided on the letterhead of the Governor of Balochistan.*"[809]

703. As noted above, Mr. Tahir's note indeed does not in itself confirm that Stage Two activities were complete. There is also no dispute that his immediate supervisor, Mr. Baloch, did not seek advice from the Law Department but issued the confirmation letter to BHP on the next day. While it is not clear from the file note why Mr. Baloch decided not to follow up on the advice of Mr. Tahir, this conduct does not establish an act of corruption. In fact, Respondent does not allege that Mr. Baloch received any illegitimate payment but rather that he was threatened by Mr. Farooq that he would lose his job if he did not sign the letter. However, even if the Tribunal were to consider such threat established, it would not constitute an act of corruption and, in any event, it would not be attributable to BHP.

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[806] Tahir II, ¶ 22 *quoting from* **Exhibit RE-256**, p. 3.
[807] **Exhibit RE-256**, p. 4.
[808] Tahir II, ¶ 22.
[809] Tahir II, ¶ 25.

704. In addition, Mr. Baloch signed the certification letter only after it had been approved by the Chairman of the BDA, Mr. Burq. The Tribunal has already noted above that it does not believe that Mr. Arndt negotiated and provided the funds for any bribery payment to Mr. Burq and, as a consequence, that Mr. Iqbal delivered the alleged amount to Mr. Burq in order to obtain the certification of BHP's 75% interest. The same also applies to the alleged passing on of a share out of this payment to Mr. Farooq, which Respondent claims to have ensured, together with alleged "*periodic payments*," that Mr. Farooq directed Mr. Baloch to issue the confirmation letter.[810] As noted above, neither Mr. Farooq nor Mr. Iqbal's testimony support Respondent's allegation that the alleged periodic payments to Mr. Farooq were made in connection with any of the 2000 instruments. In any event and for the reasons set out above, the Tribunal finds that these payments did not occur.

705. The Tribunal also cannot infer the making of an illegitimate payment from the possibility that the GOB might have refused to accept that BHP had fulfilled the requirements of Clause 3.2 of the CHEJVA when the six-year period expired in January 2000. It is apparent from the contemporaneous evidence on the record as well as from the testimony of Claimant's witnesses, in particular Mr. Skrzeczynski but also the testimony discussed in the context of the 2000 Addendum, that BHP made it clear to the GOB at the time that it was not interested in continuing to develop the project and that Mincor was apparently the only party who was.

706. BHP also informed the GOB by a letter of 10 April 2000 of the terms on which Mincor was willing to enter into the project. Mincor was asking for a certification from BHP's Joint Venture partner that BHP had earned its 75% interest in the joint venture because BHP otherwise would not have had any secure contractual position to transfer. The GOB was interested in making progress with the project, which it knew would only happen if it allowed for the eventual transfer of BHP's contractual position under the CHEJVA to Mincor. The Tribunal therefore considers it plausible that the GOB may have been willing to acknowledge and confirm BHP's 75% interest in the CHEJVA even though it might have been arguable that some Stage Two activities in the Reko Diq area were still outstanding.

707. It may indeed appear unusual that the BDA issued the certification letter only three days after receiving BHP's request and without asking for supporting documents or a justification that Stage One and Two activities had been completed. However, it again has to be taken into account that the GOB was not acting in its function as a regulatory authority but rather in its function as BHP's Joint Venture partner with a 25% interest in the Joint Venture that would progress only once the transfer of BHP's interest to Mincor was completed. This may also explain why it was decided by Mr. Tahir's supervisor Mr.

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[810] *Cf*. Respondent's Reply, ¶ 188 lit. b.

Baloch and the Chairman of the BDA Mr. Burq, who both participated in the meeting with Mr. Skrzeczynski and Mr. Schloderer on 11 April 2000, to issue the certification letter without seeking advice from the Law Department first. Against this background, the Tribunal cannot conclude from the circumstances surrounding the certification of BHP's 75% interest, that it must necessarily have involved illegitimate payments.

708. Consequently, it can again be left open whether any payment, if established, would have been attributable, firstly, to BHP and, secondly, to Mincor and Claimant.

d. Allegations Relating to the June 2000 Deed of Waiver and Consent

709. Fourth, the Tribunal will assess Respondent's allegation that June 2000 Deed of Waiver and Consent was procured by the previous making of illegitimate payments and the promise of further such payments in the future.

i. Summary of Respondent's Position

710. Respondent notes that the Deed of Waiver and Consent was one part of a series of transactions in 2000 which led to Mincor/TCC's involvement in the project, given that under the CHEJVA, the GOB had a right to either refuse the transfer to Mincor/TCC or to exercise its pre-emption rights to itself take on BHP's interests.[811]

711. Respondent alleges that three particular bribes or offers of bribes were particularly relevant to securing the Deed -

i. Mr. Arndt promised Mr. Burq in mid-2000 that he would receive payments in the future provided he supported the Deed,[812]
ii. As well as receiving regular payments from BHP, a couple of months earlier, Mr. Farooq received the following proportions of two sums of money paid by Mr. Iqbal to Mr. Burq;
    i) PAK Rs. 2 million in relation to the Addendum; and
    ii) PAK Rs. 500,000 in relation to the 75% certification of interest.[813]

712. Respondent alleges that the consequences of such bribes were twofold. Firstly, Respondent maintains that such bribes diverted key GOB decision-makers away from adequately considering whether to exercise its right to withhold consent to the transfer from BHP to Mincor. Secondly, the evidence allegedly demonstrates that the BDA, and specifically those individuals who had been paid by BHP in relation to the Addendum and certification, played a key role in facilitating the Deed.[814]

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[811] Respondent's Reply, ¶ 222, 224-226.
[812] Respondent's Reply, ¶ 219 *referring to* Iqbal, ¶ 29.
[813] Respondent's Reply, ¶¶ 133-218; Respondent's Post-Hearing Brief, ¶ 119.
[814] Respondent's Reply, ¶ 221.

(a) There Was Reason for the GOB to Object to the Transfer

713. Respondent acknowledges that an element of cause would have been required for GOB to object to the transfer under Clause 14.1 of the CHEJVA, which it alleges existed due to the fundamental attributes of Mincor/TCC.[815] Respondent emphasizes that Claimant was in agreement that BHP was one of the "*most highly reputed mining companies in the world*," whereas Mincor in stark contrast was a "*junior company*" boasting both little experience and few profits and assets.[816] In its Reply, Respondent displays in a table a comparison of BHP and Mincor's status, including their respective assets and operating revenue.[817] Respondent alleges that given the comparably weak status of Mincor, it would have been expected that the GOB would question its introduction into the project and specifically how it would provide the required finance.[818] Respondent alleges this to be the very reason for which the Addendum introduced the concept of external financing as discussed previously.

(b) Anomalies in the Approval Process

714. While Respondent acknowledges that there were some deliberations by the relevant stakeholders over "*whether GoB would exercise its preemptive right or consent to the transfer*," it alleges that there were clear anomalies in the Deed approval process including: (i) the emphasis on the GOB's pre-emption rights (Clause 14.3 of the CHEJVA), rather than its ability to withhold consent (Clause 14.1 of the CHEJVA); (ii) the improper influence of BDA individuals to whom payments were offered and/or had been paid; and (iii) the haste with which these deliberations were conducted.[819]

715. Firstly, Respondent highlights the ambiguity introduced through the Addendum in Clause 14.3.1 – it is left unclear whether Clause 14.3 is seeking to supplement Clause 14.1 or replace it (thus leaving it unclear whether the GOB retained the ability to block a transfer of BHP's rights if they did not consider the counterparty was suitable, rather than simply match the best offer BHP was able to procure from an interested party, regardless of suitability).[820] Respondent maintains that Claimant exploited this ambiguity given that the GOB correspondence with key decision-makers only expressly referenced GOB's preemptive rights under Clause 14.3 and did not refer to its right to withhold consent under Clause 14.1.[821] Respondent provides a range of evidence to substantiate this point

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[815] Respondent's Reply, ¶ 227, 230-235.
[816] Respondent's Reply, ¶ 231 *referring to* Claimant's Opposition, ¶ 111 *and* Hargreaves I, ¶ 14.
[817] Respondent's Reply, ¶ 232.
[818] Respondent's Reply, ¶ 233.
[819] Respondent's Reply, ¶ 236 *referring to* Claimant's Opposition, ¶ 145.
[820] Respondent's Reply, ¶¶ 228-229.
[821] Respondent's Reply, ¶¶ 236-240.

including the 10 April 2000 letter from BHP to the Governor and the subsequent working papers for the Cabinet addressing BHP's proposal dated 10 April 2000 and 12 May 2000, all of which it alleges did not draw attention to GOB's entitlement to withhold consent.[822]

716. Similarly, Respondent maintains that when the Finance and Law Department's vetting was requested on 17 April 2000, Mr. Baloch again failed to mention the relevant blocking provision. Respondent therefore alleges that the Governor was never actually directly informed that the GOB had such a right if it considered Mincor an unsuitable replacement.[823]

717. Respondent also advances evidence to suggest that there was indeed concern about Mincor's involvement and lack of credential which was raised in the meeting of BHP and BDA representatives as well as the Chief Secretary on 11 April 2000 and echoed by the DMD, the Industries Department and the Finance Department.[824] This evidence allegedly demonstrates that, had the relevant stakeholders have known of their right under Clause 14.1, consent may well have been withheld.[825]

718. Respondent maintains that nonetheless, on 23 June 2000 the BDA wrote to BHP agreeing to transfer the interest using the draft letter provided by BHP in April of the same year.[826] However, Respondent maintains that in stark contrast to the Summary provided to the Governor, this letter did indeed refer to both clauses with Mr. Burq allegedly signing this letter in order to demonstrate to BHP that he had "*delivered*" for them.[827]

719. Secondly, Respondent maintains that the deliberations were influenced by key BDA officials who had already received bribes in relation to the Addendum and certification of interest. In the face of Claimant's suggestion that this is merely "*theorized*" by Pakistan, Respondent refers to a "*contemporaneous documentary record*" to corroborate its allegation.[828]

720. Respondent submits that this demonstrates that Mr. Burq as BDA Chairman was heavily involved in the approval process and therefore his willingness and loyalty to assist BHP can only be explained by the bribes he had already received.[829] In fact, Respondent alleges that BHP was so confident in his loyalty that the only necessary bribe for Mr. Burq concerned deferred incentives.[830] Respondent submits: If Mr. Iqbal's evidence regarding

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[822] Respondent's Reply, ¶ 237.
[823] Respondent's Reply, ¶ 237(g).
[824] Respondent's Reply, ¶ 239.
[825] Respondent's Reply, ¶ 239 *referring to* Tahir II, ¶ 12.
[826] Respondent's Reply, ¶ 237(h) *referring to* **Exhibit RE-58(VI)(ap)**, p. 39.
[827] Respondent's Reply, ¶ 237(h) *referring to* Tahir II, ¶ 28.
[828] ; Respondent's Post-Hearing Brief, ¶ 131 *referring to* Claimant's Rejoinder, ¶ 392.
[829] Respondent's Reply, ¶ 238.
[830] Respondent's Reply, ¶ 238.

this promise of a future payment to Mr. Burq was invented to suit Respondent's interests as alleged by Claimant, why would Mr. Iqbal only have invented a future incentive, rather than an actual bribe?[831] Additionally, Mr. Iqbal's section 161 statement was dated 11 March 2016, the same day which Claimant filed its Opposition – Respondent therefore argues that there is no way Mr. Iqbal could have seen the Opposition when NAB interviewed him in order to provide a fictitious statement with the intent to plug a gap in Respondent's case.[832]

721. Additionally, Respondent maintains that Mr. Tahir played an important role in the process including preparing the revised Working Paper and liaising with BHP regarding comments from the Industries Department. Such willingness is allegedly due to the bribe he had already received in relation to the Addendum.[833]

722. Respondent also maintains that while Mr. Baloch had not received a bribe, he nonetheless played a key role in the improprieties surrounding both the Addendum and the certification of interest and whilst Mr. Farooq's involvement in the Deed approval process was minimal, nevertheless, his willingness to assist can also be explained by the bribes he had already received.[834]

723. Thirdly, Respondent maintains that the BDA was able to ensure that the process was hastily conducted with Mr. Tahir noting that everything was done in a hurry despite the importance of the transaction and the normal bureaucratic Balochistani procedure.[835] Respondent thus submits that the speed of the transaction therefore also demonstrates a further anomaly in the Deed approval process.

ii. Summary of Claimant's Position

724. Claimant perceives the attack on the Deed to be "*remarkable*" given that it was not even mentioned in Respondent's Application and therefore was initially "*not the subject of any of Pakistan's corruption* allegations."[836] Claimant maintains that despite acknowledging that the Deed was subject to stakeholder deliberations, in its Reply, for the first time, Respondent alleged that the Deed was corruptly procured.[837] Claimant maintains that

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[831] Respondent's Post-Hearing Brief, ¶ 130.
[832] Respondent's Post-Hearing Brief, ¶ 128 *referring to* **Exhibit RE-491**, p. 5; Claimant's Post-Hearing Brief, ¶ 111.
[833] Respondent's Reply, ¶ 179, 238(b).
[834] Respondent's Reply, ¶¶ 238(c)-(d).
[835] Respondent's Reply, ¶ 238(f) *referring to* Tahir II, ¶ 26.
[836] Claimant's Rejoinder, ¶ 392; Claimant's Opposition, ¶ 139.
[837] Claimant's Rejoinder, ¶ 392 *referring to* Respondent's Reply, ¶¶ 219-246, Farooq II, ¶¶ 28-29 *and* Iqbal, ¶¶ 28-29.

Respondent has not alleged that any direct payments were made to procure the Deed, but attempts to impugn the Deed on the basis of payments "*relevant to*" other agreements.[838]

725. Claimant argues that not only is this allegation demonstrably false to the extent it relies on Mr. Arndt's involvement in April or June 2000, but it is also contrary to the documentary record which shows that the Deed was indeed subject to the normal review process by no less than ten government departments (including the Chief Secretary, the Industries Department, the Finance Department, the Law Department, the Cabinet, and the Governor).[839] Claimant further maintains that Respondent itself acknowledges that the Deed was executed following careful deliberations.[840]

726. Claimant suggests that Respondent's allegations are based entirely on the notion that BDA could have misled other departments of the Balochistan Government about their right to object to the transfer. From Claimant's perspective, this gives the Government far too little credit.[841] On a plain reading of Clause 14.1 of the CHEJVA, it is wholly evident that BHP can only assign its interest to Mincor with "*the prior consent of the non-assigning party, which consent shall not be unreasonably withheld.*"[842] Simply because this clause had allegedly "*not been pointed out by the BDA*" does not convincingly demonstrate that this provision was overlooked by the relevant government departments.[843]

727. What is more, Claimant does not accept Respondent's argument that, had Clause 14.1 been considered, the GOB would have objected to the transfer. Claimant submits that the documentary record demonstrates that on review, the GOB perceived the transaction to be in the Province's best interests.[844] Claimant further argues that Respondent even acted on the advice of an independent legal advisor who determined that the GOB's interests were protected by the transfer.[845]

728. Claimant argues that Respondent misunderstands Mincor's role in this project and the general nature of the exploration mining industry.[846] Respondent places significant emphasis Mincor's relative lack of credentials, and specifically lack of financial capabilities in comparison to BHP.[847] Claimant maintains that not only is there no merit in the suggestion that Mincor would not have been able to access the same kind of debt

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[838] Claimant's Post-Hearing Brief, ¶ 109.
[839] Claimant's Post-Hearing Brief, ¶ 111; Claimant's Rejoinder, ¶ 392 *referring to* Claimant's Opposition, ¶ 145.
[840] Claimant's Post-Hearing Brief, ¶ 111.
[841] Claimant's Rejoinder, ¶ 393 *referring to* Respondent's Reply, ¶ 237.
[842] Claimant's Rejoinder, ¶ 393 *referring to* **Exhibit CE-1**, Clause. 14.1.
[843] Claimant's Rejoinder, ¶ 393 *referring to* Respondent's Reply, ¶ 237(d).
[844] Claimant's Rejoinder, ¶ 394 *referring to* **Exhibit RE-58(VI)(ap)**, p. 37.
[845] Claimant's Post-Hearing Brief, ¶ 112 *referring to* **Exhibit RE-58(VI)(ap)**, p. 38.
[846] Claimant's Rejoinder, ¶ 395.
[847] Respondent's Reply, ¶ 233.

finance as the global mining giant that is BHP, but Mr. Moore explained that "*there are very few…companies that go into a project with all the financing for the whole thing lined up from the start*" - day one capital cannot be equated to a lack of qualification for the project.[848] Claimant's witness further testified that the intention was always for Mincor to finance the project over time by issuing shares and offering equity to investors as Mincor upgraded and expanded the project.[849]

729. Claimant argues that Respondent ignores the reality of the situation, namely, that which both Mr. Moore and Mr. Hargreaves confirmed in their respective testimonies – Mincor was an ideal Joint Venture partner and while BHP was indeed a more established company, its interest in the project had diminished significantly. Claimant maintains that to the contrary, Mincor was not only fully focused on the project, but also had the backing of a multi-billion dollar company in the form of Iscor and the benefit of Mr. Moore's 20 years of experience with global mining projects.[850] Claimant thus rejects the suggestion that, because Balochistan could have questioned Mincor's credentials, the Tribunal should infer nefarious dealings.[851]

730. Ultimately, Claimant argues that in view of the history of negotiations and the approval process of the 2000 instruments, one cannot reach the conclusion that those instruments were not commercially sensible for all parties and thus Claimant deems it "*insulting*" that Respondent claims that Balochistan was somehow tricked by TCC through alleged bribery.[852] Claimant maintains that after open discussions about an investment in a project that no one but Mincor/TCC wanted, Balochistan made a reasonable decision that it knew would be to its benefit.[853]

iii. Tribunal's Analysis

731. As a final event in 2000, the Tribunal will assess Respondent's allegation of corruption in connection with the Deed of Waiver and Consent that was signed by the Chairman of the BDA on behalf of the GOB and by BHP on 23 June 2000. By means of this document, the GOB, *inter alia*, "*agreed*[d] *to waive any and all pre-emptive rights which it ha*[d] *under Clause 14.3 of the JVA* [as amended by the 2000 Addendum] *with respect to each of the Transfers and agree*[d] *that BHPM and MINCOR are free to conduct the Transfers between themselves without compliance with those pre-emptive rights*" and further gave

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[848] Claimant's Post-Hearing Brief, ¶ 115 *referring to* Claimant's Rejoinder, ¶ 395 *referring to* Respondent's Reply, ¶ 231 *and* Transcript (Day 9), p. 2304 line 9 to p. 2305 line 10.
[849] Claimant's Rejoinder, ¶ 395 *referring to* Moore, ¶ 62.
[850] Claimant's Rejoinder, ¶ 396; Claimant's Post-Hearing Brief, ¶ 114 *referring to* Moore, ¶ 59-61 *and* Hargreaves, ¶¶ 9-13.
[851] Claimant's Post-Hearing Brief, ¶ 114.
[852] Claimant's Post-Hearing Brief, ¶ 117.
[853] Claimant's Post-Hearing Brief, ¶ 117.

"*any and all consents which it must provide under Clause 14.1 of the JVA with respect to the various transfers of interest under the JVA between BHPM and MINCOR in circumstances set out in the Option Agreement*."[854]

732. The Deed of Waiver and Consent corresponded to a further condition precedent agreed between BHP and Mincor in the Option Agreement, *i.e*., that "[t]*he GOB and BDA have executed a Deed of Waiver in terms of which they waive any pre-emptive rights which may affect the transfer of interests between BHP and Mincor as required by the Alliance Agreement.*"[855]

733. Respondent does not allege that any specific bribe was paid by BHP to obtain this document but claims that:[856]

   i. Mr. Arndt rejected a request for immediate payment but promised to Mr. Burq in mid-2000 that he would receive payments in the future once the project expanded "*for procuring the approval of the DOWC and for signing it*";

   ii. the alleged recent bribes paid to Mr. Burq, Mr. Farooq and Mr. Tahir in relation to the 2000 Addendum and the certification of BHP's 75% interest "*bought the BDA's cooperation*";

   iii. alleged "*other regular payments previously received* [by Mr. Farooq] *from BHP*" were made to earn his "*continuous loyalty.*"

734. As to the results of the alleged "*bribes, promises of bribes and Mr. Farooq's pressure*," Respondent refers to the fact that the GOB waived its pre-emptive rights under clause 14.3 of the CHEJVA and gave its consent under clause 14.1 of the CHEJVA. According to Respondent, "*the insertion of Mincor, a new company and a mining minnow, without a tender and on more favourable terms than had been given to a mining giant BHP, was not in the GOB's interest*."[857]

735. The Tribunal notes that Respondent's allegations in respect of the Deed of Waiver and Consent are closely related to the same allegations it has made in respect of the Addendum and the certification of BHP's 75% interest. First, Respondent makes reference to the alleged illegitimate payments made to obtain the 2000 Addendum and the certification letter. The Tribunal has rejected Respondent's evidence as to the making of these payments. In addition, the Tribunal has found that Respondent has failed to prove that Mr. Arndt was acting in any capacity for BHP and, in fact, that he was even in Pakistan

[854] **Exhibit CE-194**, Clauses 2 and 3 lit. a.
[855] **Exhibit CE-12**, Article 5.1.3.
[856] Respondent's Post-Hearing Brief, ¶ 119; Respondent's Reply, ¶ 219.
[857] Respondent's Post-Hearing Brief, ¶¶ 122-123.

in early 2000. The Tribunal sees no reason to make a different assessment for the alleged promise by Mr. Arndt of future payments to Mr. Burq in mid-2000.

736. Second, Respondent again refers to "*other regular payments*" that Mr. Farooq had allegedly previously received from BHP, which, together with the alleged payments in connection with the Addendum and the 75% interest certification, led him to "*order*[] *Mr Baloch and Mr Tahir to cooperate with Mr Iqbal to process the DOWC quickly*." As noted above, neither Mr. Farooq nor Mr. Iqbal's testimony supports Respondent's allegation that the alleged "*regular payments*" were made in connection with the 2000 instruments. In any event and for the reasons set out above, the Tribunal does not accept that these payments occurred.

737. Third, Respondent again invokes the terms of the Addendum as being more favorable to the GOB's Joint Venture Partner than those of the CHEJVA. The Tribunal has addressed those terms in detail above and, while agreeing with Respondent that the Addendum indeed introduced significant changes into the CHEJVA that were more favorable to BHP, it also considered that the GOB may have had legitimate reasons for accepting those terms. This included in particular the undisputed fact that BHP was no longer interested in further pursuing the project and that the Addendum, the certification and the Deed of Waiver and Consent were conditions precedent under the Option Agreement by which Mincor became involved in the project.

738. The Tribunal is aware that Respondent further alleges the existence of certain "*anomalies in the process of approval*" of the Deed of Waiver and Consent, arguing that: (i) the GOB was under a misapprehension as to its rights under the CHEJVA as the discussions focused on whether the GOB should exercise its pre-emptive rights under clause 14.3 of the CJEVA, which were subject to a 90-days time limit, and not on whether the GOB should give or withhold its consent under Clause 14.1, which did not provide for a time limit; (ii) individuals at the BDA "*who were favourable to BHP*" and to whom payments had allegedly been made and/or offered "*played a key role in recommending and facilitating the approval*" of the Deed; and (iii) discussions were "*relatively quick*" in light of the GOB's previous agreement with the Addendum and the certification of BHP's 75% interest; and (iv) "*there is evidence to suggest that there was concern amongst the GoB/BDA as to Mincor's involvement*" and that, if the right under clause 14.1 of the CHEJVA had been known to the relevant stakeholders, "*consent to the transfer may have been withheld*."[858]

739. As to the first aspect, it is common ground that, by letter of 10 April 2000, BHP notified the BDA pursuant to clause 14.3 of the CHEJVA that it had received a proposal from Mincor to establish an Alliance Agreement by which Mincor could earn a share of BHP's

[858] Respondent's Reply, ¶¶ 236-239.

interest in the Joint Venture. BHP outlined the structure and terms of the Alliance Agreement, attaching a copy of the Option Agreement, and concluded that this letter served as notification under clause 14.3.2 of BHP's intentions to enter into the Alliance Agreement, thus triggering the 90-day period for the GOB "*to elect to enter into an agreement with BHP on the exact terms and conditions as the Option Agreement.*"[859]

740. Respondent notes that in its letter, BHP did not draw the BDA's attention to "*the separate right to withhold consent to the transfer under Clause 14.1 of the CHEJVA if it believed Mincor was unsuitable.*"[860] However, as Respondent itself noted, BHP's letter to the BDA of 11 April 2000 attached a draft letter to be signed on the Governor's letterhead, which made reference to clauses 14.1 and 14.3.2 of the CHEJVA.[861] In the working paper for the Cabinet prepared by Mr. Baloch on 10 April 2000, there is no reference to clause 14.1 but the Cabinet decided on 11 April 2000 that the BDA obtain the views of the Law and Finance Departments in this matter.[862] In his letter to the Law and Finance Departments of 17 April 2000, Mr. Baloch again only referred to clause 14.3 of the CHEJVA.[863]

741. The Law Department responded on 25 April 2000 that it returned the draft Option Agreement unvetted because "*the Administrative Department has not specified the points on which they intend to seek advice of the Department*" but also noted that "*from perusal of the record it has been observed that at present no law point is involved in the matter which requires considerable consideration of this Department,*" leaving it up to the BDA "*to deal with the matter in accordance with the terms and conditions as laid down in the Agreement already executed between BDA and BHP for the Exploration of Gold, Copper and Associated Mineral in Chagai District*."[864] In Respondent's view, this letter shows that the absence of any consideration of clause 14.1 also passed by the Law Department.[865] However, given the Law Department's express reference to the CHEJVA in accordance with which the BDA should deal with the matter, the Tribunal is not convinced that this is actually the case.

742. In the revised working paper for the Cabinet prepared by Mr. Tahir on 12 May 2000, it is noted that "[a]*ccording to the Agreement/Addendum, BHP can sell their interest to a Third Party subject to pre-emptive right of its joint venture partner i.e., GOB/BDA. The matter was discussed by the cabinet in its meeting held on 11.4.2000. It was decided that BDA may examine the proposal in consultation with the concerned departments of*

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[859] **Exhibit CE-192**.
[860] Respondent's Reply, ¶ 237 lit. a.
[861] **Exhibit RE-255**, p. 3.
[862] **Exhibit RE-58(ap)**, pp. 6-8, 24.
[863] **Exhibit RE-58(ap)**, pp. 19-20.
[864] **Exhibit RE-58(ap)**, p. 26.
[865] Respondent's Reply, ¶ 237 lit. d.

Government of Balochistan. BDA has obtained the views of the departments which are incorporated in the working paper."[866] In its meeting on 19 May 2000, the Cabinet decided that "*the Law Department should get the agreement examined by a corporate lawyer to see as to what extent the interests of the provincial government stand protected and what further legal remedial measure are available to the government*."[867] In accordance with this decision, the Law Department directed the BDA in a letter of 23 May 2000 to contact Mr. Shakeel Ahmed, legal advisor to the GOB, for these purposes.[868]

743. In a summary for the Governor relating to BHP's proposal prepared by Mr. Baloch on 12 June 2000, reference is made to the GOB's pre-emptive rights to be exercised within 90 days and to the Cabinet's decision to have the Alliance Agreement examined by a corporate lawyer. Mr. Baloch reported that the Law Department had consulted Mr. Ahmed: "*As per his opinion (F/F), the interest of the Government is duly protected. He advised that the GOB/BDA may execute with BHP the deed of waiver and consent as per drafts proposed by BHP and vetted and modified by him.*" On that basis, Mr. Baloch proposed that "*GOB/BDA may not pre-empt the proposed arrangements between BHP & Mincor*" and that "*BDA may be authorized to execute with BHP the Deed of Waiver and Consent on behalf of the Governor, as per drafts placed at F/G*." He further noted that the Industries, Finance and Law Departments concurred with the submission of this summary to the Governor and that the Minister for Planning and Development had approved the proposal set out above.[869]

744. While Respondent emphasizes that again no reference was made in this summary to clause 14.1,[870] Mr. Baloch reported that the GOB's legal advisor had examined the drafts proposed by BHP – which did make reference to both Clauses 14.1 and 14.3 – and that he had advised that the Deed of Waiver and Consent as modified by him – which also made reference to both provisions – could be executed by the BDA. On that basis, Mr. Baloch notified BHP on 23 June 2000 that "[p]*ursuant to clauses 14.1 and 14.3.2 of the JV Agreement*," the Governor elected not to exercise his pre-emptive right and to give the necessary consents for the transfer of BHP's interest to Mincor.[871] The Deed of Waiver and Consent was signed on the same day.[872]

745. On the basis of the contemporaneous record set out above, the Tribunal is not convinced by Respondent's argument that the GOB was deliberately put under a misapprehension

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[866] **Exhibit RE-58(ap)**, pp. 30-31.
[867] **Exhibit RE-58(ap)**, p. 35.
[868] **Exhibit RE-58(ap)**, p. 34.
[869] **Exhibit CE-434**, p. 2.
[870] Respondent's Reply, ¶ 237 lit. g.
[871] **Exhibit RE-58(ap)**, p. 39.
[872] **Exhibit CE-194**.

as to the existence of its right under clause 14.1 to withhold its consent to the transfer of BHP's interest to Mincor. Besides the fact that clause 14.1 provides that the "*consent shall not be unreasonably withheld*"[873] and thus "*some element of cause*" was necessary for the GOB to object, as Respondent acknowledges,[874] it is clear from the record that both the Law Department of the GOB and an external corporate lawyer reviewed the draft agreement and, in particular, Mr. Ahmed, also reviewed and modified the draft letters provided by BHP on 11 April 2000. Consequently, the Tribunal does not consider it reasonable to assume that the GOB was not aware of its rights under the CHEJVA and, more importantly, that this was a deliberate strategy of BHP and individuals at the BDA such as Mr. Farooq, Mr. Burq, Mr. Baloch and Mr. Tahir that would justify to draw the conclusion that illegitimate payments were made or offered to obtain the Deed of Waiver and Consent.

746. The second aspect of the alleged "*anomalies*" invoked by Respondent have thus also been addressed. Specifically, the Tribunal is not convinced that the approval process of the Deed of Waiver and Consent was influenced by the above-mentioned individuals in the manner described by Respondent. In any event, the Tribunal does not consider it established that any of the illegitimate payments or offers that Respondent claims to have been the reason for these individuals' favorable treatment to BHP actually occurred. As set out in detail above, this applies in particular to the payments and offers allegedly made by Mr. Arndt (through Mr. Iqbal) to Mr. Burq.

747. As to the third aspect, the Tribunal notes that the discussions with the GOB regarding the Deed of Waiver and Consent may well have been conducted "*relatively quickly*" because the Deed, together with the Addendum and the certification of BHP's interest, formed part of the package required under the Option Agreement for Mincor to become involved in the project and the Addendum had been under discussion since 1998. The Tribunal does not see how this would qualify as an "*anomaly*" of the approval process and, in any event, the record shows that the GOB first directed the BDA to obtain advice from the Law Department, as well as the Industries and Finance Departments, and then also requested that advice be obtained from a corporate lawyer. Only upon the approval by all of these Departments, the opinion from the external lawyer and the approval of the Minister for Planning and Development did the Governor approve the signing of the Deed of Waiver and Consent.

748. Finally, Respondent submits that "*there is evidence to suggest that there was concern amongst the GoB/BDA as to Mincor's involvement*" as result of which the GOB's consent "*may have been withheld*" if this right had been known. In this regard, Respondent relies

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[873] **Exhibit CE-1**, clause 14.1.
[874] Respondent's Reply, ¶ 227.

on the minutes from the meeting held on 11 April 2000 with the Chief Secretary, which record that the Chief Secretary "*quarried*," *inter alia*, about "*the credentials and implications of Mincor's proposal to be inducted in the project*." The minutes further provide:

> "*Chief Secretary was under the impression that the original joint venture agreement did not provide for the parties to withdraw from the project. Therefore it has to be ensured that BHP's role as partner is not being withdrawn at the cost of other partner's interest. Chief Secretary also instructed that the credentials and capability of Mincor must be ensured so that the project does eventually run according to the original joint venture agreement*."[875]

749. Respondent further refers to a letter from the Finance Department of 9 May 2000 which has already been referred to above in the context the Tribunal's analysis on the Addendum. In that letter, the Finance Department reiterated its opinion regarding the changes to the financing terms under the CHEJVA introduced by the Addendum and further noted at the end that "*the interest of Government of Balochistan must be protected while deciding introduction of third party MINCOR in pursuance of Clause 14.3 of addendum to the Joint Venture Agreement*."[876]

750. In addition, Respondent relies on the testimony of Mr. Tahir, who stated in his second witness statement regarding the introduction of Mincor (albeit in the context of the Addendum):

> "*I, together with my immediate supervisor Mr Habibullah Baloch (sometimes also called Mr Habibullah Badini), who was the General Manager of Mines at the BDA, became aware of the game that BHP was playing in terms of Mincor's proposed involvement in Reko Diq at the time that the Addendum was being negotiated, in mid-to-late 1999. While we at the BDA initially had high hopes that BHP, a large multinational company, would undertake the exploration and development activities set out in the CHEJVA, it became clear that BHP had no interest in doing so and wanted to farm out these obligations to a new, smaller company, Mincor. There were major concerns regarding Mincor taking on the project at the DMD* [Directorate Mineral Development] *and at the Industries Department. I recall that the Director of the DMD, Mr Shahnawaz Marri, and the Secretary of the Industries Department, Mr Arif Azeem, voiced concerns that BHP had benefitted from (i) the relaxations granted by the Industries Department of the Balochistan Mining Concession Rules 1970 (BMCR) and (ii) the reservation of more than three million acres of land by the DMD, both primarily because of BHP's status as a world class mineral exploration company, and that these rights should not be farmed out to a junior company like Mincor. Mr Marri was also concerned that a smaller company would not have the financial resources to*

[875] **Exhibit RE-58(ap)**, p. 22.
[876] **Exhibit RE-58(an)**, p. 60.

> *explore, develop and mine the exploration area, nor the technological expertise. He worried that this would prevent development of the Reko Diq project.*"

751. Finally, Respondent notes that there is no evidence that would suggest that any analysis was undertaken by the GOB with regard to Mincor's ability to perform the obligations under the CHEJVA.[877] In this regard, Respondent places particular emphasis on the fact that Mincor was a junior mining company or, as Respondent put it, a "*mining minnow*" compared to the "*mining giant*" BHP.[878] Respondent argues that it would thus have been "*natural for the GOB to have reservations over the introduction of Mincor to the project*" and questions both Mincor's "*experience and ability to implement a project of this scale*" and how it intended to finance the project.[879]

752. In his witness statement, Mr. Moore, who was CEO of Mincor at the time, explained that it is "*a common situation in the mining industry, where a major mining company does not want to continue with an exploration project and passes it along to a junior mining company.*"[880] He further explained:

> "*Typically a junior exploration company will take on a difficult exploration project and, if successful, will either develop it through raising equity finance or, if it is a project of a size to interest a major company, sell it to that major company in a deal that usually involves a take-over of the junior company – as happened with TCC.*
>
> *Mincor was also not a completely typical junior company. Mincor had the backing of Iscor, a multi-billion dollar company, as a 40% shareholder. I also had personal relationships with the executives in BHP who managed Reko Diq, due to the abortive deal I had negotiated with them while I worked for Iscor. … Mincor was already familiar with the Project, had already visited the site, and could rely on much of the due diligence that Iscor had already conducted – all of which was a significant advantage to BHP, saving at least 6 months-worth of work that a new suitor would have needed to evaluate the asset. It is easy to see why BHP were willing to talk to us.*
>
> *Mincor also had excellent credentials. As the CEO of Mincor, I had a background in geology and nearly 20 years of experience with mining projects around the world at Shell/Billiton and Iscor. I also had direct hands-on experience in porphyry copper systems, and the importance of this to the people who managed BHP's Reko Diq project, who were primarily geologists, should not be under-stated. Mincor offered a small startup's flexibility and willingness to take risks, strong technical credentials, known and trusted individuals who already had a good knowledge of the Reko Diq*

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[877] Respondent's Reply, ¶ 239 lit. d.
[878] Respondent's Post-Hearing Brief, ¶ 123. *See also* Respondent's Reply, ¶ 231.
[879] Respondent's Reply, ¶ 233.
[880] Moore, ¶ 59.

> *Project, and the added heft of a major mining company as controlling shareholder. For all of these reasons, Mincor was also a better partner for the GOB than BHP was at that time.*"[881]

753. When asked during the hearing how Mincor anticipated to raise the level of financing required for the then-envisaged project at H-4 (Tanjeel), Mr. Moore explained:

> "*So, it's really the classic process of exploration finance by junior companies. You spend a little bit of money in the ground, and you make a discovery. Actually, making the initial discovery isn't that expensive. You spend a bit more money, and you sort of bulk it up. The discovery gets reflected in your share price. The value of your company rises. You use that higher share price to raise more money. And then you get money to carry out the Feasibility Study. And now, you've got a something of proven value that is reflected in your share price, and you use your shares to raise a final round of financing for the development. And, normally, you try and get about 70 percent debt, 30 percent equity, and youdevelop the mine.*
>
> *This happens throughout the world, sometimes with very small companies financing very, very big billion dollars-plus projects. So, there is very few mining or exploration companies that go into a project with all the financing for the whole thing lined up from the start. You grow with the Project. The key thing is to be successful in discovering, in making that discovery. If you make that discovery, everything else flows from that.*"[882]

754. On the basis of the evidence set out above, the Tribunal is not convinced that there were concerns within the GOB regarding the introduction of Mincor to the project which, if it had been aware of its right under Clause 14.1 of the CHEJVA, would have led it to object to the transfer of BHP's interest to Mincor. While the minutes of the meeting of 11 April 2000 indicate that the Chief Secretary indeed expressed certain concerns regarding Mincor, there is no further documentary evidence to support Respondent's allegation that consent would have been withheld. In particular, the Finance Department's note in its 9 May 2000 letter does not establish that it objected to the introduction specifically of Mincor to the project. While Mr. Tahir refers to "*major concerns*" raised by the Directorate Mineral Development and the Industries Department, there is no reference to any contemporaneous documents that would demonstrate that such concerns were indeed raised at the relevant time.[883]

755. Finally, in light of Mr. Moore's testimony quoted above and also taking into account that Respondent did not question the testimony of Claimant's witnesses that Mincor was the only interested party at the time, the Tribunal is not convinced that it was not in the interest

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[881] Moore, ¶¶ 59-61.
[882] Transcript (Day 9), p. 2304 line 9 to p. 2305 line 10.
[883] Reference is made only to the 1994 Relaxations and the letter also dating from 1994 by which the Director, Mineral Development informed the BDA that the area of land had been reserved in its favor. **Exhibits CE-189** and **RE-49**.

of the GOB to waive its pre-emptive rights and give the necessary consents to the transfer of BHP's right to Mincor. In the absence of any other interested parties, it also does not appear that putting out a tender for BHP's interest would have produced a different result.

756. Consequently, the Tribunal does not believe that there were any "*anomalies*" in the approval process of the Deed of Waiver and Consent that would justify to draw the conclusion that illegitimate payments were made or offered in this process.

e. Allegations Relating to the 2006 Novation Agreement(s)

757. Fifth, the Tribunal will examine Respondent's allegation that the 2006 Novation Agreements were secured by various corrupt acts.

i. Summary of Respondent's Position

758. Respondent alleges the following acts of corruption were relevant to the securing of the novation of BHP's interests in the CHEJVA (the agreement through which the GoB agreed that TCC would replace BHP as a party to the CHEJVA and enjoy all of BHP's rights and benefits thereunder) and three exploration licenses (EL-5, EL-6 and EL-7). In respect of the CHEJVA and EL-5, two novation agreements were signed on 1 April 2006 (together the "**Novation Agreements**").[884] Respondent maintains that each of the following constitutes an illegal benefit under Pakistani law.[885]

i. Firstly, Respondent maintains that there was an improper influence over and the offering of an incentive to the BDA's legal counsel (Mr. Malik) by Mr. Hargreaves, Mr. Iqbal and TCC's lawyer Mr. Rizvi in February 2006 to ensure that he would not be an obstacle during the negotiations and would assist TCC to get the deal through quickly.[886]
ii. Secondly, Respondent submits that gifts were made to the BDA Chairman, Mr. Yousaf in March 2006, in return for his support in respect of the Novation Agreements, including the execution of those agreements.[887]
iii. Thirdly, Respondent maintains that key individuals promised to get Mr. Farooq appointed as Chairman of the BDA if he got the Novation Agreements signed, together with receiving regular payments to earn his loyalty to TCC (including in relation to the Addendum and the certification).[888]

759. As a preliminary issue, Respondent emphasizes the considerable pressure Claimant's management was under to conclude the four novation agreements.[889] Respondent notes that Claimant was subject to an unsolicited takeover offer in December 2005 and in March

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[884] Respondent's Post-Hearing Brief, ¶¶ 37, 124 *referring to* **Exhibits CE-3** *and* **CE-447**.
[885] Respondent's Post-Hearing Brief, ¶ 121.
[886] Respondent's Post-Hearing Brief, ¶ 120(a).
[887] Respondent's Post-Hearing Brief, ¶ 120(b).
[888] Respondent's Post-Hearing Brief, ¶ 120(c).
[889] Respondent's Reply, ¶¶ 253-256.

2006, Atacama Copper Pty Ltd ("**Atacama**"), a subsidiary of Antofagasta, made an offer to Claimant's shareholders to acquire all of their shares. The pressure increased due to Atacama's offer period, during which, conditions had to be satisfied, including the execution of a novation agreement.[890]

760. Respondent rejects Claimant's assertions that through the Deed, "*the GOB explicitly consented to the introduction of TCC into the CHEJVA and contractually bound itself to sign the Novation Agreements.*"[891] Respondent maintains that to say that there was any kind of contractual entitlement to transfer its right to Claimant is a falsification on what was agreed between BDA and BHP.[892] Respondent submits that, in fact, the consents contained within the Deed applied only to transfers of interest under the CHEJVA to Mincor or any "*company or companies through which Mincor … intends to carry out the business and activities referred to in the Option Agreement.*"[893] Respondent submits that Mincor's intention to immediately withdraw from the project following the transfer in Antofagasta's favor, was thus not foreseen by the Deed, which only permits internal restructuring by Mincor. Otherwise, it would have been a blanket waiver of GOB's pre-emptive rights and consent to any transfer to any third parties at any future time.[894]

761. Respondent thus argues that the execution of the Novation Agreements was the fulfilment of a condition precedent for the takeover of TCC in 2006, not merely the fulfilment of a 2000 promise.[895] The agreements therefore required due consideration and negotiation. Pakistan alleges that what ensued however, was corruption.

762. Respondent sets out in its Post-Hearing Brief an overview of the approval process behind the Novation Agreements which took place towards the end of 2005 and beginning of 2006.[896] Contrary to Claimant's suggestion that this approval process was proper, Respondent maintains that documentary and witness evidence demonstrates the following anomalies in the process.

(a) The Lack of Proper Approval of the Novation Agreements

763. Described as the "*elephant in the room*" that Claimant cannot avoid, Respondent relies on Mr. Farooq's evidence and the documentary record to allege that the Novation Agreements never received the Chief Minister's or the Governor's approval, nor adequate

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[890] Respondent's Reply, ¶ 255.
[891] Respondent's Reply, ¶ 250 *referring to* Claimant's Opposition, ¶ 139, 151.
[892] Respondent's Post-Hearing Brief, ¶ 251.
[893] Respondent's Reply, ¶ 251 *referring to* **Exhibit CE-194**, Clauses 1 (definition of "*Transfers*" and "*MINCOR*"), 2, 3(a).
[894] Respondent's Reply, ¶ 251.
[895] Respondent's Reply, ¶ 252 *referring to* Claimant's Opposition, ¶ 154.
[896] Respondent's Post-Hearing Brief, ¶¶ 257-267.

Law and Finance Department vetting.[897] Respondent maintains that despite the Chief Secretary's instruction for the BDA Chairman to "*coordinate with Law, BDA and Finance*" and, then, to put "*a commented proposal safeguarding our interests … up for approval of Competent Authority*" in September 2005, there is no evidence to suggest that such direction was acted upon and thus that such events occurred (which Respondent also alleges contravened the GOB Rules of Business 1976, Rules 7(3), 8(1), 13(1) and 14(3) and (4)).[898]

764. Respondent refers to Mr. Malik's testimony in which he confirmed that he did not want to witness the Novation Agreements without Law Department vetting, but was pressured to do so by Mr. Farooq. Despite Claimant's claims that it encouraged the input of the relevant departments, Respondent maintains that there is no document to suggest that Claimant insisted on Law Department vetting, nor that the Finance Department was ever consulted regarding the Novation Agreements.[899]

765. Respondent submits that Mr. Farooq admitted that given the stringent timeframe, it was agreed that the Chairman should be persuaded to sign the Novation Agreements alone (*i.e.*, without the MMDD also signing). Mr. Farooq did so by advising the inexperienced then-Chairman of the BDA that he could sign on behalf of the Governor, based on the 1999 authorization in respect of the Addendum.[900]

(b) The Crucial Role of Mr. Farooq

766. Respondent emphasizes that Mr. Farooq's motivation to be appointed as Chairman of the BDA and his deep involvement in the process had a significant effect on the approval.[901] The suggestion that Claimant would not have the power to appoint him as Chairman is denied by Respondent by reference to the testimony of influential individuals including Mr. Hargreaves, Mr. Lakhani and Col. Sher Khan whose recommendations went a long way in determining who should be appointed as Chairman.[902] Respondent refers to various meetings in early to mid-2006 in which Col. Khan and Mr. Flores allegedly made clear to Chief Minister Yousaf and Chief Secretary Rind that Claimant wanted Mr. Farooq to become BDA Chairman.[903]

767. Additionally, Respondent maintains that witness evidence and Claimant's e-mail exchanges clearly demonstrate Claimant's awareness of Mr. Farooq's influence over and

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[897] Respondent's Reply, ¶ 271 *referring to* Farooq I, ¶ 14 *and* Farooq II, ¶ 36.
[898] Respondent's Reply, ¶ 271 *referring to* Farooq II, ¶ 36, **Exhibits RE-268**, pp. 4-5 *and* **RE-20**.
[899] Respondent's Reply, ¶ 271 *referring to* Malik, ¶ 4, Claimant's Opposition, ¶ 158 *and* Hargreaves, ¶ 41.
[900] Respondent's Reply, ¶ 272(b) *referring to* Farooq I, ¶ 14.
[901] Respondent's Reply, ¶¶ 277-280.
[902] Respondent's Reply, ¶ 276 *referring to* Farooq II, ¶ 32 *and* Khan II, ¶ 23.
[903] Respondent's Reply, ¶ 276 *referring to* Khan II, ¶ 23.

involvement in the Novation Agreement approval process and its subsequent use of this influence to ensure approval was obtained.[904]

768. In response to Claimant's argument that Mr. Farooq's persuasion of the Chairman would have been unnecessary, Respondent maintains the contrary – Mr. Farooq's persuasion was necessary, given there was a lack of vetting by concerned departments and higher approval for the Novation Agreements, such that Mr. Yousaf wrongly felt that he had the discretion to sign the Novation Agreements on behalf of both the BDA and the Governor.[905]

(c) Attributability of Mr. Farooq's Conduct

769. Respondent alleges that the acts of Mr. Farooq are attributable to Claimant given his role over the course of his 14-15 year involvement in the project as TCC's *de facto* representative in Pakistan.[906] Despite its awareness of his corrupt reputation, Respondent maintains that TCC took no steps to distance itself from him, nor to raise any complaint in relation to his 2006 promotion to BDA Chairman, preferring to maintain a close relationship with him given that he was instrumental in advancing Claimant's project.[907] Respondent refers to the statements of Mr. Hargreaves who acknowledged his "*good working relationship with Mr. Farooq*" and Mr. James who noted that he was "*looking forward to meeting many times*" with Mr. Farooq during his tenure, as evidence of the strength of this relationship.[908]

770. Moreover, Respondent submits that there is extensive documentary evidence further demonstrating the lengths to which Mr. Farooq would go to support BHP and TCC, including but not limited to communication with the Additional Chief Secretary seeking early approval of the Addendum, Mr. Schloderer's letter to Mr. Farooq concerning the completion of Stage One and Two activities, communication concerning the draft novation agreements and also his attempts to obtain the airstrip rights for free.[909]

771. Respondent notes that witnesses have repeatedly testified that Mr. Farooq was accepting bribes in return for favoring and advancing BHP's and later Claimant's interests in the project and his loyalty to TCC rather than the Government.[910] Witnesses have also painted a picture of him as a secondary conduit (alongside Col. Khan) for money to be used for bribes to pass from Claimant to other Balochistan officials in connection with virtually

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[904] Respondent's Reply, ¶¶ 277-279 *referring to* **Exhibits CE-438** *and* **Ex RE-321**.
[905] Respondent's Reply, ¶ 280.
[906] Respondent's Post-Hearing Brief, ¶ 353 *referring to* Transcript (Day 8), p. 2129 lines 8-11.
[907] Respondent's Reply, ¶¶ 57-59.
[908] Respondent's Reply, ¶ 59 *referring to* Hargreaves, ¶ 63, Iqbal, ¶ 17, **Exhibits RE-284** *and* **RE-218**.
[909] Respondent's Reply, ¶ 61.
[910] Respondent's Reply, ¶ 383; Respondent's Application, ¶¶ 61-62.

every key moment of the project.[911] Thus by his conduct and his relationship, Respondent maintains that Claimant cannot separate itself from Mr. Farooq's conduct on its behalf.[912]

(d) Improper Influence over Mr. Malik

772. Respondent questions the impartiality of "*independent corporate counsel*" Mr. Malik based on witness statements showing that he acted contrary to his obligations to his client, the BDA.[913] Respondent submits that witnesses confirmed that he replaced BDA's long-standing counsel at Claimant's request given criticisms relating to the Addendum.[914] Respondent emphasizes that Mr. Farooq described collusion between himself and Mr. Malik to secure the Novation Agreements, something which was motivated by Claimant's promise to help Mr. Malik get a job at a specific law firm.

773. Apart from Claimant's alleged awareness of the job offer at the law firm of Antofagasta's lead counsel, Mr. Rizvi, Respondent contends that contemporaneous documents cast further doubt on Mr. Malik's independence, arguing that: (i) Claimant was paying him for interrelated work (novations of EL-6 and EL-8) in circumstances where it was obvious a conflict may arise; and (ii) Claimant was giving Mr. Malik instructions and was aware of his advice to the BDA regarding the novations of the CHEJVA and EL-5.[915] Respondent alleges that it is evident that the promise of a job and further instruction given by Claimant to Mr. Malik shifted his loyalty from BDA towards TCC. Respondent thus argues that the BDA was not represented in the novation agreement negotiations by independent legal counsel as it should have been.[916]

(e) Gifts to Mr. Yousaf

774. Finally, Respondent relies on the testimony of Mr. Farooq to confirm that gifts were made to Mr. Yousaf, including "*a Rolex watch and a cigar case.*"[917] Respondent alleges that such expensive gifts undoubtedly had an impact when Mr. Farooq came to persuade Mr. Yousaf to sign the Novation Agreements.[918]

775. Respondent submits that Claimant's allegation of a lack of "*real bribery or corruption*" and that Pakistan's case is limited to "*allegations of very small favors to low-level and relatively insignificant people*," effectively invites the Tribunal to tolerate a certain level

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[911] Respondent's Reply, ¶ 450 *referring to* Respondent's Application, ¶¶ 61-62.
[912] Respondent's Application, ¶¶ 61-62.
[913] Respondent's Reply, ¶ 281 *referring to* Claimant's Opposition, ¶ 158.
[914] Respondent's Reply, ¶ 282 *referring to* Iqbal, ¶ 32 *and* Farooq II, ¶ 37.
[915] Respondent's Reply, ¶ 286; Respondent's Post-Hearing Brief, ¶ 135 *referring to* **Exhibit RE-216**.
[916] Respondent's Post-Hearing Brief, ¶ 135.
[917] Respondent's Reply, ¶ 287 *referring to* Farooq II, ¶ 38.
[918] Respondent's Reply, ¶ 287 *referring to* Farooq II, ¶ 38.

of corruption, something contrary to the scheme of the UNCTAD and OECD Convention, transnational public policy and Pakistani law.[919]

776. Respondent alleges a causal link between the Novation Agreements and the earlier corruption events; but-for BHP's corruption procuring the Addendum, the certification of BHP's interest and the Deed, Claimant would never have farmed into the project, and thus would not have had the opportunity to establish the Novation Agreements transferring BHP's purported interest in the CHEJVA to it. Respondent therefore alleges that these events, procured by bribery and but-for which there would have been no Novation Agreements, must be considered "*real bribery and corruption.*"[920]

ii. Summary of Claimant's Position

777. On a preliminary note, Claimant emphasizes that the main novation agreement is the only one where any conduct attributable to TCC could possibly affect its Treaty rights since this is the only contract by which TCC became party to the CHEJVA, through which its investment was admitted in Pakistan for purposes of the Treaty.[921]

778. Claimant highlights that despite Mr. Farooq's statement that he was "*not aware of any specific payments made to get the Novation Agreement signed,*" Respondent persevered, developing unsubstantiated allegations of illicit gifts and job promises.[922] Claimant instead maintains that: (i) BHP was contractually entitled to transfer its rights in the CHEJVA to Claimant; (ii) the Novation Agreements were carefully negotiated; (iii) the record disproves the allegation that Mr. Farooq's was paid to ensure signing or that he persuaded the Chairman to sign; and (iv) the allegation of improper influence over Mr. Malik is unsubstantiated.[923]

779. Ultimately, Claimant alleges that Respondent has "*failed to prove that any of this alleged corruption actually occurred, much less that the Novation was corruptly procured so as to have any effect on TCCA's right to recover for Pakistan's breaches of the Treaty.*"[924]

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[919] ; Respondent's Reply, ¶ 511; Respondent's Post-Hearing Brief, ¶¶ 133-134 *referring to* Transcript (Day 1), p. 276 lines 7-9 and p. 278 lines 12-15, Transcript (Day 6), p. 1591 lines 1-3, *both referring to* Farooq II, ¶ 38, Claimant's Rejoinder, ¶ 397, Transcript (Day 1), p. 276 lines 9-11 and p. 26 lines 5-14.
[920] Respondent's Post-Hearing Brief, ¶ 136.
[921] Claimant's Post-Hearing Brief, ¶ 118.
[922] Claimant's Post-Hearing Brief, ¶ 119 *referring to* Farooq II, ¶ 38 *and* Respondent's Reply, ¶ 247.
[923] Claimant's Opposition, ¶ 156-165; Claimant's Rejoinder, ¶ 397-404.
[924] Claimant's Post-Hearing Brief, ¶ 131.

(a) Contractual Entitlement to Transfer Its Rights in the CHEJVA to Claimant

780. Claimant denies that it would have been necessary to use corruption to secure the Novation Agreements, arguing that Balochistan was legally required to execute these agreements by virtue of the Deed and the Addendum.[925]

781. Claimant submits that the Deed provided that the GOB, acting through the BDA Chairman, "*agrees to do all things and sign all documents necessary to give effect to the Transfers,*" while the Addendum provided that "*where there is an assignment…all Parties to this Agreement shall execute all documents necessary to assign or transfer such Percentage Interest.*"[926]

782. Claimant challenges Respondent's argument that the Deed did not contemplate the entry of a new third party.[927] This argument allegedly contradicts Respondent's objections to the 2000 Addendum and Deed, *i.e.*, that BHP's substitution by Mincor was against Balochistan's interests. Claimant submits that the transfer to TCCA (not Antofagasta) was expressly contemplated by the 2000 Agreements.[928]

(b) Careful Negotiation of the Novation Agreements

783. Claimant maintains that the documentary record demonstrates that the Novation Agreements were the subject of extensive evaluation. Claimant submits that there is nothing on record to support the allegation that MMDD's proposal that a "*meeting be convened…for consideration of the case in consultation with the Finance, Law and M&M Departments*" did not take place.[929] Additionally, Claimant submits that since Respondent refused to produce documents in relation to how the Novation Agreements were approved, it cannot now rely on an absence of evidence about that very process.[930]

(c) Mr. Farooq's Testimony

784. Claimant argues that Respondent has not adequately explained how TCC could have secured Mr. Farooq's appointment as BDA Chairman.[931] Claimant submits that both Mr. Farooq and Col. Khan explained that the Chairman is selected by the Chief Minister and Chief Secretary and therefore, as supported by the evidence of Mr. Flores and Mr. Hargreaves, it is hard to see how TCC could have influenced this process beyond simply

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[925] Claimant's Post-Hearing Brief, ¶ 128.
[926] Claimant's Rejoinder, ¶ 398 *referring to* **Exhibits CE-194**, Clause 2 *and* **CE-2**, new Clause 14.5.
[927] Respondent's Reply, ¶¶ 250-251.
[928] Claimant's Rejoinder, ¶ 399.
[929] Claimant's Rejoinder, ¶ 400 *referring to* Respondent's Reply, ¶ 271(a) and **Exhibit RE-268**, p. 5.
[930] Claimant's Rejoinder, ¶ 401 *referring to* Claimant's Redfern, at 50 (Request 29).
[931] Claimant's Rejoinder, ¶ 402; Claimant's Post-Hearing Brief, ¶¶ 120-122.

making a recommendation or "*putting in a word*" on behalf of Mr. Farooq, especially when at the time it found it difficult even to get a preliminary meeting with these individuals.[932]

785. Moreover, Claimant submits that the ever-changing nature of Mr. Farooq's testimony in relation to his purported guarantee of appointment as Chairman and the aforementioned motivation for him to lie to the NAB given his kickback scheme involvement, render his other claims regarding the gifts made to Mr. Yousaf, lacking credibility.[933] Not only does Claimant maintain that these allegations are so vague that Respondent has not even alleged a payor, but it submits that the testimony of Mr. Hargreaves demonstrates that Mr. Yousaf genuinely supported and had interest in the project – he therefore did not need to be bribed.[934] Claimant contends that his enthusiasm made perfect sense given the potential of the project to transform the local economy through employment, skills development, and revenue to Balochistan though profits to the joint venture partnership and royalties to public treasury.[935]

786. Furthermore, Claimant argues that, although Respondent now refuses to acknowledge it, it is indisputable that the highest-ranking officials of both the Federal and Provincial Governments openly supported and encouraged TCC's investment. Claimant maintains that, as the Tribunal has already found, "*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.*" [936] Claimant therefore suggests that it is inconceivable that TCC would have any reason to interfere with the inner workings of the BDA hierarchy when far higher authorities than Mr. Farooq had already determined the investment to be welcome.[937]

(d) Attributability of Mr. Farooq's Conduct

787. Moreover, Claimant argues that documentary evidence relied upon by Respondent to support the cornerstone of its case, namely that "*Mr. Farooq acted as a de facto TCC representative in Pakistan,*" actually shows nothing more than an ordinary working

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[932] Claimant's Post-Hearing Brief, ¶ 122 *referring to* Farooq II, ¶ 32, Transcript (Day 2), p. 548 lines 9-21, p. 551 lines 5–17 and p. 549 lines 5–20, Transcript (Day 4), p. 1026 line 20 to p. 1030 line 12, Flores, ¶ 31, Flores II, ¶ 14, Hargreaves, ¶ 64, Hargreaves II, ¶ 29 *and* Transcript (Day 10), p. 2593 lines 3-15, p. 2597 line 21 to p. 2598 line 18; Claimant's Rejoinder, ¶ 402 *referring to* Hargreaves II, ¶¶ 29-30.
[933] Claimant's Post-Hearing Brief, ¶ 121, 125.
[934] Claimant's Post-Hearing Brief, ¶¶ 124-126 *referring to* Farooq II, ¶ 38 *and* Hargreaves II, ¶ 31.
[935] Claimant's Post-Hearing Brief, ¶ 126.
[936] Claimant's Post-Hearing Brief, ¶ 123 referring to Draft Decision, ¶ 951.
[937] Claimant's Post-Hearing Brief, ¶ 123.

relationship between representatives of the Joint Venture parties.[938] Claimant submits that there is actually documentary and witness evidence (from Dr. Jezek and Mr. Hargreaves) refuting this supposed loyalty - for example concerning the Novation Agreements, Mr. Farooq and the BDA actually supported MMDD Director-General Maqbool Ahmed in his refusal to sign the Novation Agreements on behalf of the MMDD.[939]

788. Claimant submits that there is nothing suspect about Mr. Farooq's relationship with TCC – Balochistan chose him as the Government's liaison to the Joint Venture by appointing him as a member of the Operating Committee and thus TCC had no choice but to work with him.[940] Claimant maintains that Mr. Farooq was never an employee or consultant of TCC and thus cannot be considered the "*directing mind and will*" of TCC.[941] Claimant maintains that in his dealings with TCC, he was simply acting as *Balochistan's* representative in the Joint Venture and was simply fulfilling *Balochistan's* obligations under the CHEJVA; there is no basis to attribute his acts to Claimant.[942]

789. Moreover, Claimant maintains that Respondent's allegations that TCC did not take any steps to distance itself from Mr. Farooq, nor raise any complaint in relation to Mr. Farooq's promotion to BDA Chairman, miss the point.[943] Claimant submits that Ms. Boggs' lack of familiarity with Mr. Farooq upon his promotion not only contradicts his supposed "*key role in the project*" but also any suggestion that TCC played a role in his appointment.[944]

(e) Mr. Malik's Independence

790. Claimant firstly perceives the allegation that Mr. Malik represented "*two parties in their negotiation of a contract*" to be a desperate attempt to establish some sort of corruption related to the Novation since Balochistan did not have an interest in Exploration Licenses EL-6 or EL-8 and was not a party to the novations of those licences.[945] Moreover, Claimant argues that there is no evidence to conclude that Mr. Malik materially affected the Novation Agreements' outcome, nor that he did not act in his client's best interests.[946]

791. Claimant also disputes Respondent's allegation that Mr. Malik "*was appointed at TCC's request*" based on the documentary record.[947] Not only does the record demonstrate the

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[938] Claimant's Rejoinder, ¶¶ 214-216.
[939] Claimant's Rejoinder, ¶¶ 217-218 *referring to* Hargreaves II, ¶ 26.
[940] Claimant's Rejoinder, ¶ 216 *referring to* Boggs I, ¶ 12 *and* Flores I, ¶ 28.
[941] Claimant's Post-Hearing Brief, ¶¶ 213-214.
[942] Claimant's Post-Hearing Brief, ¶¶ 213-214 *referring to* **Exhibit CE-1**, Clause 7.2(a).
[943] Claimant's Rejoinder, ¶ 219 *referring to* Respondent's Reply, ¶ 57, 59.
[944] Claimant's Rejoinder, ¶ 220 *referring to* Farooq II, ¶ 11.
[945] Claimant's Post-Hearing Brief, ¶ 127.
[946] Claimant's Rejoinder, ¶ 404 *referring to* Respondent's Reply, ¶ 286 *and* Hargreaves II, ¶ 34.
[947] Claimant's Post-Hearing Brief, ¶ 127 *referring to* Respondent's Reply, ¶ 281.

BDA's invitation of offers by newspaper advertisements for the outside counsel position, but it also confirms that the BDA's appointment of Jamshid Malik was news to Claimant and that they did not know who he was at the time.[948] Additionally, what Claimant perceives should be telling is that after Mr. Hargreaves had refuted such an allegation in his witness statement, Respondent did not even question him about it at the hearing.[949]

iii. Tribunal's Analysis

792. There is common ground between the Parties that on 1 April 2006, the GOB, BHP and Claimant concluded the 2006 Novation Agreement concerning the CHEJVA, which provided, most importantly, that "*TCC shall replace BHPB under and as a party to the JVA.*"[950] On the same date, the same parties also concluded a further novation agreement concerning the Exploration License EL-5 jointly held by the Joint Venture partners, which provided that "*TCC shall replace BHPB as the holder of the Transferred Interest* [*i.e.*, BHP's 75% interest in Exploration License EL-5]."[951] Together, these two agreements are referred to as the "**Novation Agreements**." While it was originally envisaged that two additional novation agreements would be signed in respect of Exploration Licenses EL-6 and EL-8 in which BHP held 100% at the time,[952] it was decided in mid-March 2006 that the transfer of those Licenses would be carried out pursuant to applications to the MMDD under 2002 BM Rule 64 only.[953] The reason for this change in approach to the transfer is in dispute between the Parties and will be addressed in further detail below.

793. There is further common ground that Antofagasta's offer of 9 March 2006 to acquire all of Claimant's shares and thus to take over Claimant from Mincor was subject to the conditions that, *inter alia*, before the end of the Offer Period on 11 April 2006:

> "*(A) a novation agreement is entered into under which Tethyan is substituted for BHP Minerals International Exploration Inc. as a party to the Chagai Hills Exploration Joint Venture Agreement; and*
>
> *(B) Tethyan is duly registered as the holder of a 75% interest in EL5 and a 100% interest in EL6 and EL8.*"[954]

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[948] Claimant's Post-Hearing Brief, ¶ 127 *referring to* **Exhibits RE-268** ¶ 17 *and* **CE-739**.
[949] Claimant's Post-Hearing Brief, ¶ 127 *referring to* Hargreaves II, ¶ 22.
[950] **Exhibit CE-3**, Clause 2 lit. a.
[951] **Exhibit CE-447**, Clause 2 lit. a.
[952] *See, e.g.*, **Exhibit CE-438**.
[953] **Exhibit CE-444**.
[954] **Exhibit RE-275**, p. 3.

794. While Respondent does not allege that any specific illegitimate payments were made in connection with the Novation Agreements, it does claim that these Agreements were secured by "*various corrupt acts*," constituting "*illegal benefits under Pakistani law*":[955]

   i. An offer by Mr. Hargreaves, Mr. Iqbal and Mr. Rizvi, Antofagasta's local lead counsel, of a job and instructions to Mr. Jamshid Malik, BDA's outside legal counsel, in February 2006 "*to ensure that he would not be an obstacle during the negotiations of the Novation Agreements and would assist TCC to get the deal through quickly*";

   ii. Valuable gifts given by "*TCC*" to Mr. Yousaf, Chairman of the BDA, in March 2006 "*to gain support for the Novation Agreements, including the execution of those agreements*;"

   iii. A promise by Col. Khan, Mr. Arndt and Mr. Hargreaves to Mr. Farooq that "*they would get him appointed as BDA Chairman if he ensured the Novtion Agreements were signed*";

   iv. "*regular payments made to Mr Farooq prior to 1 April 2006,*" which together with the above-mentioned promise were meant "*to earn his loyalty to TCC*."

795. In support of these allegations, Respondent relies on the witness testimony of Mr. Farooq, Mr. Malik, Mr. Iqbal and Col. Khan, which will be addressed in detail below.

796. Respondent submits that, as a result of these illegal benefits, "*BHP obtained the Novation Agreements in which inter alia the GoB agreed that TCC would replace BHP as a party to the CHEJVA and enjoy all of BHP's rights and benefits under the CHEJVA.*"[956] In this regard, the Parties are in dispute as to whether: (i) the GOB had already agreed to the transfer of BHP's rights to Claimant under the 2000 Deed of Waiver and Consent and was thus contractually bound to sign the Novation Agreements; and (ii) there was a lack of proper approval of the Novation Agreements. In addition, there is a dispute as to whether, even in the absence of proper approval, this would justify drawing an inference that illegitimate benefits were given.

(a) The Relevance of Claimant's Conduct in the Negotiations and Execution of the Novation Agreements

797. In its Draft Decision on Jurisdiction and Liability, the Tribunal found that for the purposes of assessing whether Claimant had an "*investment*" within the meaning of Article 1(1)(a) of the Treaty and, specifically, whether such investment was "*admitted*" by Respondent

[955] Respondent's Post-Hearing Brief, ¶¶ 120-121; Respondent's Reply, ¶ 247.
[956] Respondent's Post-Hearing Brief, ¶ 124.

"subj*ect to its law and investment policies applicable from time to time*," the conclusion of the 2006 Novation Agreement concerning the CHEJVA constituted the relevant point in time as of which such assessment had to be made because Claimant thereby became party to the CHEJVA and took over BHP's rights and obligations *vis-à-vis* its Joint Venture partner.[957] Similarly, in the context of assessing Claimant's legitimate expectations, the Tribunal confirmed that it considered the conclusion of the 2006 Novation Agreement as the main investment decision.[958]

798. The Tribunal notes that Claimant concludes from this finding that the Novation Agreement "*is the only agreement where any conduct attributable to TCCA could possibly affect its Treaty rights*" and Respondent therefore must establish that the execution of this Agreement was procured by corruption in order to succeed on its Application.[959] At the same time, Claimant argues that none of the conduct alleged by Respondent "*could possibly amount to corruption causing the execution of the Novation Agreements*" because, pursuant to the Deed of Waiver and Consent, the GOB "*was legally required to execute those agreements*."[960]

799. Respondent, on the other hand, claims that the transfer to TCC as it was carried out in 2006 was not contemplated by the Deed of Waiver and Consent, which applied to a transfer between BHP and Mincor, including "*companies through which Mincor Resources NL intends to carry out the business and activities referred to in ithe Option Agreement*," but not the transfer to TCC as a separately-owned, stand-alone company that was soon to be owned by Antofagasta. In addition, and in any event, Respondent argues that the GOB retained discretion "*as regards the mechanism and wording of any such transfer of interests*."[961] Respondent considers the execution of the Novation Agreements to be "*a significant event in the life of the project*," which "*could not have been completed without the GoB's cooperation and consent*."[962]

800. The Tribunal takes the view that it is not necessary to make a finding on whether the provisions of the Deed of Waiver and Consent placed the GOB under a contractual obligation to consent to the transfer of BHP's interest in the circumstances prevailing in early 2006. It suffices to note at this point that, as explained by Mr. Hargreaves in his first witness statement, the purpose of the Deed was to provide the necessary security that was required on the part of TCC, which was investing significant time and capital into the exploration works at Reko Diq, that it would eventually be entitled to "*step up to the*

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[957] Draft Decision, ¶ 637, *maintained in* Decision on Jurisdiction and Liability, ¶ 640.
[958] Draft Decision, ¶ 897, *maintained in* Decision on Jurisdiction and Liability, ¶ 900.
[959] Claimant's Post-Hearing Brief, ¶ 118.
[960] Claimant's Post-Hearing Brief, ¶ 128.
[961] Respondent's Reply, ¶¶ 250-251; Respondent's Post-Hearing Brief, ¶ 126.
[962] Respondent's Post-Hearing Brief, ¶ 127.

contractual rights" of BHP when it came to producing and profiting from this investment.[963]

801. In any event, however, the Tribunal agrees with Respondent that an obligation of the GOB to consent to the transfer would not extend to the exact content of the particular Novation Agreements or the question by whom they would be signed or approved. As Mr. Hargreaves testified, what had to be discussed were "*the details of how to implement that earlier agreement* [*i.e.*, the Deed of Waiver and Consent]."[964] The same applies to the timing of the execution, which was undisputedly of relevance in the circumstances, given the limited validity period of Antofagasta's offer and the parallel hostile bid of a third party, Crosby, whose offer was not conditioned on the execution of any novation agreements.[965] Consequently, the Tribunal cannot exclude that if there had been an act of corruption in the context of negotiating or executing the Novation Agreements, it could have contributed to Claimant's becoming party to the CHEJVA and thus have fulfilled the necessary causal link between an illegitimate benefit and Claimant's investment.

802. On the other hand, the Tribunal takes note of Claimant's submission that, on Respondent's own argument, there would have been no reason for the GOB not to allow for the transfer of BHP's interest to TCC under the allegedly new circumstances prevailing in 2006. Claimant argues that, after claiming that the entry of Mincor in 2000, which Respondent described as a "*mining minnow and novice*," was against the GOB interests, Respondent cannot complain about the decision in 2006 to allow for the entry of Antofagasta, which marked the entry of a new "*mining giant*."[966] The Tribunal also recalls the finding it has made in its Draft Decision that Claimant's activities in Pakistan, including the entry of Antofagasta and, later that year, of Barrick Gold, were highly welcomed and encouraged on every level of the GOB and the Government of Pakistan ("**GOP**") at the time.[967] The Tribunal will bear these considerations in mind in its evaluation of the evidence adduced by Respondent.

803. Respondent acknowledges that there was "*high-level support for Antofagasta's investment*" but argues that this is "*no response to direct evidence of corruption*." In this regard, it claims that Claimant: (i) "*encouraged the BDA to push through the* [Novation Agreement] *without certain key approvals*"; (ii) made promises to Mr. Farooq "*to ensure that he would wield his influence on the process*"; (iii) exercised improper influence on

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[963] Hargreaves I, ¶ 36.
[964] Hargreaves I, ¶ 37. *See also* Hargreaves II, ¶ 20.
[965] *Cf.* Respondent's Reply, ¶¶ 253-256. Mr. Hargreaves confirmed during the hearing that it was a "p*ressing issue*" to achieve the deadline for fulfilling the condition precedent set by Antofagasta in its offer and further that the hostile offer of Crosby "*didn't have that condition*" but that they were "*absolutely cheering for Antofagasta because* [they] *thought that this was the best opportunity for Pakistan*." Transcript (Day 9), pp. 2352-2353.
[966] Claimant's Rejoinder, ¶ 395; Claimant's Post-Hearing Brief, ¶ 130.
[967] Draft Decision, ¶ 637, *maintained in* Decision on Jurisdiction and Liability, ¶ 640.

the BDA's corporate counsel, Mr. Malik; and (iv) gave expensive gifts to the Chairman of the BDA, Mr. Yousaf, "*to secure his support*."[968]

(b) The Alleged Lack of a Proper Approval Process

804. As to the approval process, Respondent primarily relies on the absence of any evidence that the Novation Agreements were vetted by the relevant departments, in particular by the Law Department, as directed by the Chief Secretary in September 2005, and the fact that it was decided in March 2006 that the Novation Agreements would not be signed by a representative of the MMDD but only by the Chairman of the BDA. In addition, Respondent invokes the absence of an express authorization from the Governor for the signing of the Novation Agreements by the Chairman of the BDA.

(i) The Alleged Absence of Relevant Departmental Approvals

805. As pointed out by Respondent, the Chief Secretary wrote underneath a note written to him by the Chairman of the BDA on 19 September 2005, which referred, *inter alia*, to the draft novation agreement: "*May coordinate with Law, BDA and Finance and then a commented proposal safeguarding our interests to be put up for approval for competent authority*."[969] Respondent further notes that while the MMDD proposed to convene a meeting to be held with the referenced departments, Mr. Farooq wrote a few days later: "*Since agreement has not been finalized as yet, we may inform CS office accordingly informing progress so far made in the matter*."[970] Respondent also points to the minutes of the OC meeting on 11 February 2006, which record:

> "*In terms of the novation of BHP's interest in the CHEJV and EL5 to TCC, TCC advised that the final versions of the Novation Agreements would be submitted in the following week. BDA advised that it expected that since these had already been reviewed it expected that they could be approved quickly be the provincial Law Department for signature provided the changes were not major*."[971]

806. Respondent claims that there is no evidence that the Law Department or the Finance Department vetted or approved the Novation Agreements as the Chief Secretary had directed in September 2005 and, relying on the witness testimony of Mr. Farooq, that he was actually "*trying to side-step a cross-departmental meeting*" and that there is no evidence that such a meeting ever took place.[972] In his first witness statement, Mr. Farooq stated that "[a]*s a result of* [his] *efforts, the Law Department was bypassed when the*

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[968] Respondent's Reply, ¶ 249.
[969] **Exhibit RE-268**, p. 4.
[970] **Exhibit RE-268**, p. 5.
[971] **Exhibit CE-55**, p. 6.
[972] Respondent's Reply, ¶ 271 lit. a (with note 906).

Novation Agreement was signed in 2006."[973] In his second witness statement, Mr. Farooq stood by this statement but added that "*although there was discussion of these agreements amongst GOB departments, full vetting and approval by the concerned departments and senior individuals did not take place as per the instructions of the CS in the 21 September 2005 note*."[974]

807. Claimant, on the other hand, notes that there is also no evidence that a meeting between the relevant departments did *not* take place and emphasizes that Respondent refused to produce any documents in response to Claimant's document production request for "[d]*ocuments reflecting the process by which* 'the 2006 Novation Agreement between the GOB and TCC' *was approved including documents reflecting that it was allegedly* 'pushed across the line by Mr. Farooq despite it not having been vetted by the GoB's Law Department."[975] Claimant notes that Respondent argued in its objection to this request that, *inter alia*, it was "*for Pakistan to discharge its burden of proof for positive aspects of its claims/defences (in this instance that irregularities/impropriety tainted the procurement of the Novation Agreement)*" and further that it was for Respondent "*to determine what if any documents are necessary to be produced and on which it wants to rely in order to meet the burden of proof.*"[976] The Tribunal denied Claimant's document production request on that basis, noting that Respondent had acknowledged that it "*bears the burden of proof for positive aspects of its claims/defenses*."[977] Against this background, the Tribunal agrees with Claimant that, given Respondent's burden of proof regarding the existence of anomalies in the approval process, it cannot merely invoke the absence of evidence to the contrary.

808. As for Respondent's reference to Mr. Farooq's comment on the 21 September 2005 note, the Tribunal considers that this note, in itself, does not provide any indication that Mr. Farooq intended to "*side-step*" the Law and Finance Departments but rather that their consultation would be postponed until there were finalized drafts to be reviewed. Mr. Farooq also did not make reference to this note in his witness statements. According to Mr. Farooq's testimony, there was further a certain amount of discussion with these departments, which means that they were not completely bypassed as alleged by Respondent.

809. In addition, as pointed out by Claimant, on 24 February 2006, it transmitted final drafts of the Novation Agreements to the Chairman of the BDA "*for review and approval by the Balochistan Law Department*" and stated that "[i]*n case the Law Department*

[973] Farooq I, ¶ 14.
[974] Farooq II, ¶ 36.
[975] Claimant's Redfern Schedule as of 26 April 2016, Request No. 29.
[976] Claimant's Redfern Schedule as of 26 April 2016, Responses and Objections, p. 51.
[977] Claimant's Redfern Schedule as of 26 April 2016, Tribunal's Decision, p. 50.

proposes changes, please advise as soon as possible following which TCC will discuss with the other parties and when agreed incorporate these into the execution copies."[978] Similarly, on 26 February 2006, Claimant provided the drafts to the BDA's external counsel, Mr. Malik, "*for your review and perusal with the law department with Farooq's help*."[979]

810. Mr. Hargreaves confirmed during the hearing that when the Novation Agreements were signed by the Chairman of the BDA, he assumed that all the relevant approvals had been obtained. While he freely admitted that he did not check whether this, or any other agreement he signed in Pakistan, had, in fact, obtained such approvals, he stated that "[t]*he presumption is that the civil servants do their job according to their rules, and when the documents are ready for signature, you sign them*." He also confirmed that this was left to Mr. Farooq as "[t]*hat was his role*."[980]

811. In these circumstances and taking into account that it was indeed the role of the BDA under the CHEJVA to make applications and obtain relevant approvals, the Tribunal considers that even if the approval of the Law Department may ultimately not have been obtained in accordance with the 1976 Business Rules of the GOB, such a failure could not prejudice Claimant. In particular, the Tribunal does not agree with Respondent that it would have been for Claimant to "*insist*[] *on Law Department vetting in circumstances where it was not clear that it was being sought*."[981]

812. The Tribunal is aware that Mr. Masood Malik, Additional General Manager (Planning) at the BDA, testified that he did not want to sign the Novation Agreement as a witness without the vetting by the Law Department but ultimately did so because Mr. Farooq insisted.[982] Mr. Malik did not state, however, that he informed any representatives from Claimant or BHP of his concerns, nor that anyone else besides Mr. Farooq insisted on him signing the Agreement. Therefore, even if the Tribunal accepted that Mr. Malik's testimony was correct, this would not change the finding above that it was not for Claimant do more than to submit the draft agreements "*for review and approval by the Law Department*" and that it cannot be prejudiced if such approval was ultimately not obtained.

813. The same applies to the approval of the Finance Department. Even though Claimant may not have made express reference to this Department in its letter, there is no evidence that this Department raised any concerns in the discussions referred to by Mr. Farooq that remained outstanding at the time of the signing. As noted above, it would have been for

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[978] **Exhibit CE-437**.
[979] **Exhibit CE-438**.
[980] Transcript (Day 9), p. 2360 line 3 to p. 2361 line 1.
[981] *Cf.* Respondent's Reply, ¶ 271 lit. b.
[982] Malik, ¶ 4.

Respondent to discharge its burden of proof as regards the alleged anomalies in the approval process.

(ii) The Alleged Improper Influence over the BDA's External Counsel, Mr. Jamshid Malik

814. As for the fact that the BDA was further advised by external counsel, Respondent claims that the BDA's counsel, Mr. Jamshid Malik, was not acting as an independent advisor to the BDA but was rather "*appointed at TCC's request and acted in TCC's favour*."[983] As pointed out by Claimant, the Chairman of the BDA noted in his 19 September 2005 note to the Chief Secretary that the "*BDA invited offers through leading newspapers for appointment of a solicitor/advocate having sufficient experience in international agreements for vetting agreements submitted by TCC. M/s Jamshid & Davood Law Firm of Quetta was selected for the purpose*."[984] Respondent alleges that this was only a formality, with Mr. Malik already having been chosen beforehand, and refers to the witness testimony of Mr. Farooq, who stated in his second witness statement:

> "*Mr Malik was appointed in the place of Shakil Law Firm, who had advised the BDA since 1974 (the inception of the BDA). Mr Arndt had asked me to get another law firm involved, other than Shakil Law Firm, who TCC had found to be against them during the 2000 Addendum negotiation. Although a public tender had to be issued for a law firm to do this work, this was simply a formality as it had already been decided that Mr Malik would be hired. I had a number of frank conversations with Mr Malik once he was appointed – I was friends with Mr Malik's father, so I was comfortable speaking to him in this way. I explained to him that my aim was to help TCC and he told me that he was interested in getting an appointment with a big law firm through TCC (which he did). He suggested to me that we should together be helpful to TCC. I recall that Mr Malik did not raise any big objections during the processing of the Novation Agreements*."[985]

815. Claimant rejects the allegation that it was involved in the selection of Mr. Malik and points to an e-mail dated 15 August 2005, in which Mr. Hargreaves reported internally:

> "*BDA has appointed a Quetta based Lincoln's Inn barrister called Jamshed Malik, whose claim to fame is that he is the son of someone famous (we don't know whom yet). Jamshed can't be too busy as Farook has just volunteered him for 2 days - 25th and 26th and decided he can go to Karachi. Sikandar already has him under investigation! I will write to BDA tomorrow to confirm these dates and I will see Khairas tomorrow evening in Islamabad to try and*

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[983] Respondent's Reply, ¶ 281.
[984] Claimant's Post-Hearing Brief, ¶ 127 *referring to* **Exhibit RE-268**, ¶ 17.
[985] Farooq II, ¶ 37.

> *organise him for some of those times as well as for a meeting with us on the 24th in Karachi*."[986]

816. Mr. Hargreaves further testified in his second witness statement that "*the recommendation for the GOB to obtain independent legal advice was raised by TCC's lawyers, Kabraji & Talibuddin during negotiations in late 2005, but the BDA handled the selection and appointment of its counsel in which TCC played no part.*"[987]

817. The Tribunal notes that Mr. Iqbal testified in his witness statement that "[s]*omeone from TCC (I do not recall who it was) recommended Mr Malik to Mr Farooq and the Chairman of the BDA in a meeting that I attended*."[988] Mr. Farooq, on the other hand, stated that he was friends with Mr. Malik's father and did not confirm that the recommendation to hire his son had come from TCC. Mr. Hargreaves' contemporaneous e-mail also does not provide any indication that they were in any manner involved in the selection process. While the record indicates that Mr. Malik may have been chosen because of his father's relationship with, and thus, possibly, on the recommendation of, Mr. Farooq, Respondent has failed to establish that "[s]*omeone from TCC*" had any say in this process.

818. Respondent further claims that Mr. Malik was improperly influenced by Claimant to collude with Mr. Farooq in the negotiation of the Novation Agreements by: (i) paying for interrelated work regarding the novations of Exploration Licenses EL-6 and EL-8; (ii) giving him instructions and being "*aware of his advice to the BDA regarding the novations of the CHEJVA and EL-5*"; and (iii) being aware of an offer to him of a job with the law firm of Antofagasta's lead counsel, Mr. Rizvi.[989] In this regard, Respondent relies on the witness testimony of Mr. Farooq quoted above and that of Mr. Iqbal, who testified that "*TCC influenced Mr Malik in the following ways*":

> "*(a) Mr Malik was offered a job at the firm of Antofagasta's lead lawyer, Mr Ahsan Rizvi, if he was helpful in shaping the opinion of the BDA and others in the GoB to get the Novation Agreements signed in a quick timeframe. This offer was made by Mr Rizvi during a meeting that I attended at the Serena Hotel, Quetta. Mr Hargreaves very much knew that Mr Malik was offered a job at Mr Rizvi's firm and encouraged this. I know that Mr Malik did join Mr Rizvi's law firm in Karachi in 2006.*
>
> *(b) Mr Jamshid Malik was also retained by TCC in respect of the EL-6 and EL-8 novations, for which TCC paid him directly. Mr Hargreaves had no concerns over hiring and paying Mr Malik to advise on this issue, even though it was interrelated with the CHEJVA and EL-5 novations (for which he was supposed to be working for the BDA) and the BDA*

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[986] **Exhibit CE-739**.
[987] Hargreaves II, ¶ 22.
[988] Iqbal, ¶ 32.
[989] Respondent's Reply, ¶ 286.

> *raised a question over whether the GoB should have an interest in EL-6 and EL-8. Mr Hargreaves encouraged me and Mr Rizvi to use Mr Malik to push the deal through.*"[990]

819. As to the first aspect of the alleged influence, it appears to be undisputed that Mr. Malik was in fact hired by the law firm of Mr. Rizvi in 2006. Mr. Hargreaves denies, however, that he was involved in any manner in this aspect, testifying in his second witness statement:

> "*I also deny Mr. Farooq's and Mr. Iqbal's claims that TCC or I played a role in Jamshid Malik getting a job with a big law firm. Sometime in 2006, Ahsan Rizvi, Antofagasta's lawyer at the time who later became TCC's lawyer, had mentioned in passing to me his idea to hire someone like Mr. Malik with experience and contacts in Quetta. This idea was not instigated or encouraged by TCC or me. I do not recall why Mr. Rizvi brought this up or why he thought he needed to share this with me. I did not have an opinion either way about the merits of Mr. Rizvi's idea or the suitability of Mr. Malik as a candidate. I also do not recall making any comment or opinion to Mr. Rizvi in response. I believe that Mr. Rizvi ultimately decided to hire Mr. Malik, but again, I did not encourage or take any part in that decision.*"[991]

820. As for the second aspect, Respondent also refers to an e-mail sent by Mr. Iqbal to Mr. Malik on 26 February 2006, attaching drafts of the Novation Agreements, in which he did not copy anyone from the BDA. In this e-mail, Mr. Iqbal referred to a telephone conference on 24 February 2006 and stated: *"As discussed, please find attached four novation agreements for CHEJVA, EL5, EL6 and EL8 for your review and perusal with the law department with Farooq's help.*"[992]

821. In addition, Respondent relies on an e-mail from Mr. Iqbal to Mr. Hargreaves dated 6 March 2006 in which he wrote in relevant part:

> "*Jamshid* [Malik] *has reviewed and forwarded four drafts of the novation agreements to Farook along with his comments that these are in accordance with our discussion with BDA and he (Jamshid) is satisfied with them.*
>
> *Jamshid has a concern that he was hired by BDA to review novation agreements for EL5 only. I told him that we will pay for his time he will spend on novation agreements for EL6 and EL8. The benefit for us to route these agreements through him and BDA is that they are in a good position to get these cleared from law department in a one go. He was agreed to it.*
>
> *I also spoke to Farook and he said he is reviewing the agreements and will take action on these shortly. He was happy to carry novation agreements for*

[990] Iqbal, ¶ 32.
[991] Hargreaves II, ¶ 32.
[992] **Exhibit CE-438**.

> *EL6 & EL8 to the law department for us although they do not belong to the joint venture*."[993]

822. Claimant notes that the GOB did not have an interest in Exploration Licenses EL-6 and EL-8 Licenses and was not a party to their novation.[994] Mr. Hargreaves further testified in his second witness statement:

> "*Moreover, I do not recall hiring and paying Mr. Malik directly in respect of the EL-6 and EL-8 novations. I have now seen a copy what appears to be an incomplete e-mail exchange between Mr. Iqbal and myself dated 6 March 2006. Mr. Iqbal's e-mail is a response to my request for feedback from Mr. Malik on the Novation Agreements dated 4 March 2006. Even after seeing these e-mails I still cannot recall whether TCC in fact hired and paid Mr. Malik, which Mr. Iqbal claims.*
>
> *At the time, EL-6 and EL-8 were exclusively held by TCC, in which the GOB did not have any interest. In any event, if TCC had retained Mr. Malik in respect of the EL-6 and EL-8, this would not have been a secret, but open and known to the BDA. Moreover, Mr. Malik was generally suitable to provide advice because of his familiarity with the project and the transaction. Had TCC retained Mr. Malik, my impression was that the BDA would have permitted Mr. Malik to act as long as the BDA did not have to pay him for doing TCC work. In fact, the BDA may have preferred Mr. Malik's involvement to stay aware of developments in these transactions because the BDA hoped to gain an interest in EL-6 and EL-8, as long as the BDA did not have to pay for it*."[995]

823. While the Tribunal does not find that Claimant was aware of and encouraged a job offer to Mr. Malik made at some point in 2006 by Antofagasta's local counsel, Mr. Rizvi, the record does indicate that Claimant may have paid or at least offered to pay Mr. Malik for his review of the initially contemplated novation agreements regarding Exploration Licenses EL-6 and EL-8. The record further does show that Mr. Iqbal appeared to be in direct contact with Mr. Malik at the time. However, the Tribunal does not consider that this amounted to improper influence given the explanation provided by Mr. Hargreaves regarding the interrelation of the four novation agreements, coupled with the BDA's reasonable unwillingness to pay for the review of documents to which it was not party. Mr. Hargreaves further stated that the BDA would have been aware of such an arrangement at the time – a statement that Respondent has not disputed.

824. In any event, the Tribunal is not persuaded that Mr. Malik exercised any relevant influence during the negotiations of the 2006 Novation Agreements. Respondent submits that on the basis of the evidence it has adduced, "*it would appear that the improper*

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[993] **Exhibit RE-321**.
[994] Claimant's Rejoinder, ¶ 404; Claimant's Post-Hearing Brief, ¶ 127.
[995] Hargreaves II, ¶¶ 33-34.

actions in respect of Mr Malik on TCC's behest had an impact on the procurement of the Novation Agreements."[996] It further argues that as a result of shifting his loyalty to TCC, "[t]*he BDA was … not represented in the Novation Agreements negotiations by independent legal counsel as it should have been.*"[997] Mr. Iqbal testified in this regard that "*Mr Malik went on to be a great help to TCC during the process of negotiating the Novation Agreements. I know that Mr Hargreaves was very pleased with Mr Malik's contributions, as well as with his enthusiasm and willingness to help.*"[998] The Tribunal notes, however, that neither Respondent nor Mr. Iqbal identify any specific action or omission of Mr. Malik that was supposedly "*helpful*" to them and went against the GOB's interests. Apart from the fact that Respondent has not pointed to any requirement for the BDA to be represented by outside legal counsel during the negotiations, it has thus failed to establish any specific impact that Mr. Malik has or failed to have during the negotiations of the Novation Agreements.

(iii) The Change of Approach to the Signatories of the Novation Agreements

825. The second issue raised by Respondent concerns the undisputed fact that, contrary to the initial approach, which contemplated that four novation agreements would be signed, *inter alia*, by the Director General of the MMDD (as was still reflected in the drafts circulated by Claimant on 16 March 2006),[999] it was decided shortly thereafter that BHP would submit applications for the assignment and transfer of Exploration Licenses EL-5, EL-6 and EL-8 to the MMDD,[1000] while two Novation Agreements for the CHEJVA and EL-5 would be signed by the Chairman of the BDA.[1001] According to Claimant, this change came about at a meeting held between representatives from BHP, Claimant, the BDA and the MMDD on 18 March 2006 where the Director General, Mr. Ahmed, refused to sign the Novation Agreements.[1002] In this regard, Claimant refers to Mr. Hargreaves who stated in his first witness statement:

> "*In March 2006, I attended a meeting with the GOB, BDA officials including Mr. Farooq, and BDA's lawyer to sign the Novation Agreements. Up until that meeting we had been planning to have four Novation Agreements and expecting that the Director General of the Mines and Minerals Development Department (*'MMDD'*) would have been one of the signatories to all four agreements. However, at the March meeting the Director General, supported by external counsel and by Mr. Farooq, refused to sign the Novation*

[996] Respondent's Reply, ¶ 286.
[997] Respondent's Post-Hearing Brief, ¶ 135 lit. a.
[998] Iqbal, ¶ 33.
[999] *See* **Exhibits CE-441**, **CE-442**, **CE-443** *and* **CE-492**.
[1000] **Exhibits CE-444** and **CE-445**.
[1001] **Exhibits CE-3** and **CE-447**.
[1002] Claimant's Opposition, ¶ 159.

> *Agreements. They took the view that there was no reason for the MMDD to be a party to any of the Novation Agreements. Rather, the Novation Agreements for the CHEJVA and exploration license EL-5 should be executed by the BDA on behalf of the GOB by virtue of the GOB's 25% interest in the joint venture. The MMDD would only consider the formal applications under Rule 64 of the Balochistan Mineral Rules to accomplish the actual license transfers.*
>
> *These comments from the GOB, the BDA, and their counsel prompted BHP and TCC to reorganize the transaction to follow the structure Balochistan had proposed. In accordance with this new structure, on 28 March 2006, I transmitted revised and final drafts of the Novation Agreements for the CHEJVA and EL-5 to the BDA, which the BDA signed on 1 April 2006. In parallel, on 28 March 2006, I transmitted, on behalf of BHP, its applications under Rule 64 for transfers of EL-5 and two other exploration licenses. On 8 April 2006, the MMDD approved these applications and assigned the EL-5 in favour of TCCA.*"[1003]

826. Respondent does not deny that Mr. Ahmed raised objections to signing the Novation Agreements at the 18 March 2006 meeting but claims that this had been agreed beforehand during a "*dinner-meeting*" in mid-March 2006 held between Mr. Arndt, Mr. Hargreaves, Mr. Farooq and Mr. Ahmed.[1004] Respondent refers to the witness testimony of Mr. Farooq, who had not mentioned such meeting in his first witness statement but had more generally testified that "*there was tremendous pressure on myself by Col. Khan to get the Agreement signed quickly without any changes from the draft agreed upon by BHP and TCC.*"[1005] In his second witness statement, Mr. Farooq then stated:

> "*One evening shortly before 18 March 2006, I had dinner at a hotel in Karachi with Mr Hargreaves, Mr Arndt and Maqbool Ahmed Hussain (Director General of the MMDD). I showed the TCC representatives the (unhelpful) comments made by the CS in a Note on 21 September 2005 in relation to the Novation Agreements, for the BDA to* 'coordinate with Law, BDA and Finance and then a commented proposal safeguarding our interests be put up for approval of competent authority'. *I explained to them that it was not possible for the novations to be approved and executed through the proper channels in the timeframe they required. These requirements caused some concern amongst them and I and Mr Maqbool Ahmed told them that the best way to get the Novation Agreements signed without these further steps was for the Chairman of the BDA alone (and not the MMDD also) to sign the Novation Agreements. Mr Arndt immediately supported our suggestion, while Mr Hargreaves took a bit of convincing. We agreed that Mr Hargreaves would handle the CS and while I would focus my attention on persuading the Chairman of the BDA to sign the Novation Agreements (contrary to the CS's direction). At this dinner, I warned TCC to be careful about making Mr*

[1003] Hargreaves I, ¶¶ 42-43.
[1004] Respondent's Reply, ¶ 272 lit. a.
[1005] Farooq I, ¶ 14.

> *Yousaf (the new Chairman of the BDA) uneasy and that I would manage him. We also discussed my intended appointment as the Chairman of the BDA.*
>
> *The 18 March 2006 meeting was for the purpose of discussing the process for getting the Novation Agreements signed. As arranged at the earlier dinner meeting, Mr Maqbool Ahmed and I raised objections to the Novation Agreements being signed by the MMDD and instead proposed that only the Chairman of the BDA sign the Novation Agreements on the part of the GoB. It is therefore not true that TCC did not know about this change to the structure of the transaction before this meeting or that there was no reason for me raising an objection. The whole purpose of my objection was to bypass the other approvals that would otherwise be required to be obtained.*"[1006]

827. In his second witness statement, Mr. Hargreaves rejected the allegation that he and Mr. Arndt had participated in a private meeting with Mr. Farooq and Mr. Ahmed and maintained that he had "*learned about the request to change the transaction at the meeting in March 2006 attended by the GOB, BDA officials, and BDA's lawyer, and not at that private meeting in which a plan was also devised for* [him] *to* 'handle' *Chief Secretary ('*CS*') KB Rind*."[1007] He added:

> "*Even though representatives for Antofagasta and TCC tried to explain the reasons why we thought the DG should sign, he refused to do so. He insisted that the Novation Agreements for the CHEJVA and exploration license EL-5 should be signed by the BDA only, as the BDA was the GOB's agent contractually. In contrast, he wanted to preserve the MMDD's role as regulator of the mining sector. In that capacity he would not make a contractual agreement; instead, he would only approve formal transfer applications under Rule 64 of the Balochistan Mineral Rules, subject to undertakings TCC was to provide assuming BHP's obligations and liabilities*."[1008]

828. Mr. Hargreaves maintained that the Director General's refusal was the reason for the reorganization of the transaction and that, ultimately, the two Novation Agreements were signed and the applications for the transfer of the three Exploration Licenses approved "*not because* [TCC] *had circumvented rules and processes, but because it had complied with them*." Mr. Hargreaves further rejected the allegation that he or others at TCC schemed to "*handle*" the Chief Secretary, testifying that he "*was in no position to* 'handle' *these officials* [*i.e.*, the Chief Secretary or the Chief Minister]" as he "*could not even arrange a single meeting with either of them prior to Antofagasta's acquisition of TCC*." He denied that TCC had "*a number of meetings with CM Yousaf and CS Rind over the course of early-mid 2006*" and testified that he did not meet the Chief Secretary, who did

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[1006] Farooq II, ¶¶ 34-35.
[1007] Hargreaves II, ¶ 25. *See also* ¶¶ 21-24.
[1008] Hargreaves II, ¶ 26.

not join the Chile trip in December 2006, "*until even later than that, well after Antofagasta acquired TCC.*"[1009]

829. The Tribunal notes that during his cross-examination, Mr. Hargreaves acknowledged that the new process agreed during the 18 March 2006 meeting was simpler than the one previously contemplated and added that "*I guess we should be thankful for the Government proposing a simpler process*."[1010] However, when asked whether he remembered that Mr. Farooq had told him that this was "*a plan to circumvent the proper channels*," Mr. Hargreaves responded:

> "*No, I don't. There was no plan to circumvent proper channels. There was some discussion about what the proper channels were, and that was clarified by giving us a two-channel process; one through the Mines Department and one through the BDA.*"[1011]

830. The Tribunal notes that, as Mr. Hargreaves testified, the MMDD's no longer being a signatory to the Novation Agreements may have made the signing process simpler than originally planned. However, BHP still had to and did file applications for the renewal and assignment of its (interest in the) Exploration Licenses with the MMDD, which were separately approved by the Director General in his function as the Licensing Authority.[1012] Therefore, the Tribunal does not accept that the change in approach agreed on in March 2006 served to circumvent relevant approvals. In particular, if as alleged by Respondent, Mr. Ahmed from the MMDD was part of a secret plan, while the Chairman of the BDA was not, the Tribunal does not see the reason why the plan should have involved removing Mr. Ahmed as signatory from the Novation Agreements.

831. As for the alleged "*handling*" of the Chief Secretary by Mr. Hargreaves, there is no evidence of any such conduct or that Mr. Hargreaves would have had the necessary influence to "*handle*" the GOB official, in particular taking into account Mr. Hargreaves' testimony that he met him for the first time after the Chile trip, *i.e.*, long after Antofagasta had acquired Claimant.

(iv) The Alleged Lack of Authorization from the Governor

832. Respondent also argues that there was no authorization from the Governor of Balochistan for the Chairman of the BDA to sign the Novation Agreements.[1013] It again refers to Mr. Farooq who stated in his first witness statement that "*I also managed to persuade the*

[1009] Hargreaves II, ¶¶ 28-29.
[1010] Transcript (Day 9), p. 2358 lines 16-18.
[1011] Transcript (Day 9), p. 2359 lines 1-5.
[1012] **Exhibits CE-18**, **CE-449** and **CE-450**.
[1013] Respondent's Reply, ¶ 272 lit. b.

Chairman at the time, Arbab Yousaf, to sign the Novation Agreement on behalf of the BDA."[1014] In his second witness statement, he added:

> "*Mr Yousaf, who was unfamiliar with what was going on at the BDA at this time, agreed, on my advice, to sign the Novation Agreements on behalf of the Governor of Balochistan on the basis of the Governor's authorisation of December 1999, without us obtaining a fresh authorisation and approval by the Governor (which I knew was improper). I pushed the agreements through as I was being pressurised by BHP/TCC personnel to avoid delay.*"[1015]

833. The Tribunal notes that the issue of whether the Chairman of the BDA was properly authorized to sign in particular the CHEJVA, but also the Addendum and the Novation Agreements, was already discussed at an earlier stage of these proceedings. In its Draft Decision, the Tribunal found that even if there was an internal issue within the GOB regarding the proper authorization of the CHEJVA (which Respondent claimed to have continued in the signing of the Novation Agreement),[1016] there was no evidence that any Government representative suggested at any stage prior to early 2011 that the CHEJVA was invalid. The Tribunal further found that the reasons for which the Supreme Court ultimately declared the CHEJVA (and also the Novation Agreement) invalid 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.[1017]

834. As noted above, it is further undisputed by Respondent that Antofagasta's investment in Pakistan had high-level support.[1018] As Mr. Hargreaves testified in his first witness statement:

> "*In early 2006, we also had high-level meetings with GOB officials, including a meeting with the Governor, to discuss Barrick and Antofagasta's future participation in the Reko Diq project. Representatives of the BDA also attended this meeting. Antofagasta's Chairman, Jean-Paul Luksic, also met with GOP and GOB officials including Pakistan's Prime Minister and the Governor of Balochistan. At these meetings, formal substitution of TCC for BHP's interest was openly discussed. The GOP and GOB officials understood that Antofagasta and Barrick would jointly own TCC and enthusiastically supported their development of the mine.*"[1019]

835. Against this background, the Tribunal is not convinced that the Chairman of the BDA lacked the proper authorization from the GOB to sign the Novation Agreements and thus to allow for the entry of Antofagasta into the project.

[1014] Farooq I, ¶ 14.
[1015] Farooq II, ¶ 36.
[1016] *See, e.g.*, Respondent's Rejoinder on Liability and Reply on Jurisdiction, ¶ 25.
[1017] Draft Decision, ¶¶ 637-638, *maintained in* Decision on Jurisdiction and Liability, ¶¶ 640-641.
[1018] *Cf.* Respondent's Reply, ¶ 249.
[1019] Hargreaves I, ¶ 39.

(v) The Alleged Improper Influence over Mr. Farooq and the Chairman of the BDA, Mr. Yousaf

836. Respondent claims that Mr. Farooq improperly influenced the Chairman to sign the Addendum without proper authorization and that he was motivated to do so by a promise that TCC would get him to be appointed Chairman of the BDA if he managed to get the Novation Agreements signed. In addition, Respondent alleges that the Chairman of the BDA, Mr. Yousaf, was given expensive gifts by TCC.

837. At the outset, the Tribunal notes that Respondent does not raise an allegation that any illegitimate payments were made or offered in connection with the Novation Agreement. Mr. Farooq confirmed in his second witness statement that he was "*not aware of any specific payments made to get the Novation Agreements signed*."[1020]

838. Mr. Farooq further testified:

> "*However, TCC did give Arbab Yousaf, who became the new Chairman of the BDA in January 2006, gifts, such as a Rolex watch and a cigar case. These were given to the Chairman in his room at a hotel (I do not recall which one) in Karachi prior to a meeting on 18 March 2006.*"[1021]

839. As pointed out by Claimant, Mr. Farooq does not identify any individual who is supposed to have given these gifts on behalf of TCC.[1022] Mr. Hargreaves further testified in his second witness statement:

> "*Chairman Yousaf was one of the few BDA chairmen who expressed interest in the project and in fact was the only one to visit the Reko Diq site during his tenure. In all my dealings with him, he expressed support for and a legitimate interest in the project. There was no reason to feel uneasy or distrust him. Chairman Yousaf's support was genuine and, contrary to Mr. Farooq's insinuations, not bought by gifts that TCC allegedly gave him such as "a Rolex watch and a cigar case*."[1023]

840. The Tribunal agrees with Claimant that Respondent's allegation regarding the alleged gifts to Mr. Yousaf is not sufficiently substantiated.[1024] Also taking into account Mr. Hargreaves' testimony on the nature of Mr. Yousaf's interest in and support for the project, the Tribunal is not persuaded that any illegitimate gifts were given to Mr. Yousaf to ensure that he would sign the Novation Agreements.

841. Respondent further claims that Mr. Farooq was promised by several individuals at TCC that they would get him appointed Chairman of the BDA if he managed to get the

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[1020] Farooq II, ¶ 38.
[1021] Farooq II, ¶ 38.
[1022] *Cf.* Claimant's Rejoinder, ¶ 403; Claimant's Post-Hearing Brief, ¶ 124.
[1023] Hargreaves II, ¶ 31.
[1024] *Cf.* Claimant's Rejoinder, ¶ 403.

Novation Agreements signed. In his first witness statement, Mr. Farooq testified in this regard:

> "*Col. Sher Khan had promised me that if I managed to get the Novation Agreement signed as he wished, he would work to get me appointed as the Chairman of the BDA, a longstanding ambition of mine. Col. Sher Khan and TCC came good on their promise. In June 2006, I was appointed Chairman of the BDA.*"[1025]

842. Col. Khan did not mention the alleged promise in his first witness statement but then confirmed Mr. Farooq's testimony in his second witness statement:

> "*I understand that Mr Farooq has explained how, in 2006, I (and others) promised that if he worked with TCC to have the Novation Agreements executed, TCC would in return work to have Mr Farooq appointed as the Chairman of the BDA. I can confirm that I made this promise to Mr Farooq in the months prior to the signing of the Novation Agreements and that, contrary to what Mr Hargreaves and Mr Flores now say, TCC did exert their influence to have Mr Farooq installed as the BDA Chairman in June 2006.*
>
> *The position of Chairman of the BDA is appointed by the Chief Minister of Balochistan (CM). The appointment to this position – like many others in Balochistan – depends almost entirely on political will and personal influence. In mid-2006, the CM was Jam Yusuf, who was a very corrupt man. TCC (myself and then-CEO Eduardo Flores) had a number of meetings with CM Yusuf and CS Rind over the course of early-mid 2006. At many of these meetings, we made it clear that TCC wanted Mr Farooq to be the Chairman of the BDA because it would mean that things would get done for the project. I recall one meeting in the month or two after the Novation Agreement was signed which Mr Flores and I attended with CS Rind in which we expressly recommended that Mr Farooq be appointed as Chairman. TCC's endorsement carried significant weight. There was enthusiasm for Antofagasta in Government circles at that time. Mr Farooq was duly appointed Chairman of the BDA in June 2006.*"[1026]

843. Mr. Farooq also expanded on this allegation in his second witness statement:

> "*I always wanted to become Chairman of the BDA, as this was an important and influential post and personally of great significance to me. However, it was difficult for me to become Chairman because I was a BDA cadre officer (and had not spent time in more prestigious parts of the civil service) – I am the only Chairman from the BDA cadre to date. Also, I was not affiliated with any local caste. I therefore needed to rely on Mr Hargreaves and Col. Sher Khan, who were influential people, to recommend me to CM Jam Yousaf and CS Rind, which I know they did. It was ultimately the CM and CS that would decide who the new Chairman would be. However, the reality was that senior individuals at TCC (including Mr Hargreaves and Col. Sher Khan) were*

[1025] Farooq I, ¶ 14.
[1026] Khan II, ¶¶ 22-23.

> *extremely influential and could impact the CM's and CS's decision. Although I said in my first statement that it was Col. Sher Khan that promised to get me appointed as Chairman of the BDA if I got the Novation Agreements signed. I now recall that Mr Arndt and Mr Hargreaves made similar promises. I also relied on my relationship with CM Yousaf, who used to take his share from me of money received from contractors and to whom I paid money to get my appointment over the line*."[1027]

844. Mr. Flores responded to Mr. Farooq's testimony of the alleged promise given to him by Col. Khan:

> "*I am not aware of any such arrangement and believe this claim to be false. It also makes no sense. Neither Col. Khan nor anyone else at TCC had the ability to influence the Provincial Governement's political appointments*."[1028]

845. Mr. Hargreaves stated in in his first witness statement that he was "*surprised by Col. Khan's alleged promise*" and also by Mr. Farooq's purported "*longstanding ambition*" to become Chairman of the BDA. He testified:

> "*I am not even sure that was the case since Mr. Farooq told me, and I had also heard from others, that he wanted to remain BDA's Director of Finance to avoid the politics associated with the chairmanship. More importantly, TCC and Col. Khan had no influence over the appointment of the BDA Chairman. Presumably, the GOB appointed the Chairman of the BDA. We also had no problem with the then-Chairman, Arbab Yousaf, and would have been happy to see him continue to chair the BDA. He was the only BDA Chairman who visited the Reko Diq site, and had considerably more involvement with and knowledge of the project than his predecessors*."[1029]

846. In his second witness statement, *i.e.*, after he had been directly implicated by Mr. Farooq and Col. Khan's testimony, Mr. Hargreaves responded as follows:

> "*Since TCC had conducted itself perfectly lawfully in obtaining the Novation Agreements and the license transfers, Mr. Farooq's and Col. Khan's allegations about how I or perhaps others at TCC schemed to* 'handle' *CS Rind or to somehow get Mr. Farooq appointed BDA Chairman are false and even bizarre. I never promised Mr. Farooq any such thing. Moreover, the truth was that I was in no position to* 'handle' *these officials or influence them so as to win Mr. Farooq the BDA Chairmanship. I could not even arrange a single meeting with either of them prior to Antofagasta's acquisition of TCC. In early 2006, we even travelled to Quetta with senior Antofagasta representatives but could not get an audience with Chief Minister of Balochistan (*'CM'*) Yousaf. It was certainly not the case that TCC* 'had a number of meetings with CM Yousaf and CS Rind over the course of early-mid 2006.' *In fact, the Chile trip was the first occasion during which I*

[1027] Farooq II, ¶ 32.
[1028] Flores I, ¶ 31.
[1029] Hargreaves I, ¶ 64.

> *actually interacted with the CM, and since the CS did not join the trip I did not meet him until even later than that, well after Antofagasta acquired TCC.*
>
> *Given that I could not get a meeting CM Yousaf or CS Rind, even when we tried to introduce key decision-makers from one of the largest mining companies in the world, it should be evident how farfetched it is to allege that my endorsement* 'carried significant weight' *or* 'could impact' *CS Rind and CM Yusuf."*[1030]

847. Mr. Flores also responded to Mr. Farooq and Col. Khan's testimony in his second witness statement:

> "*These allegations are all false. As I stated in my previous witness statement, to my knowledge, TCC played no role in the appointment of Mr. Farooq as Chairman of the BDA, and had no ability to influence government appointments in Balochistan. In addition, I made no request or suggestion concerning the appointment of Mr. Farooq as BDA Chair in any meetings with government officials in 2006, and to my knowledge, Col. Khan did not do so either. In fact, I recall that I first learned of Mr. Farooq's appointment from Tim Hargreaves, when he explained that Mr. Farooq was actually the fourth person to be appointed BDA Chairman in that year alone.*
>
> *Moreover, the supposed timing of these claims demonstrates how false they are. Mr. Farooq has said that he was appointed as BDA Chairman in June 2006. As I have explained, my first trip to Pakistan occurred in May 2006, shortly after I was appointed TCC CEO. A copy of my itinerary for that trip has been submitted as Ex. CE-515. While I and other TCC colleagues met with representatives of the BDA on two days of this visit (see id. at 2), I did not meet with Chief Minister Yousaf or Chief Secretary Rind during this trip, and certainly would not have had time in my busy schedule to meet with them multiple times prior to Mr. Farooq's June 2006 appointment*."[1031]

848. The memorandum by which Mr. Hargreaves informed Mr. Flores on 21 June 2006 of, *inter alia*, Mr. Farooq's appointment as Chairman of the BDA, reads in relevant part:

> "***BDA Chairman changes again today!***
>
> *Mohamad Farooq was officially appointed as Chairman BDA today. The good news is that Farooq has been associated with the project for 13 years and is the most knowledgeable and competent person with whom we have been associated. The bad news is that he is the 4th Chairman of the year and is now at risk of being politically ousted as he is now in a more vulnerable political position (the record was 13 Chairmen rotated through the post in a single year!). If Farooq's appointment signals GOB recognition of the growing importance of the project and the need for continuity it presents us with a window of opportunity to move ahead on the* [mineral] *agreements*."[1032]

[1030] Hargreaves II, ¶¶ 29-30.
[1031] Flores II, ¶¶ 14-15.
[1032] **Exhibit CE-516**, p. 1.

849. During the hearing, all four witnesses were cross-examined on this issue. When Mr. Farooq was asked whether he had given a bribe to the Chief Minister to become Chairman of the BDA, he answered: "*Yes, I gave him a bribe, but TCC helped me more in this regard.*" When referred to his written testimony that Col. Khan and Mr. Hargreaves recommended him to Chief Minister Yousaf, he responded that "*Colonel Sher Khan was not alone in this—the CEO, Mr. Flores was there. Their CEO was there. They helped me, and they said,* 'If you keep helping us with our work of mining and mineral, we'll make your Chairman.'"[1033] Mr. Farooq then confirmed that the decision on who becomes Chairman of the BDA is made by the Chief Minister and the Chief Secretary.[1034] In response to the question whether it was therefore his testimony that Mr. Hargreaves and Col. Khan recommended him to these two officials rather than "*make*" him Chairman, he stated:

> "*To recommend and put in a good word is the only thing needed to make someone. recommending someone that's what they could do. I was an ex-cadre man. I could not become Chairman. I needed some recommendation from the people they bribed, or met or partied with---they had influence over the Chief Minister and Chief Secretary, so they could do this for me—they could get my job done, and they could do this for me.*
>
> *And I asked them for their recommendation. Recommendation means to put in a good word. They used to meet them so that's why my job was done and they played the mid part in this*."[1035]

850. Mr. Farooq further confirmed his written testimony that he also "*paid money to get* [his] *appointment for the job*" and that his influence regarding the appointment of Mr. Mandokhail as Chairman of the BDA in 2003 "*was there because of the money* [he] *was paying*."[1036]

851. Col. Khan confirmed during the hearing that he had testified on the alleged promise he made to Mr. Farooq only in his second witness statement, stating that he "*was not directly involved, but* [he] *knew what was happening*." Col. Khan further testified that he knew about this alleged promise at the time he submitted his first witness statement and at the time he talked to the NAB, but the "*NAB did not speak to* [him] *on the subject of the Novation*."[1037] Col. Khan then confirmed that the Chairman of the BDA was not appointed by TCC but rather by the Governor of Balochistan and described Claimant's alleged involvement in the appointment as follows:

[1033] Transcript (Day 2), p. 545 line 15 to p. 546 line 6.
[1034] Transcript (Day 2), p. 548 lines 16-21.
[1035] Transcript (Day 2), p. 549 lines 8-22.
[1036] Transcript (Day 2), p. 551 lines 6-22.
[1037] Transcript (Day 4), p. 1026 line 20 to p. 1028 line 5.

> "[I]*n our case, yes, we put in a word, and because he had done a fantastic job for us, a very much—a job which was totally impossible, and we had promised that we put in a word, and I remember taking Mr. Eduardo Flores to the Chief Minister, and we put in a word for his becoming the Chairman of the BDA.*"[1038]

852. When Mr. Flores was confronted with the testimony of Mr. Farooq and Col. Khan that TCC had lobbied to get Mr. Farooq appointed as Chairman, he again denied this allegation, stating "[t]*hat's, again, something that never happened*."[1039] More specifically, when confronted with Col. Khan's testimony that he and Mr. Flores had made clear to the Chief Minister and the Chief Secretary that they wanted Mr. Farooq to be Chairman, Mr. Flores answered:

> "*A. The answer is no. I'm sorry. It doesn't make sense. Mr. Farooq was not the person that can make a big change, potentially, in the business.*
>
> *Q. No, but he was someone who had been very helpful, hadn't he?*
>
> *A. On the operational side, I would say yes, but that's something that the company was trying to develop a much bigger business in the country, in the region.*
>
> *Q. Indeed, but to do that, you needed, in place at the BDA, someone who would look after TCC's interest?*
>
> *A. Absolutely. … Interests of TCC, including 25 percent of the Government of Balochistan. They were owners of the Project as well*."[1040]

853. Mr. Flores further confirmed that Mr. Farooq was "*a very good person in terms of helping facilitating, et cetera*" but also stated that "*the company was also interacting with all of the agencies of the Balochistan Government, in order to get the permits.*"[1041] In response to the question whether, against the background that the Reko Diq project had just been acquired by two large mining companies, the endorsement by TCC's CEO of a person with whom it wished to deal at the GOB and the BDA would carry considerable weight, Mr. Flores responded: "*Of course it would be helpful, but not in the level that that the company lobbied to maintaim him as a Chairman of the BDA, or to become Chairman of the BDA.*"[1042]

854. Finally, Mr. Flores stated with regard to his first trip to Pakistan in May 2006 that he recalled having had coffee with Mr. Farooq at the Serena Quetta hotel but that he had "*no background of Mr. Farooq at that time. That makes no sense for me trying to convey the message that he might stay or become Chairman of the BDA*." Mr. Flores further did not

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[1038] Transcript (Day 4), p. 1029 line 14 to p. 2030 line 10.
[1039] Transcript (Day 10, p. 2586 lines 1-6.
[1040] Transcript (Day 10), p. 2586 line 11 to p. 2587 line 5.
[1041] Transcript (Day 10), p. 2587 lines 9-12.
[1042] Transcript (Day 10), p. 2588 line 21 to p. 2589 line 13.

remember having met the Chief Minister or the Chief Secretary on this trip. When asked about the two full days of meetings in Quetta referenced in his itinerary for the trip, he answered that he did not recall having had those meetings. He added: "*I don't remember what we did those two days, if those two days happened. I'm trying to remember 10 years ago, and not easy for me to mention what else happened. But I don't remember to have had a meeting with the Chief Minister.*"[1043]

855. Mr. Hargreaves was not questioned about the alleged promise to Mr. Farooq. In the context of the allegation that Mr. Farooq overcharged TCC in respect of the airfares paid for the Chile trip, which will be discussed in further detail below, Mr. Hargreaves confirmed that he considered Mr. Farooq very helpful for TCC and added: "*I just want to record my appreciation of all that he did for us. He's characterized as a villain, but he was very helpful for Tethyan*." When asked whether he thus considered it good news when Mr. Farooq was appointed Chairman of the BDA, Mr. Hargreaves responded: "*I thought it was good that we had the continuity preserved. But I also saw it as a risk because of the rotating seat of the Chairman. I felt that we may not have him there for very long*."[1044]

856. The Tribunal notes that this final statement accords with Mr. Hargreaves' contemporaneous memorandum in which he reported about Mr. Farooq's appointment as Chairman of the BDA, which has been quoted above at paragraph 683 above. While it is clear from Mr. Hargreaves' testimony that he considered Mr. Farooq's assistance in relation to the Reko Diq project very helpful, the Tribunal thus considers it questionable whether Claimant would have even wanted Mr. Farooq to be in the politically exposed position of Chairman, which was described by both sides as a "*revolving door*" given that Mr. Farooq had been the fourth Chairman appointed in the course of one year, while Mr. Farooq's previous assistance had been independent of his different positions within the BDA.[1045]

857. In any event, the Tribunal is not convinced that Claimant and, in particular, Col. Khan, Mr. Hargreaves or Mr. Flores, would have been in a position to exercise notable influence on the Chief Minister and the Chief Secretary who were in charge of nominating the Chairman of the BDA. During the hearing, both Mr. Farooq and Col. Khan confirmed that the sole contribution that any of them could have made was to "*put in a word*" for Mr. Farooq. In the Tribunal's view, however, this is not equal to a promise from Claimant that Mr. Farooq would be made Chairman of the BDA if the Novation Agreements were signed and, thus, it is doubtful whether this could be considered as an exercise of improper

[1043] Transcript (Day 10), p. 2591 line 5 to p. 2594 line 5.
[1044] Transcript (Day 9), p. 2440 lines 4-16.
[1045] *Cf.* Transcript (Day 9), p. 2240 line 17 to p. 2441 line 8.

influence, even if it were considered established that someone from Claimant had "*put in a word*."

858. In addition, Respondent has failed to establish that Mr. Hargreaves or Mr. Flores did, in fact, "*put in a word*" for Mr. Farooq. In particular, the Tribunal does not consider it sufficient evidence that, according to his itinerary, Mr. Flores had two days of meetings in Quetta during his first trip to Pakistan in May 2006. First, Mr. Flores could not recall having had a meeting with either the Chief Minister or the Chief Secretary on that occasion. Second, even if there was a meeting with either of these officials at that point, this would still not accord with Col. Khan's testimony that he and Mr. Flores had "*a number of meetings with CM Yusuf and CS Rind over the course of early-mid* 2006," given that Mr. Flores was in Pakistan only once before Mr. Farooq became Chairman. Mr. Hargreaves, whom Mr. Farooq described as "*extremely influential*," also testified that he had not been able to arrange a single meeting with these two officials and only met them during the Chile trip in December 2006 and, in the case, of the Chief Secretary, only thereafter. There is no documentary evidence in the record that any meeting took place between Mr. Hargreaves and either the Chief Minister or the Chief Secretary prior to Mr. Farooq's appointment as Chairman.

859. Finally, the internal memorandum prepared by Mr. Hargreaves also does not give any indication that he or Mr. Flores had been involved and, on Respondent's case, succeeded in having Mr. Farooq appointed. To the contrary, the memorandum reports both an upside and a downside to this development, which speaks against Respondent's allegation that both the author and the recipient of this memorandum had lobbied to get Mr. Farooq appointed.

860. The Tribunal further notes that Mr. Farooq himself testified that he paid a bribe to the Chief Minister to become Chairman of the BDA in June 2006 and that he had also managed to get Mr. Mandokhail appointed to the same position in 2003 by exercising his influence and paying money. Thus, the Tribunal is not convinced by Mr. Farooq's testimony that he would not have been able to become Chairman without the alleged recommendation from Claimant.

861. Finally, as to the alleged promise made prior to the execution of the Novation Agreements, the Tribunal notes that while Mr. Farooq initially testified in his first witness statement that such promise was made by Col. Khan, he stated in his second witness statement that he remembered that Mr. Hargreaves and Mr. Arndt made similar promises to him. During the hearing, he then testified that Mr. Flores had also been involved. Col. Khan, on the other hand, did not mention the alleged promise at all in his first witness statement, then confirmed in his second witness statement that he had made the promise and went to the Chief Minister with Mr. Flores. He did not, however, make reference to Mr. Hargreaves or Mr. Arndt. By contrast, Mr. Hargreaves and Mr. Flores consistently

denied having made any promise to Mr. Farooq or having "*put in a word*" for him with the Chief Minister or the Chief Secretary and also consistently explained why they considered that they would not have been in a position to do so and why it would not have made sense in their view to make such a recommendation. Therefore, the Tribunal is not convinced that either Mr. Hargreaves or Mr. Flores made a promise to Mr. Farooq. While Mr. Farooq further made reference to Mr. Arndt in his second witness statement, the Tribunal considers that his involvement in the alleged promise has not been substantiated.

862. Finally, the Tribunal is aware that Col. Khan confirmed that he himself made a promise to Mr. Farooq on behalf of Claimant. The Tribunal is not convinced, however, by this testimony, taking into account the inconsistencies referred to above and the fact that Col. Khan could not point to any specific occasion on which the alleged recommendation to the Chief Minister and Chief Secretary was made.

863. On that basis, the Tribunal therefore does not accept that Mr. Farooq was promised by Claimant that he would be appointed Chairman of the BDA if he secured the signing of the Novation Agreements. Consequently, the Tribunal does not have to express an opinion at this point whether the conduct of any individual, in particular of Col. Khan, would have been attributable to Claimant.

864. In conclusion, Respondent has thus failed to establish that any illegitimate benefits were promised or bestowed by Claimant in connection with the Novation Agreements. In the absence of such evidence, the Tribunal also rejects the allegation that the Chairman of the BDA, Mr. Yousaf, was persuaded by illegitimate means to sign the Novation Agreements. In that regard, the Tribunal also recalls its earlier finding that there is no reason to assume that it would have been against the GOB's interests in early 2006 to consent to the replacement of BHP by TCC and thus to allow for the entry of Antofagasta, one of the world's largest copper mining companies, into the project. In line with the Tribunal's previous finding that TCC's activities in Pakistan were highly welcomed and encouraged at every level of the GOB and the GOP at the time, the Tribunal therefore does not accept that the negotiation or execution of the Novation Agreements was tainted by corruption.

f. Additional Allegation Pertaining to the Time Period Prior to the Execution of the Novation Agreements

865. As a final note in the context of the making of Claimant's investment, the Tribunal makes reference to an additional allegation raised in Respondent's Application that pertains to the period prior to the execution of the Novation Agreements, *i.e.*, the allegation that Mr. Shehbaz Mandokhail received during his tenure as Chairman of the BDA from August 2003 to May 2005 monthly payments of PAK Rs. 100,000 to 200,000 from Mr. Farooq, allegedly "*on behalf of TCC*" in exchange for "*looking after their affairs in relation to*

Reko Diq."[1046] Respondent did not make any further reference to this allegation in its subsequent submissions. Claimant briefly addressed it as one of Respondent's "*other scattershot allegations*."[1047]

866. Mr. Mandokhail testified in his witness statement:

> "*In addition to my salary referred to above (paid by cheque) and throughout my tenure as Chairman of the BDA, I used to receive a monthly sum of between PAK Rs 100,000 to PAK RS 200,000 in cash from Mr Farooq. Mr Farooq told me that this came from TCC in return for looking after their affairs in relation to Reko Diq. He told me that he received money frequently from TCC on many occasions.*
>
> *During this time, I had an office in the same building and on the same corridor as Mr Farooq. Colonel Sher Khan, who was the Governmental Affairs Manager for TCC, used to visit Mr Farooq in his office frequently. I never saw Col Sher Khan give money to Mr Farooq, but they both told me on numerous occasions that this was what happended – they were two sides of the same coin.*
>
> *On five or six occasions, the two of them came into my office to discuss a number of matters relating to the Reko Diq project, including security for TCC staff to visit the Reko Diq mine and other matters such as land for the airstrip (discussed below). Col. Sher Khan told me during at least one of these meetings that he was* 'looking after Mr Farooq'. *As a result, TCC requirements relating to the Reko Diq project were always given top priority.*"[1048]

867. Mr. Farooq testified in his first witness statement about Mr. Mandokhail and his predecessor as Chairman of the BDA, Mr. Sheryar Khan Mehsud, as follows:

> "*In 2003, Sheryar Khan Mehsud was the Chairman of the BDA. He was critical of TCC and raised a number of objections to their conduct, particularly the delays in exploration. I also knew that he would be difficult to bribe. I spoke with Chris Arndt, who was general Manager at the time, who asked me to manage the Chairman. I suggested to Mr Arndt that it would be easier if we just got someone else appointed as Chairman of the BDA. He agreed. My choice was Shehbaz Khan Mandokhail, an ex-Director of the BDA, who I believed would be amenable to taking bribes and would therefore do TCC's bidding. This was based on my knowledge having worked with him before and I explained this to Mr Arndt. Mr Arndt and I agreed that TCC would complain to the CM about Mr Mehsud and that I would lobby to get Mr Mandokhail the job. We were successful, and Mr Mandokhail was appointed Chairman of the BDA in late 2003. Soon after his appointment, CM Yousaf told Mr Mandokhail in my presence that he would be rewarded if*

[1046] Respondent's Application, ¶ 33.
[1047] Claimant's Post-Hearing Brief, ¶ 272.
[1048] Mandokhail, ¶¶ 11-13.

> *he looked after TCC's interests. From 2003, I made regular cash payments to Mr Mandokhail to ensure his assistance. I funded these payments from sums I received from BDA's contractors. During Mr Mandokhail's tensure as Chairman, TCC never faced any serious problems*."[1049]

868. Col. Khan stated in his first witness statement that he started to pay Mr. Farooq "*to get things done*" after Mr. Farooq had told him "*that it would be very difficult for TCC to achieve its goals without paying bribes*" and after he had raised this issue with Mr. Flores "*in 2006 or 2007*."[1050] While Col. Khan testified that he was aware of Mr. Farooq's corrupt reputation already from his initial interactions with him "*around 2002 / 2003,*"[1051] he did not state that he personally made any payments to Mr. Farooq before his alleged discussion with Mr. Flores in 2006 or 2007.

869. Apart from the fact that the Tribunal does not consider that the specific purpose of any of the alleged payments to Mr. Mandokhail was sufficiently substantiated, it is not convinced that any such payments, if they were indeed made by Mr. Farooq, could be attributed to Claimant. The witness testimony of Mr. Mandokhail and Mr. Farooq is contradictory in this regard. Mr. Farooq confirmed during the hearing that the payments he allegedly made to Mr. Mandokhail were "*a Chairman's cut*" out of the money he received from the BDA's contractors.[1052] Mr. Mandokhail, on the other hand, denied that he was participating in what Claimant described as "*the scheme by which Mr. Farooq and other officials took a kickback from … the BDA contract*" and that he received "*any money from any other sector*," *i.e.*, besides the money he allegedly received from Claimant.[1053] While he insisted that the money he had received came from Claimant, Mr. Mandokhail also confirmed that he had never seen Col. Khan or anyone else on behalf of Claimant giving any money to Mr. Farooq.[1054] Finally, Col. Khan also did not testify that he made any payments to Mr. Farooq prior to 2006.

870. On that basis, the Tribunal concludes that this final allegation pertaining to the time period preceding the execution of the Novation Agreements has not been proved.

g. Conclusion on Respondent's Allegations Relating to the Making of Claimant's Investment

871. For the reasons set out in detail above, the Tribunal concludes that Respondent has not established any of the alleged acts of corruption in connection with the so-called

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[1049] Farooq I, ¶ 12.
[1050] Khan I, ¶¶ 13-14.
[1051] Khan I, ¶ 9.
[1052] Transcript (Day 2), p. 571 line 14 to p. 572 line 20.
[1053] Transcript (Day 5), p. 1402 lines 2-19 and p. 1406 line 20 to p. 1407 line 1.
[1054] Transcript (Day 5), p. 1412 line 4 to p. 1413 line 17.

"*foundational*" aspects of Claimant's investment, *i.e.*, those relating to and leading up to the establishment of its investment.

872. As noted above, the Tribunal will further assess all allegations of corruption relating to events in the performance of the investment. If and to the extent the Tribunal reaches the conclusion that any such allegation has been established, it will decide on the legal consequences of such finding.

2. Allegations Relating to the Performance of Claimant's Investment

873. In the context of the performance of Claimant's investment, Respondent raises allegations concerning additional events, which it describes as "*integral to TCC's* 'bundle of rights'" and as having a "*significant impact on the establishment and the value of TCC's interest*."[1055] In chronological order, these events are the following: (i) two trips made at the invitation of Claimant's respective parent companies by GOP and GOB officials first to Chile in December 2006 and second to Toronto and Nevada in March 2007; (ii) the grant of an airstrip lease on 10 May 2007; (iii) the extensions of Exploration License EL-5, most importantly the second extension granted on 1 December 2007; (iv); the grant of a surface rights lease on 22 May 2008, as amended on 27 September 2008; (v) certain events surrounding visa applications, which occurred mostly in 2009; and (vi) the negotiations on a mineral agreement from 2007 to 2009 and preparations for the Mining Lease Application that was filed in February 2011.

a. Allegations Relating to the 2006 Chile Trip and the 2007 Canada Trip

i. Summary of Respondent's Position

874. Respondent alleges that two excessive overseas trips were set up with a view to influencing the discretion of the government officials it needed to support the proposed Mineral Agreement and these trips were fraudulently disguised on Antofagasta's books.[1056]

(a) December 2006 Chile Trip

875. Respondent dismisses Claimant's argument that the all-expenses paid Chile trip for eleven GOB/GOP officials had a legitimate purpose, incurred reasonable costs and that SONAMI's involvement was unremarkable.[1057]

[1055] Respondent's Reply, ¶ 106.
[1056] Respondent's Reply, ¶ 329.
[1057] Respondent's Post-Hearing Brief, ¶¶ 176-196 *referring to* Claimant's Rejoinder, ¶ 20, ¶¶ 92-98 *and* Transcript (Day 1), p. 97 line 20 to p. 98 line 4.

876. While recognizing that the schedule provided for exposure to mining operations and "*featured scheduled days of mining-related activities,*" Respondent argues that the documents and evidence paint a different picture.[1058] Respondent notes that six GOB delegates arrived late, thereby missing two full days of the schedule, and refers to Mr. Flores' testimony that the visit to the Los Pelambres mine was "*not well attended by the GoB delegates,*" meaning that one of the two remaining days was spent enjoying Santiago.[1059]

877. Respondent dismisses Claimant's explanation that poor health and old age led to poor attendance at the mine. It refers to Mr. Flores' changing testimony as to whether these individuals had undergone medical examinations prior to the trip. In addition, Respondent argues that this demonstrates an oversight on Mr. Hargreaves' part who should have been aware of these individuals' inability to attend.[1060] Respondent submits that what was portrayed as an educational itinerary was merely a day of meetings and dinner.[1061]

878. Respondent maintains that even if Claimant could successfully prove an educational purpose, this alone would not make it "*legitimate*" since Antofagasta's anti-corruption policy expressly prohibits "*any economic benefit under any pretext or circumstances and using any means.*"[1062]

879. Respondent argues that the Chilean National Mining Association, SONAMI, was used to conceal the gross expenditure on Government officials from Antofagasta's books, as confirmed by Mr. Flores.[1063] Respondent maintains that Claimant's witnesses could provide no plausible explanation as to how inserting SONAMI into the payment structure served any legitimate purpose.[1064] Respondent further maintains that SONAMI also provided cover for the potential corruption offense which would have been committed under Pakistani law if Claimant had paid for the trip, as confirmed by Mr. Flores and alluded to by Mr. Hargreaves (had the invitation letter not indicated that the costs would be bourne by SONAMI, the delegation may not have accepted the invitation).[1065]

[1058] Respondent's Reply, ¶ 330; Respondent's Post-Hearing Brief, ¶ 178.
[1059] Respondent's Post-Hearing Brief, ¶¶ 178-180 *referring to* Flores II, ¶ 23 *and* Transcript (Day 10), p. 2515 line 12 to p. 2516 line 2.
[1060] Respondent's Post-Hearing Brief, ¶ 180 *referring to* Flores I, ¶ 44, Flores II, ¶ 23 *and* Transcript (Day 10), p. 2513 line 6 to p. 2514 line 21.
[1061] Respondent's Post-Hearing Brief, ¶ 181.
[1062] Respondent's Reply, ¶ 330 *referring to* Claimant's Opposition, ¶ 208 *and* **Ex RE-434**, Antofagasta Crime Prevention Manual dated November 2014 at p.13.
[1063] Respondent's Post-Hearing Brief, ¶ 182 *referring to* Transcript (Day 10), p. 2651 lines 9-13.
[1064] Respondent's Post-Hearing Brief, ¶ 183.
[1065] Respondent's Post-Hearing Brief, ¶¶ 184-187 *referring to* Transcript (Day 10), p. 2538 line 12 to p. 2539 line 9, p. 2539 lines 10-17 and p. 2539 line 18 to p. 2540 line 2 *and* Transcript (Day 9), p. 2386 lines 4-13.

880. Respondent further submits that, despite attempts to downplay accommodation and hospitality levels, missing invoices and before considering the stopover, the costs were disproportionately high.[1066] In its Reply, Respondent includes a cost breakdown and claims that these costs strayed beyond the bounds of propriety to keep the GOB officials happy.[1067] Respondent argues that the excess of attendees, excessive spending on lavish entertainment and excessive stopover trips clearly breached the Code of Ethics, Barrick Gold's Anti-Corruption and Anti-Bribery Policy as well as Antofagasta's Anti-Corruption policy prohibiting entertainment in excess of USD 100.[1068]

881. Respondent submits that the ultimate objective of the trip was to curry favor with those Government officials on whom Claimant relied for the grant of various licenses and approvals, and most importantly, the Mineral Agreement, as confirmed by Mr. Hargreaves' e-mail.[1069] Despite the suggestion that the Mineral Agreement negotiations had not begun at the time of the trip, Mr. Hargreaves and Mr. Flores both testified that this agreement, without which the project was not viable, was very much at the front of Claimant's mind at the time.[1070] Moreover, Respondent maintains that Mr. Flores accepted that: (i) Claimant held meetings with Government officials shortly after the trip; (ii) was in fact considering circulation of a Draft Mineral Agreement at that stage; and (iii) by February 2007, had identified the key individuals in the Mineral Agreement negotiation on the Government side.[1071]

882. Respondent further argues that the stopovers in New York, London, Rio de Janeiro and Nice were wholly improper – there was no business need for these stops.[1072] Mr. Flores and Mr. Hargreaves explained the criteria used to determine what level of expenditure would ultimately be deemed acceptable; Pakistan submits that, measured against this criteria, the London stopover "*did increase the cost significantly*" and was therefore excessive.[1073] Additionally, Respondent maintains that Claimant's total abdication of responsibility compounded its impropriety given that it made no effort to investigate who

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[1066] Respondent's Reply, ¶¶ 333-334, 349-354 *referring to* Claimant's Opposition, ¶ 212.
[1067] Respondent's Reply, ¶¶ 349-354.
[1068] Respondent's Reply, ¶ 78.
[1069] Respondent's Post-Hearing Brief, ¶ 188 *referring to* **Ex RE-293**, E-mail, subject: Bonds Invoices (Chile Trip), dated 17 December 2006.
[1070] Respondent's Post-Hearing Brief, ¶¶ 190-191 *referring to* Flores II, ¶ 25, Claimant's Rejoinder, ¶ 279, Transcript (Day 9), p. 2361 lines 2-12, Flores II, ¶ 22 *and* Transcript (Day 10), p. 2504 lines 18-21.
[1071] Respondent's Post-Hearing Brief, ¶ 191 *referring to* Transcript (Day 10), p. 2504 lines 18-21, p. 2505 line 22 to p. 2506 line 4, p. 2506 line 21 to p. 2507 line 2 *and* p. 2508 lines 4-9.
[1072] Respondent's Post-Hearing Brief, ¶¶ 192-196; Respondent's Reply, ¶ 336.
[1073] Respondent's Post-Hearing Brief, ¶ 193 *referring to* Flores I, ¶ 42, Transcript (Day 10), p. 2527 lines 18-19, p. 2520 line 22 to p. 2521 line 2, Hargreaves I, ¶ 54 *and* Transcript (Day 9), p. 2379 line 15 to p. 2380 line 7 *and* p. 2383 line 18 to p. 2384 line 2.

approved these stopovers and both Mr. Flores and Mr. Hargreaves denied accountability.[1074]

883. Moreover, Respondent argues that Col. Khan's extraordinary expenses on the London stopover were approved without question and in addition, he was allegedly given USD 5,000 in cash from Mr. Flores with which to "*show the GoB delegates the* 'high life' *in London.*"[1075] Similarly, Respondent submits that the fact that Mr. Farooq was allowed to secure an additional benefit by using his son's own travel agency, Elektra Travel International, to book the flights and in fact its mark-up of the air fares by USD 10,000, was also entirely overlooked.[1076]

(b) March 2007 Canada Trip

884. Respondent submits that the Canada trip and its stopovers in London and Rome similarly breached company policy, Pakistani law and the FCPA.[1077] Respondent maintains that there was a clear crossover in terms of attendance with the Chile trip, with attendance from key decision-makers in the Mineral Agreement discussions (including Chief Secretary Rind, who Mr. Flores deemed to be "*absolutely*" one of the key men).[1078] Despite Mr. Flores' and Ms. Boggs' testimony that the stopover "*holidays*" requested could not be accommodated, Respondent maintains that they took place and were funded by Claimant.[1079] Respondent maintains that the testimony of Mr. Flores and Ms. Boggs denying their awareness of this is remarkable given their specific involvement in obtaining legal advice on the propriety of such stopovers.[1080] Nonetheless, Respondent maintains that Claimant must be held accountable for these breaches irrespective of who approved them.

(c) Result

885. Respondent alleges that these trips contravened: (i) Barrick Gold's Anti-Bribery and Anti-Corruption Policy; (ii) Antofagasta's Code of Ethics; and (iii) Articles B3 and B9 of

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[1074] Respondent's Post-Hearing Brief, ¶¶ 194-195 *referring to* Transcript (Day 10), p. 2502 lines 9-13, p. 2520 lines 3-7 and lines 13-17, p. 2568 line 13 to p. 2569 line 1 *and* Transcript (Day 9), p. 2397 line 22 to p. 2398 line 2.
[1075] Respondent's Reply, ¶ 335 *referring to* Khan II, ¶ 32.
[1076] Respondent's Post-Hearing Brief, ¶ 196 *referring to* **Exhibit RE-298**.
[1077] Respondent's Post-Hearing Brief, ¶¶ 197-199.
[1078] Respondent's Post-Hearing Brief, ¶ 197 *referring to* Transcript (Day 10), p. 2570 lines 14-20.
[1079] Respondent's Post-Hearing Brief, ¶ 199 *referring to* Transcript (Day 11), p. 2880 lines 15-17, p. 2882 lines 8-10, p. 2886 line 18 to p. 2887 line 2 *and* Transcript (Day 10), p. 2568 line 21 to p. 2569 to 14 *and* p. 2570 lines 2-4.
[1080] Respondent's Post-Hearing Brief, ¶ 199 *referring to* Transcript (Day 11), p. 2886 line 18 to p. 2887 line 2 *and* Transcript (Day 10), p. 2568 line 21 to p. 2569 line 14.

the Antofagasta Crime Prevention Manual.[1081] Respondent submits that the trips amounted to acts of improper influence on the Government officials involved and despite not resulting in the signing of the Mineral Agreement, they resulted in delegates acting favorably towards Claimant in the wake of the trips, which led to an expanded exploration programme, the approval of the airstrip lease and the surface rights order.[1082]

886. Respondent thus maintains that these trips demonstrate that Claimant and its shareholders did not maintain a robust compliance culture as claimed and the misconduct is in fact compounded by Claimant's failure to investigate and hold any officer accountable for them.[1083] Respondent emphasizes the lack of investigation against anyone within Claimant's company, Barrick Gold or Antofagasta in relation to Elektra Travel's involvement or the delegates' expenses on the London stopover.[1084] Respondent maintains that this impropriety continued when Claimant failed to disclose documents relevant to these trips and only did so under threat of adverse inference after Pakistan had joined the dots in relation to SONAMI's involvement to reveal concealment of USD 78,000 in relation to the Chile trip as well as Mr. Flores' complicity in an accounting fraud with SONAMI.[1085]

887. Ultimately, Respondent maintains that these failures evidence a fundamental lack of diligence on the part of Claimant in managing its investment and that these acts of corruption disentitle Claimant to any protection of its investment under the Treaty.[1086]

ii. Summary of Claimant's Position

888. Claimant argues that Respondent mischaracterizes the educational trips, ignoring the testimony of Claimant's witnesses and the contemporaneous documents which serve to confirm the legitimate purpose of the trips.[1087] Claimant contends that Respondent has advanced no evidence of a corrupt intent nor a *quid pro quo*.

(a) December 2006 Chile Trip

889. Claimant submits that there can be no reasonable dispute as to the legitimate educational purpose behind the trip for the following reasons.

[1081] Respondent's Post-Hearing Brief, ¶¶ 200-203 *referring to* Transcript (Day 10), p. 2534 line 20 to p. 2535 line 5.
[1082] Respondent's Post-Hearing Brief, ¶ 204.
[1083] Respondent's Post-Hearing Brief, ¶¶ 301-309.
[1084] Respondent's Post-Hearing Brief, ¶ 206, ¶¶ 301-309 *referring to* Transcript (Day 9), p. 2439 line 18 to p. 2440 line 3 *and* **Exhibit RE-298**.
[1085] Respondent's Post-Hearing Brief, ¶ 309 *referring to* Respondent's Reply, ¶ 26, 81, 327(f) *and* Supplemental Reply, ¶ 10, 16-23.
[1086] Respondent's Post-Hearing Brief, ¶ 206.
[1087] Claimant's Post-Hearing Brief, ¶ 139; Claimant's Rejoinder, ¶ 270.

890. Firstly, Claimant submits that not only did Mr. Flores testify that the trip helped to educate GOP and GOB officials about the requirements for and benefits of large-scale mining projects, but as evidenced by media reports at the time and an e-mail to Antofagasta employees in 2006 emphasizing that "[t]*he main objective of this visit is to familiarize the Government of Pakistan with how Chile has developed its mining industry and how its major actors (government, investors, unions, suppliers, and contractors, etc.) properly coordinate with one another to create one of the most productive industries in the country*," this was always maintained as the main objective.[1088]

891. Claimant argues that no weight is to be attached to Mr. Hargreaves' e-mail purportedly demonstrating the "*ultimate objective of the trip*" because it was taken out of context.[1089] Claimant maintains that as Mr. Hargreaves explained, the ultimate purpose was something far bigger than the Mineral Agreement – developing the mining industry in Balochistan.[1090]

892. Claimant emphasizes that Mr. Flores also specifically denied the alleged corrupt purpose behind the trip and Col. Khan, in his early statements to the NAB, even emphasized the trip's intended educational purpose (before then exaggerating claims of corruption in response to Claimant's exposure of the gaps in Respondent's case).[1091]

893. Claimant argues that Respondent's emphasis on the unexpected changes to the itinerary, the GOB delegation's travel plans and their reported disinterest in some activities, does not negate the legitimate intentions behind the trip.[1092] Claimant submits that Respondent ignores that: (i) Claimant did not plan for and had no control over the shortened itinerary; (ii) Claimant organized a second trip to the Los Pelambres Mine; and (iii) productive meetings and dinners between Federal and Provincial officials and the Chilean Mining Minster which "*fostered bilateral relations between Chile and Pakistan*" did take place.[1093] Claimant explains that, following meetings with the delegates, the Chilean Foreign Minister described the visit as the "*high point of bilateral relations which would further strengthen the already existing ties*" between the two countries.[1094]

[1088] Claimant's Rejoinder, ¶¶ 271-274 *referring to* **Exhibits CE-459** *and* **CE-458**; Claimant's Post-Hearing Brief, ¶ 143 *referring to* Flores I, ¶ 35, **Exhibits CE-814**, **CE-521**, p. 3 *and* **CE-524**.
[1089] Claimant's Post-Hearing Brief, ¶¶ 152-153; Claimant's Rejoinder, ¶¶ 277-279 *referring to* Flores II, ¶ 25, Respondent's Reply, ¶ 78(c) (*citing* **Exhibit RE-293**).
[1090] Claimant's Post-Hearing Brief, ¶¶ 149-151.
[1091] Claimant's Post-Hearing Brief, ¶¶ 149-151 *referring to* Transcript (Day 10), p. 2644 lines 5–8 *and* Transcript (Day 4), p. 1031 line 14 to p. 1036 line 8.
[1092] Claimant's Post-Hearing Brief, ¶ 145 *referring to* Transcript (Day 1), p. 102 lines 1–6.
[1093] Claimant's Post-Hearing Brief, ¶¶ 145-148 *referring to* Transcript (Day 9), p. 2374 line 21 to p. 2375 line 2, p. 2382 line 6 to p. 2383 line 12, p. 2459 line 21 to p. 2460 line 3, Transcript (Day 10), p. 2510 lines 9–11, p. 2637 lines 14–20, p. 2632 lines 12–16, p. 2633 lines 2–4, p. 2636 lines 16–21, **Exhibit CE-519** *and* Flores I, ¶ 37, 46.
[1094] Claimant's Rejoinder, ¶ 272 *referring to* **Exhibit CE-519.**

894. Claimant perceives Respondent's allegations to be nonsensical given the timeline of the Mineral Agreement negotiations which had not even begun at the time of the Chile trip, questioning how it was created to secure an agreement nowhere near finalization.[1095] Claimant notes that it did not send a proposed draft of the Mineral Agreement until July 2007, with negotiations only commencing in December 2007 (and then indeed extending for a further three years).[1096]

895. Responding to the allegations that expenses were "*extraordinarily high*," Claimant maintains that the largest expense was understandably the flights (maintaining that it is not surprising that first-class and business-class arrangements were made for these delegates), while other expenses including accommodation, internal travel and translation services were entirely reasonable and consistent with the schedule.[1097]

896. Referring to Mr. Flores' testimony, Claimant argues that there was no intent to give the GOB officials some kind of holiday on the stopovers.[1098] In fact, Claimant argues that the officials took advantage of Claimant's good intentions, requesting additional stopovers in different locations and avoiding to obtain Claimant's approval by booking through Mr. Farooq's son's travel agency.[1099] Claimant maintains that Mr. Hargreaves was unaware of these specific travel arrangements and did not find out that the GOB officials had used Mr. Farooq's son's travel agency until after the trip.[1100] Claimant further argues that the stopover in London was not in itself unreasonable given the lengthy journey, lack of direct flights and health condition of the Chief Minister.[1101] However, once in London, Claimant submits that the officials again took advantage of TCC's expectation of reasonable and incidental expenses, with Col. Khan concealing excessive leisure expenses as accommodation costs which did not alert TCC to what was happening.[1102]

897. In relation to Respondent's claims of cash payments allegedly made in Chile and London, Claimant dismisses Mr. Aziz's suggestion that Mr. Farooq received payments whilst on the Santiago trip, given Mr. Farooq's denial of such.[1103] The payment to Col. Khan in

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[1095] Claimant's Post-Hearing Brief, ¶ 152.
[1096] Claimant's Post-Hearing Brief, ¶ 152 *referring to* **Exhibit CE-216**, Boggs I, ¶ 37, **Exhibit CE-219**, p. 4 *and* Boggs I, ¶¶ 40–45.
[1097] Claimant's Rejoinder, ¶¶ 284-285 *referring to* Respondent's Reply, ¶ 332.
[1098] Claimant's Post-Hearing Brief, ¶ 154 *referring to* Transcript (Day 10), p. 2639 lines 6–20.
[1099] Claimant's Post-Hearing Brief, ¶ 155 *referring to* Flores I, ¶ 43 *and* Hargreaves I, ¶ 56.
[1100] Claimant's Post-Hearing Brief, ¶ 155 *referring to* Hargreaves I, ¶ 56.
[1101] Claimant's Rejoinder, ¶ 286 *referring to* Flores, ¶ 42 *and* Hargreaves I, ¶ 54.
[1102] Claimant's Post-Hearing Brief, ¶ 156 *referring to* Khan II ¶ 30 *and* Transcript (Day 4), p. 1033 line 6 to p. 1036 line 8.
[1103] Claimant's Post-Hearing Brief, ¶ 157 *referring to* Farooq II, ¶ 56.

London is further denied by Claimant on the basis that Col. Khan's testimony changed and unraveled at the hearing and Mr. Flores flatly denied making such a cash payment.[1104]

898. In relation to SONAMI's role, Claimant argues that Pakistan relies on a mistranslation of an internal Antofagasta e-mail to contend that Mr. Flores tried to distance the SONAMI payment from TCC to conceal the cost of the trip. In fact, Claimant argues that the document itself as well as Mr. Flores' and Mr. Hargreaves' testimonies reveal that TCC processed the expenses in an entirely "*transparent way*" and that SONAMI's motive behind sponsoring the trip was in no way sinister, but in fact an attempt to advance bilateral relations between Chile and Pakistan.[1105]

(b) March 2007 Canada Trip

899. As a preliminary issue, Claimant rejects Respondent's suggestion that Claimant concealed evidence by producing "*no documents relating to the cost*" of this trip, submitting that this is entirely explained by the fact that none of Pakistan's document requests concerned this trip.[1106]

900. Claimant relies on the testimony of Ms. Boggs who explained that the March 2007 trip to the PDAC Convention served as "*a great and entirely legitimate educational tool*" for mining officials as well as Mr. Flores who corroborated the educational purpose behind the trip and made clear that no stopovers were allowed for on this trip given the previous abuse of TCC's good intentions on the Chile trip.[1107] According to Claimant, this demonstrates that any stopovers here happened without the CEO's knowledge and against explicit instruction.[1108] Claimant submits that Pakistan's assertion that "*it is hard to see any educational value*" in both trips is wholly contradicted by various media reports reporting the delegates' views on their return to Pakistan confirming the "*fruitful and meaningful*" nature of the trips.[1109]

iii. Tribunal's Analysis

901. At the outset of its analysis of Respondent's allegations concerning the trips made by certain federal and provincial Government officials at the expense of Claimant or its respective parent companies to Chile in December 2006 and to Toronto and Nevada in

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[1104] Claimant's Post-Hearing Brief, ¶¶ 157-160; Claimant's Rejoinder, ¶ 287 *referring to* Flores II, ¶ 26 *and* Transcript (Day 4), p. 1121 lines 19–22 and lines 8–15.
[1105] Claimant's Rejoinder, ¶¶ 275-276; Claimant's Post-Hearing Brief, ¶¶ 163-164 *referring to* Supplemental Reply, ¶ 19(b) (*quoting* **Ex. RE-511**—Respondent's translation of **Exhibit CE-729**, p. 14), Transcript (Day 10), p. 2544 lines 6–7, p. 2543 line 21 to p. 2544 line 10, p. 2549, lines 14–21, p. 2647 line 14, p. 2630 line 13, Hargreaves I, ¶ 49 *and* Flores I, ¶ 38.
[1106] Claimant's Rejoinder, ¶ 289 *referring to* Respondent's Reply, ¶ 339.
[1107] Claimant's Post-Hearing Brief, ¶¶ 165-168; Claimant's Rejoinder, ¶ 282 *referring to* Boggs IV, ¶ 29.
[1108] Claimant's Post-Hearing Brief, ¶ 168 *referring to* Transcript (Day 11), p. 2886 lines 18–21 *and* Flores II, ¶ 36.
[1109] Claimant's Rejoinder, ¶ 273 *referring to* Respondent's Reply, ¶ 78(c), 327(c), **Exhibits CE-524** *and* **CE-520**.

March 2007, the Tribunal notes that these allegations do not relate directly to a specific right or benefit that Claimant obtained in respect of its investment. As will be discussed further below, it is disputed between the Parties whether there is a causal link between these trips and specific steps in the chronology of Claimant's investment, in particular the Mineral Agreement negotiations. In any event, however, it is Respondent's position that regardless of any such link, the events surrounding particularly the Chile trip are relevant in the present case. Taking into account the emphasis placed by Respondent on these events, the Tribunal has carefully reviewed the evidence adduced by the Parties in relation to the two trips attended by Government officials.

(a) The December 2006 Chile Trip

(i) The Alleged Lack of a Legitimate Purpose of the Chile Trip

902. Respondent claims that "*TCC engaged in two excessive overseas trips with a view to influencing the discretion of government officials TCC needed to support the proposed Mineral Agreement.*"[1110] According to Respondent, particularly the Chile trip served no legitimate purpose.[1111] In support of its submission, Respondent relies primarily on the witness evidence of Col. Khan and Mr. Farooq.

903. In his first witness statement, Col. Khan testified that in his presence, Antofagasta's chairman, Mr. Luksic, "*complained that people in Pakistan didn't know anything about mining and needed to understand who TCC (and Barrick and Antofagasta) were and what a mining operation looked like,*" and further stated that both Mr. Luksic and Mr. Flores "*were of the view that government officials from GoB and GoP had to be* 'won over'." Col. Khan then described the visit in Chile as follows:

> "*The delegation was put up at one of the best hotels in Santiago – the Royal Hyatt. Whilst a few mine visits were organized, the trip was essentially one big party and there were non-stop lunches, dinners, massage services and parties, with all bills paid by Antofagasta / TCC. Mr Flores had told me that the* 'sky is the limit' *in terms of spending on the delegation and that I should not hold back to ensure that all the delegates' needs were taken care of.*"[1112]

904. In his second witness statement, Col. Khan added that "*whilst there were optional mine visits etc. to give the trip some credibility, the real purpose of the trip was entertain and win favour with officials. No one on the trip (and least of all the Chief Minister) was interested in mining.*"[1113]

[1110] Respondent's Post-Hearing Brief, ¶ 176.
[1111] Respondent's Post-Hearing Brief, ¶¶ 178 *et seq*.
[1112] Khan I, ¶¶ 20, 24.
[1113] Khan II, ¶ 27.

905. Mr. Farooq, who was one of the GOB delegates on the Chile trip, confirmed Col. Khan's testimony in his first witness statement, testifying that "*Antofagasta treated the delegates to lavish entertainment, including a stay in a five star hotel and every other indulgence such as expensive dinners and trips to night clubs, along with massages etc*" and that "*the purpose of the trip was to win favour with government officials, particularly as TCC wanted to procure the Mineral Agreement and Mining Lease*."[1114] In his second witness statement, he expanded on this statement:

> "*The purpose of the trip from TCC's point of view as I understood it was to get near to the key people involved in the project, as they wanted favours from us and they wanted the Mineral Agreement to be finalised. The purpose of the trip from at least the GOB's perspective was mostly as an excuse to go to Rio de Janeiro, Brazil, with the CM Jam Yousaf being particularly intent on going to Rio. … Those from the GOB that attended the Santiago part of the trip were not interested in the educational aspects of the trip (most of those that attended had nothing directly to do with mining), so excuses were made so that people did not need to attend the whole programme and we enjoyed our leisure time*."[1115]

906. Claimant, on the other hand contends that both trips "*served to educate Provincial and Federal officials about the requirements for and benefit of large-scale mining projects, and to develop ties between the officials and their foreign counterparts*."[1116]

907. In a contemporaneous e-mail sent by Mr. Flores, who was Claimant's CEO at the time, to various Antofasta employees shortly before the Chile trip on 7 December 2006, he described the planned visit as follows:

> "*The main objective of this visit is to familiarize the Government of Pakistan with how Chile has developed its mining industry and how its major actors (government, investors, unions, suppliers, and contractors, etc.) properly coordinate with one another to create one of the most productive industries in the country. We will visit the deposits in Los Pelambres and Chuquicamata; we will meet with the authorities of the Second Region, the Ministry of Mining and Foreign Relations, and also with the authorities of Sonami, the Mining Board, and Aprimin.*
>
> *We hope that by the end of the visit, the Government of Pakistan (GoP) and the Government of Balochistan (GoB) will have a better understanding of the challenges that Pakistan will face in developing its mining industry in the future*."[1117]

[1114] Farooq I, ¶¶ 21-22.
[1115] Farooq II, ¶ 55.
[1116] Claimant's Post-Hearing Brief, ¶ 139.
[1117] **Exhibit CE-814**, p. 3.

908. In his first witness statement, Mr. Flores further explained that the trip was meant to address what he considered to be a "*knowledge gap*" on the part of the GOP and GOB officials as a result of which "*they did not appreciate what an operation like that would entail with respect to infrastructure and technological requirements, manpower, contractors, resource contributions, regulatory challenges, tax implications, or social benefits.*"[1118] Mr. Flores therefore considered that the trip had three distinct purposes: (i) "*to demonstrate to the Government officials firsthand how a major industrial mining operation was run in an area that was geographically very similar to Chagai*"; (ii) "*to explain Antofagasta's experience and success in developing analogous mining operations*" that could serve "*as a model for what the Reko Diq project could achieve*"; and (iii) "*to foster relationships between Pakistani officials and their Chilean counterparts, as well as with other mining companies in Chile, all of whom could provide valuable insights on how to develop and encourage a mining industry*." Mr. Flores added:

> "*Achieving all three goals was very important for the future of TCC, as it would be difficult to negotiate the Mineral Agreement and Shareholders Agreements with the Governments if they did not understand the requirements and benefits of a project like Reko Diq*."[1119]

909. Specifically, in response to Col. Khan's testimony that "*the real purpose of the trip was to entertain and win favour with officials*," Mr. Flores stated that "[t]*his allegation is completely false. As the program for the trip reflects, every day the agenda featured meetings and activities from morning until evening designed to give the federal and provincial officials exposure to large-scale, industrial mining and the relevant business and regulatory considerations*."[1120] He further denied having said to Col. Khan that "'the sky is the limit' *in terms of spending on the delegation*" and testified that, instead, Col. Khan "*was only authorized to cover reasonable, incidental expenses incurred by the delegates*."[1121]

910. Similarly, in response to Mr. Farooq's testimony that the Chile trip was arranged because they wanted "*the Mineral Agreement to be finalised*," Mr. Flores testified that this allegation was "*fabricated*" and disproven by the timing of Mineral Agreement negotiations, which had not yet begun at the time the Chile trip took place.[1122] He also stated:

> "*If these allegations are meant to suggest that the Chile trip was an effort to improperly influence government officials to act in favor of TCC, they are false. We certainly believed that seeing these mines in operation, and*

[1118] Flores I, ¶¶ 35-36.
[1119] Flores I, ¶ 37.
[1120] Flores II, ¶ 22. *See also* Flores I, ¶ 52.
[1121] Flores I, ¶ 53.
[1122] Flores II, ¶ 25.

> *speaking with representatives from the Chilean Government, industry groups, and other mining companies would allow the Pakistani officials to better evaluate the challenges and benefits of such a project, and therefore place them in a better position to negotiate these agreements. But it is a complete mischaracterization to claim that we conducted the trip in exchange for the approval of these agreements*."[1123]

911. Mr. Hargreaves confirmed Mr. Flores' testimony in his first witness statement, testifying that "[t]*he objective of the trip … was educational: to provide opportunities for Pakistani and Balochistan government officials to learn more about large-scale mining ventures by touring successful mines and associated infrastructure, and meeting with Chilean mining officials and industry groups.*" He further explained that "[s]*uch educational trips are common practice in the mining industry before beginning operations in a country where the local officials are unfamiliar with large-scale mining operations*."[1124]

912. In response to Mr. Farooq's testimony that Claimant's real objective was to get "*favours from* [officials] *and* [TCC] *wanted the Mineral Agreement to be finalized*," Mr. Hargreaves considered that "*there is no basis to Mr. Farooq's implication that by the trip TCC hoped to obtain the Mineral Agreement illicitly*."[1125] He added:

> "*There is of course nothing nefarious about TCC hoping ultimately to negotiate a suitable Mineral Agreement, or thinking that we could be more successful in that process if our key national staff were able to act as ambassadors of TCC to help explain the Mineral Agreement concept to the stakeholders and that they together with our counterparties had some basic idea of what we were seeking and why we were seeking it. We firmly believed that the more the GOP and GOB representatives understood about large scale mining operations and the issues associated with them, the more fair and effective our negotiations would be for all parties. It is much harder to negotiate with someone who has no idea what you are talking about than with someone who at least understands the proposals and why you are making them*."[1126]

913. Mr. Hargreaves emphasized his view that "[w]*hile Mr. Farooq and Col. Khan portray the trip essentially as* 'an excuse' *for GOB officials* 'to go to Rio de Janeiro' *or* 'to entertain and win favour with officials' *because of the GOB's lack of engagement in the program, this was never the aim of the trip*."[1127]

914. The Tribunal notes that there is considerable discrepancy between the Parties' positions as to what was the purpose of the Chile trip. As the relevant question for the Tribunal to assess is whether Claimant did, or at least intended to, illicitly influence the Government

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[1123] Flores I, ¶ 49.
[1124] Hargreaves I, ¶ 48.
[1125] Hargreaves II, ¶ 38.
[1126] Hargreaves II, ¶ 40.
[1127] Hargreaves II, ¶ 43.

officials attending the trip, the Tribunal first considers it necessary to distinguish the trip as it was envisaged and planned by Claimant and its parent companies from the trip as it was viewed and carried out by the GOB officials.

915. In this regard, it is undisputed that Claimant and its parent companies invited eleven Government officials, five from the GOP and six from the GOB, for a visit to Chile in December 2006.[1128] A formal invitation letter was issued by the Chilean Minister for Energy and Mines.[1129] These officials included: (i) the Federal Minister for Petroleum & Natural Resources, H.E. Ammanullah Khan Jadoon; (ii) the Joint Secretary at the MPNR, Jehangir Khan; (iii) the Deputy Director (G&M) at the MPNR, Kurram Bhatti; (iv) the Personal Secretary to the Federal Minister, Syed Tauqir Hussain; (v) the Special Advisor the the Federal Minister, Mohammad Zubair Khan;[1130] (vi) the Chief Minister of Balochistan, H.E. Jam Muhammad Yousaf Khan; (vii) the Provincial Minister of Balochistan, Abdur Rehman Jamali; (viii) the Principal Secretary to the Chief Minister, Farid Uddin Ahmedzai; (ix) the Chairman of the BDA, Muhammad Farooq; (x) the Secretary to the Chief Minister, Tahir Nadeem; and (xi) the Director General of the MMDD, Maqbool Ahmed.[1131]

916. The visit was scheduled to last for five days and, according to the itinerary, it included acitivities such as a tour of the Los Pelambres mine in the Andes mountains, a visit to the Chilean State owned (Coldelco) North Division Mining Operations, meetings with the Chilean Mining Association (SONAMI), Chilean Government officials, the Chilean Mining Council and representatives from Claimant's parent companies.[1132]

917. Respondent recognizes that "[t]*he formal itinerary prepared by Antofagastas does indeed reflect these* [mining-related] *activities*."[1133] It emphasizes, however, that while the visit was scheduled for five days, the delegation from the GOB arrived late and was able to participate only in the events scheduled for days four and five of the trip. In addition, Respondent refers to Mr. Flores' testimony that the visit of the Los Pelambres mine, which was re-scheduled for the GOB delegates to day five, "*was not well attended by the GoB delegates*."[1134]

[1128] As to the selection of this delegation, *see* Flores I, ¶ 40.
[1129] **Exhibit CE-455**.
[1130] It remains unclear to the Tribunal whether the Special Advisor to the Federal Minister actually attended the trip given that he is not included in the itinerary circulated by an employee of Antofagasta as part of the GOP delegation, which was to arrive in Chile on the following day. **Exhibit CE-458**, p. 3.
[1131] **Exhibit CE-458**; Flores I, ¶ 40.
[1132] **Exhibit CE-458**.
[1133] Respondent's Post-Hearing Brief, ¶ 178. *See also* Respondent's Reply, ¶ 330.
[1134] Respondent's Post-Hearing Brief, ¶¶ 178-179, *quoting from* Flores II, ¶ 23.

918. First, the Tribunal notes that Respondent has not raised any allegation that the delegates from the Federal Government, who attended all five days of the visit, did not participate in the scheduled events – except for the visit to the Los Pelambres mine, which is located at a high altitude in the Andes mountains and caused altitude sickness for several delegates.[1135] Mr. Flores described the tours and meetings in his first witness statement and also noted that the visit received favorable press coverage in both the Chilean and Pakistani media.[1136] Mr. Hargreaves testified in his second witness statement with regard to the GOP officials:

> "*Based on what I saw during the trip, which included meetings with Chilean Ministers, Chilean trade and industry representatives, and executives from major Chilean mining companies, the GOP delegates and their Chilean counterparts made the most of these opportunities. Indeed, I supplied the GOP officials with information that was intended for a report on the trip to the Federal Parliament, and I believe that the officials actually submitted such a report that described the trip's legitimate objectives and benefits. I note that I have seen no allegations of impropriety by the GOP delegates who also attended the Chile trip and whose enthusiasm and interest in all aspects of the mining business, and engagement with their Chilean counterparts made me personally proud*."[1137]

919. Second, as to the GOB officials, it is undisputed that they arrived three days late in Chile and therefore participated only in the events scheduled for the fourth and fifth day of the visit.[1138] Mr. Hargreaves testified in his second witness statement that "*the GOB officials did not embrace this opportunity in the same way*" and added that "*despite* [Claimant's] *best efforts, the GOB engineered the circumstances to make their own travel arrangements at the last minute*" and therefore "*missed parts of the educational program that had been arranged for them*," which he considered "*frustrating and disappointing*."[1139] During the hearing, Mr. Hargreaves then explained:

> "*The problem that the Balochistan delegation had was that President Musharraf had made an unplanned trip to Quetta shortly before the delegation was due to leave to open the kidney center and a women's conference.*
>
> *Now, although we had set the dates and got agreement between the Government of Pakistan and Balochistan, we didn't have control on the President's agenda. So, when he decided he wanted to go to Quetta, the ability of the Balochistan delegation to travel was cut back, and this was the*

[1135] *Cf.* Flores I, ¶ 44.
[1136] Flores I, ¶¶ 45-48. *See also* Claimant's Rejoinder, ¶¶ 272-273, *referring to* **Exhibits CE-519**, **CE-520** *and* **CE-524**.
[1137] Hargreaves II, ¶ 43.
[1138] *Cf.* **Exhibit CE-458**.
[1139] Hargreaves II, ¶ 44.

> *frustration which I think I've communicated in my Witness Statement. And I think I might have been a little unkind on Farooq, because at the time, I thought that he was the one who was jerking us around, but I later realized that it was the President, and that's why the delegation came late*."[1140]

920. Mr. Hargreaves further testified that, while the delay of the GOB delegation was discussed at the time, "*it just wasn't registered on any of us that this was the reason why they were delayed*." He then clarified:

> "*At the time we knew of the visit. So, the significance of it impacting the schedule, we were so busy trying to deal with other things, and the Balochis weren't showing up. We ran with the Federal Government delegation. We did all the activities. We were frustrated that they didn't arrive. It all--it was a chaotic time. We didn't sit down and say, you know,* 'What's happening here?' *We just went with what we had*."[1141]

921. Mr. Flores confirmed during the hearing that they had learned of the visit of the President to Balochistan "*a couple of days before launching the entire visit*" and, after analyzing the situation, came to the conclusion that it would still be worth going forward with the trip despite the fact that the GOB delegation would have only two days, "*at least for visiting a mine and … one of the most important meetings with the Mine Minister in Chile, attending with both delegations*."[1142]

922. As for the events scheduled for after the GOB delegation arrived, Mr. Flores testified in his second witness statement that these "*were generally well attended by both the federal and provincial delegates,*" except for the re-scheduled visit to the Los Pelambres mine, which was "*not well-attended by the GOB delegates,*" which in his recollection was "*due to health concerns and* [was] *in no way connected to an ulterior motive such as entertainment*."[1143] During the hearing, Mr. Flores confirmed that the delegates who were absent from the visit, which made up almost half of the time they spent in Chile, would have "*presumably spent their time in Santiago instead.*"[1144] He added:

> "*One issue we did not plan very well was the specific safety requirements for visiting a mine at that altitude. I think the Delegation of Balochistan was not properly fit for that trip. And one of the reasons for also canceling that, once they were in Chile, it was about that safety revelation from our company.*
>
> *That was not part of the plan. We should have planned that in more details*."[1145]

[1140] Transcript (Day 9), p. 2374 line 20 to p. 2375 line 14.
[1141] Transcript (Day 9), p. 2366 line 18 to p. 2379 line 4.
[1142] Tanscript (Day 10), p. 2510 lines 8-22.
[1143] Flores II, ¶ 23.
[1144] Transcript (Day 10), p. 2512 lines 1-9.
[1145] Transcript (Day 10), p. 2512 lines 10-19.

923. When asked why they decided to go ahead with the trip even though the GOB officials could attend only the last two days, Mr. Flores explained that the "*main two reasons*" were that they were trying to adapt the agenda to accommodate the late arrival and that they did not have any alternative to conduct the visit. He added:

> "*We in the company decided to go ahead mainly because--one of the main reasons was bringing together the Government of Pakistan and Government of the Balochistan together in front of the Chilean authorities. That was a very good opportunity we did not want to miss.*"[1146]

924. In response to the question why they intended to bring these Government officials together, Mr. Flores explained:

> "*The main concept was trying to get the full picture from the Chile authority regarding the mining business development, and this is a coordinated effort between regional and Federal Government authorities. It was a very good opportunity for them to really discuss together with the Chilean Minister at this time, and it proved to be a very, very, very good meeting. It took longer, I remember, and they were very pleased in terms of the questions and discussion together.*"[1147]

925. In light of the above, the Tribunal notes that, while the visit of the GOB officials undisputedly did not include as many mining-related activities as originally planned, this was due to reasons beyond Claimant's control, *i.e.*, a visit of the President of Pakistan to Balochistan, which required the presence of the GOB officials. It appears to the Tribunal that when Claimant's representatives found out about this scheduling conflict shortly before the trip was about to start, they attempted to make the best of this situation by re-scheduling a visit to the Los Pelambres mine and the meetings with Chilean authorities that they considered most essential to achieve the stated purpose of the visit. As for the fact that several GOB delegates could not attend the mine visit due to health reasons, Mr. Flores freely admitted that this should have been planned in more detail before the trip. In the Tribunal's view, this does not, however, establish that the real purpose of the trip was to entertain and "*win the favor*" of the GOB officials.

926. The Tribunal is aware that Respondent argues, *inter alia*, that in light of the short stay of the GOB officials, the known cost of the trip of USD 245,000 or USD 20,500 per delegate,[1148] was disproportionate *vis-à-vis* the educational element of the visit.[1149] In response to that suggestion, Mr. Hargreaves confirmed during the hearing that in hindsight "*would I want it to have been done better? Yes, I would.*"[1150] Claimant argues

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[1146] Transcript (Day 10), p. 2630 line 19 to p. 2631 line 12.
[1147] Transcript (Day 10), p. 2632 lines 8-21.
[1148] *Cf.* Respondent's Supplemental Reply, ¶¶ 13-14.
[1149] Respondent's Post-Hearing Brief, ¶ 181; Respondent's Supplemental Rejoinder, ¶ 13.
[1150] Transcript (Day 9), p. 2381 line 15 to p. 2382 line 2.

that the costs presented by Respondent are "*significantly overstated*" because they also include expenses of participants other than the GOP and GOB officials, in particular expenditures for personnel of Claimant and its parent companies, and thus do not allow for a per-delegate allocation. According to Claimant, the aggregate per delegate expense is less than USD 18,000, about half of which is allocated to the costs of the international flights.[1151]

927. Even if the corrections to the total costs for the trip presented by Claimant were deemed accurate, the Tribunal would agree with Respondent that the expenses for a visit of the GOB officials, which Mr. Flores described as "*one of day of effectiveness*,"[1152] might be considered disproportionate if the trip had been planned for this short time period from the outset. However, the fact remains that Claimant's representatives were notified of this change only a few days before the trip and were faced with the option to cancel the entire trip, including for the GOP officials who undisputedly attended all five days of the trip, or to go ahead with it despite the shortened stay of the GOB officials. As explained by Mr. Flores:

> "*The one-day educational visit turned to be the end of a process, a very dynamic process in which, first, Government of Balochistan were willing to attend half of the visit, and then we were facing health problem with the people in order to attend what we considered an important part of the visit, and that's where we continued with the concept of bringing them into Chile. The visit to the mine was something very, very important, but we faced that situation just in Chile, not before.*"[1153]

928. Under these circumstances, the Tribunal does not consider it appropriate to assess the proportionality of the travel and accommodation expenses incurred for the GOB delegation based on the actual length of their stay in Chile. In any event, the Tribunal does not accept Respondent's argument that the trip lacked any educational, and thus legitimate, purpose.

(ii) The Stopovers Made on the Way Back from Chile

929. In addition to the events in Chile, Respondent claims that certain stopovers made by the delegates on their way back from Chile to Pakistan were improper. Specifically, Respondent refers to: (i) a stopover of three days in Rio de Janeiro for five delegates; (ii) a stopover of three to four days in London for nine delegates; a stopover in New York for two delegates; and (iv) a stopover in Nice for Mr. Farooq. Respondent argues that these

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[1151] Respondent's Supplemental Rejoinder, ¶¶ 12-14 and Annex 1.
[1152] Transcript (Day 10), p. 2518 lines 6-8.
[1153] Transcript (Day 10), p. 2517 line 18 to p. 2518 line 5.

stopovers were unnecessary as they served no educational purpose and notes that the expenses for the stopover in London alone amounted to almost USD 50,000.[1154]

930. In his first witness statement, Mr. Farooq stated that "[a] *stopover was arranged in London on our return, where we also enjoyed lavish entertainment. The cost of the London trip was picked up by Col Sher Khan on behalf of TCC*."[1155] In his second witness statement, Mr. Farooq added that the delegates "*went sightseeing in limousines along with other entertainment (including massages and lunches/dinners).*"[1156]

931. Col. Khan described the stopover that he "*hosted*" in London as follows:

> "*We stayed for 2 nights at the Hilton, Park Lane, which I had arranged. I had an American Express TCC Corporate Credit Card to use in London for the delegation. This card had no fund limit and I was the only Pakistani employee who was given such a credit card. Every delegate wanted their own limousine to take them around London and, in one delegate's case, the limousine bill for just one day was over thousand pounds as he travelled outside London. Delegates also shopped a lot and, as a result, I had to pay around five hundred pounds as excess baggage for the delegates at the airport when we left.*"[1157]

932. In his second witness statement, Col. Khan specified that he spent: (i) AUD 1,323.60 on "*excess baggage fees for members of the delegation*"; (ii) GBP 1,421.29 at the Hilton Park Lane on "*limousines and massages enjoyed by the delegates*"; and (iii) a further GBP 9,252.81 at the Hilton Park Lane on "*leisure expenses of the GoB / GoP guests during their stay*."[1158] Col. Khan further stated that he "*was encouraged to spend as much as necessary to ensure that the delegates had a good time*" and added that the expenses recorded on his credit card were "*approved immediately and without any questions by Chris Arndt*."[1159] In addition, Col. Khan testified that he was given USD 5,000 in cash by Mr. Flores in Santiago "*to cover incidental entertainment expenses in London*" and "*to show the GoB delegates the* 'high life' *in London*," which according to Col. Khan was spent on prostitutes and massages.[1160]

933. Mr. Hargreaves testified in his first witness statement with regard to the stopovers:

> "*During the planning of the trip, the Balochistan delegation asked us to schedule a stopover in London on the return trip. We considered that to be acceptable, so long as it did not interfere with the educational purpose of the trip or add materially to the cost. We were also aware that Jam Muhammad*

[1154] Respondent's Post-Hearing Brief, ¶ 192; Respondent's Supplemental Reply, ¶ 103.
[1155] Farooq I, ¶ 21.
[1156] Farooq II, ¶ 55.
[1157] Khan I, ¶ 25.
[1158] Khan II, ¶¶ 29-30.
[1159] Khan II, ¶ 31.
[1160] Khan II, ¶ 32.

> *Yousaf had health issues. Once we expressed some willingness to agree to stop-overs, the delegations multiplied their requests, asking for stops in Rio de Janiero and New York instead of or in addition to the stop in London. Despite being pressed by the delegations for these additional requests, we insisted on limiting expenses and we imposed cost control by using TCC's usual travel agency to book rooms directly with the London hotel and to issue vouchers to the delegates*."[1161]

934. During the hearing, Mr. Hargreaves clarified that "[t]*here was an approved stopover in London and a requested stopover at the Balochistan delegates' expense in Rio on their way back*" but acknowledged that the delegates' flights to Rio, as well as to London, New York and Nice were ultimately paid for by Antofagasta.[1162] He added that Claimant "*reluctantly agreed to accommodate London*" but when an additional request for Rio was raised, the delegates were told: "[O]*n your expense, on your time*."[1163]

935. As for the London stopover, Mr. Hargreaves confirmed that Claimant paid for the delegates' hotels and expenses but stated that he did not have any personal knowledge of any entertainment they allegedly enjoyed during their stay.[1164] He did not confirm that an extra USD 50,000 was spent on the London stopover but considered that, if this amount were correct, it was "*rather high*."[1165] Mr. Hargreaves further testified that to his knowledge, and having checked with the travel agent at the time, the London stopover did not cost "*significant extra costs in the flights*," which "*was the basis on which we said, okay, a stopover is going to be permissible*."[1166] Finally, he testified that at the time he wrote an e-mail to Mr. Arndt and Col. Khan on 25 November 2006 stating that they could support the London stopover, he "*thought it was a two-day stopover*" but "*wasn't contemplating five days.*"[1167] In that e-mail, Mr. Hargreaves had written in relevant part:

> "*After discussing with Eduardo* [Flores], *we can support the London stopover for the delegation on the way back from Santiago on the basis that this is a long trip and such stopovers are customary with Pakistani delegations.* …
>
> *In terms of payment, it would be useful if the travel agent can arrange hotel packages with vouchers through the airlines and issue and* [sic] *invoice for bed and breakfast to be paid from Santiago. Whilst in London, Sher Khan can pay for meals not included on the voucher via his credit card (even though these would be Tethyan costs, they are customary and reasonable and I believe acceptable from a corporate ethics point of view).*

[1161] Hargreaves I, ¶ 54.
[1162] Transcript (Day 9), p. 2372 lines 4-10.
[1163] Transcript (Day 9), p. 2380 lines 14-16.
[1164] Transcript (Day 9), p. 2372 line 11 to p. 2373 line 7.
[1165] Transcript (Day 9), p. 2379 line 15-19.
[1166] Transcript (Day 9), p. 2378 line 22 to p. 2379 line 7.
[1167] Transcript (Day 9), p. 2392 line 9 to p. 2393 line 6.

> *In terms of the Balochistan delegation, I think that we can also offer this facility even though I note they will stay 3 nights in London as this will offset our inability to cover their Rio trip and I note that not all of the delegation is stopping over in London.*"[1168]

936. Mr. Flores, who was copied in on that e-mail, responded on the next day that he "*concur*[red] *with Tim's recommendation.*"[1169]

937. When pointed to the fact that the e-mail mentioned a stay of three nights, Mr. Hargreaves answered: "*Okay. Three nights. I thought it was two.*"[1170] He further explained: "*I think that there was disappointment in our reluctance to sponsor a trip to Rio. The request was made, and we said no. So, to soften the* 'no,' *I agreed to the three days in London.*"[1171] In response to a question regarding the overall flight costs, Mr. Hargreaves testified that he "*was an advisor, not the person doing the detail on this trip.*"[1172] Similarly, he answered that he did not know whether all four stopovers had been part of the itinerary from the outset because he "*wasn't following it to that level of detail.*"[1173]

938. Mr. Flores recalled the planning of the stopovers in his first witness statement as follows:

> "*There are no direct flights from Pakistan to Santiago, and there are many potential connection and layover options. Several of the Balochistan officials requested stopovers in London and Rio. Mr. Khan and Mr. Rizvi also made similar requests, and explained that many Pakistanis viewed stopovers as customary when traveling long distances internationally. Finally, I recall that Col. Khan informed me that Chief Minister Yousaf specifically cited his poor health as the reason he needed a stopover. Our view was that a stopover was permissible, provided that it did not interfere with the objectives of the trip or increase the cost significantly.*
>
> *As planning progressed, the requests of the provincial officials became increasingly demanding, with some asking for multiple stopovers in different locations.*"[1174]

939. During the hearing, Mr. Flores explained that he had personally travelled from Chile to Pakistan more than 20 times and considered "*stopovers to be something acceptable because of the length of the trip. The minimum hours, it's about 30 in a combined group of planes.*" However, Mr. Flores also explained that his understanding of a stopover was to stay "*overnight and taking the plane the next morning.*"[1175]

[1168] **Exhibit RE-289**.
[1169] **Exhibit RE-289**.
[1170] Transcript (Day 9), p. 2393 lines 18-22.
[1171] Transcript (Day 9), p. 2397 lines 9-12.
[1172] Transcript (Day 9), p. 2397 line 20 to p. 2398 line 2.
[1173] Transcript (Day 9), p. 2400 lines 1-5.
[1174] Flores I, ¶¶ 32-33.
[1175] Transcript (Day 10), p. 2522 lines 11-20.

940. In his witness statement, Mr. Flores denied Col. Khan's testimony that he had been given a corporate credit card with no fund limit and and stated that "[a]*ll corporate credit cards held by TCC employees had a credit limit, and were to be used only for business-related expenses.*" He added that "[i]*n the context of this trip, that would include paying for reasonable, incidental expenses in the hotel in which they were staying*" but denied that Col. Khan was authorized to cover the costs for limousine services or excess baggage. Mr. Flores further stated that he would not have seen Col. Khan's credit card statements at the time and therefore did not know whether he actually made such payments. He testified that "*Col. Khan was a trusted employee who was well aware of our company policies, so I had no reason to think that he would not have followed those policies when accompanying the Government delegation.*"[1176] Mr. Flores added that Claimant's company policy at the time required at least two signatures to authorize payments on behalf of the company and recalled that "*Mr. Andt and a pre-designated staff member would have been authorized to approve the reimbursement amount Col. Khan requested, without requiring any involvement from* [Mr. Flores]."[1177]

941. During the hearing, Mr. Flores testified that he had not been aware of all the stopovers and of the "*substantial expenses*" reimbursed to Col. Khan before he prepared his witness statement in this arbitration. He recalled that what had been discussed was a stopover in London on the way to Chile and a stopover in Rio on the way back but acknowledged that ultimately all stopovers were made on they way back to Pakistan and that the stopover in Rio was an addition. Mr. Flores explained that he had approved two locations "*with the concept that it was either an overnight or day before taking the next plane to home or traveling to Chile*." In response to the question who approved a stopover of three to four nights in London, Mr. Flores stated that "[e]*ither Tim* [Hargreaves] *or Chris* [Arndt] *was in charge of the full process.*"[1178]

942. When asked whether the London stopover significantly increased the cost, Mr. Flores responded: "*I hundred percent agree. This is what I realized after looking details in preparing my Statement. But it wasn't the discussion and the conversation when I approved this and the concept I approved with Tim.*" He added that he never discussed with Mr. Hargreaves "*the specific details, timing, how long it's going to take, how much cost is going to be increased.*"[1179] Mr. Flores further stated that he while he was not involved in the approval of the expenses of Col. Khan's expenses for the London stopover, he considered that it "*was not appropriate to approve this.*"[1180]

[1176] Flores I, ¶ 54.
[1177] Flores II, ¶ 27.
[1178] Transcript (Day 10), p. 2518 line 21 to p. 2520 line 17; p. 2527 lines 1-19; p. 2568 line 9 to p. 2569 line 1.
[1179] Transcript (Day 10), p. 2520 line 22 to p. 2521 line 15.
[1180] Transcript (Day 10), p. 2528 line 15 to p. 2530 line 9.

943. Both in his written and his oral testimony, Mr. Flores denied that he gave USD 5,000 in cash to Col. Khan to spend on the stopover in London. He added that he could not remember any occasion on which he gave any amount of cash to Col. Khan and saw no reason to do so given that Col. Khan had a corporate credit card. During the hearing, he added that he had "*no authority in order to get that cash without being approved by someone else in the company*," noting that "*it's not easy for any senior person in the company to get cash in that amount in Chile.*" Mr. Flores further strongly rejected having had any conversation with Col. Khan about showing delegates the "*high life*" in London or about entertainment with prostitutes, which he considered deeply offensive.[1181]

944. The Tribunal notes that it is undisputed between the Parties, and Mr. Hargreaves explicitly confirmed during the hearing, that the stopovers made by the delegates on their way back from Chile to Pakistan did not serve any educational purpose.[1182] Mr. Flores further confirmed that stopovers of three to four days in Rio and London were "[a]*bsolutely not*" something for which there was no alternative.[1183] Mr. Flores also freely admitted that "*the learning of the specific amounts being incurred by the company being authorized by our people contravened completely this policy*," *i.e.*, Barrick Gold and Antofagasta's anti-corruption policies concerning entertainment.[1184] By contrast to Mr. Hargreaves, who testified about his belief that the relevant anti-corruption policies of Claimant and its parent companies had been complied with,[1185] Mr. Flores explicitly acknowledged several breaches of these policies in the context of the stopovers. When asked why no action was taken as a result of those breaches, Mr. Flores testified:

> "*I was aware of the figures and details of that stopovers or entertainment only this year. That was never discussed at the time I was the CEO of the company, never brought to my attention. I consider that, of course, is a breach in the internal guidelines of the company. Me being the most senior person, should have been aware of this.*"[1186]

945. Mr. Hargreaves did not consider the "*stopover on the way back from a very long trip*" to be in breach of FCPA regulations.[1187] In response to questions raised by the Tribunal, Mr. Hargreaves confirmed that he and Mr. Flores had obtained legal advice on whether the stopover in London would be in breach of Pakistani laws and stated that they also asked "*lawyers from Barrick*" whether it was in breach of the FCPA and that "*they gave the*

[1181] Flores II, ¶ 26; Transcript (Day 10), p. 2530 line 16 to p. 2531 line 10.
[1182] *Cf.* Transcript (Day 9), p. 2378 lines 15-18.
[1183] Transcript (Day 10), p. 2522 line 21 to p. 2523 line 3.
[1184] Transcript (Day 10, p. 2533 lines 6-9 *being shown* **Demonstrative RD-8**.
[1185] Transcript (Day 9), p. 2394 lines 8-13.
[1186] Transcript (Day 10), p. 2533 line 10 to p. 2535 line 5.
[1187] Transcript (Day 9), p. 2381 lines 1-5.

view it was acceptable." He also confirmed that they did not obtain legal advice as regards the stopovers in Rio, New York or Nice.[1188]

946. In the Tribunal's view, it is rather apparent, and Mr. Flores admitted without hesitation, that the stopovers, in particular the three-day stopover in London with expenses paid by Claimant, were not in compliance with the anti-corruption policies of Claimant or its parent companies. First, the Tribunal agrees with Claimant that a stopover on a trip that involved thirty hours of flying cannot *per se* be deemed improper. The Tribunal also considers that the stopover for a delegation of elderly gentlemen who are not used to long-distance travelling and some of whom were suffering from certain health issues may have to be somewhat longer than that for a frequently travelling person such as Mr. Flores.

947. However, the Tribunal also agrees with Respondent that a stopover of three nights in London, which apparently caused additional costs of at least USD 50,000, may well go beyond what can be considered in compliance with anti-corruption policies. As to the additional stopover in Rio for some of the delegates as well as for the shorter stopovers in New York and Nice, the Tribunal understands that the delegates had to pay for their hotels and expenses themselves but Antofagasta still paid for all of the flights. The Tribunal further understands that the two delegates that went to New York did not have an additional stopover on their way back to Pakistan. By contrast, the stopovers in Rio and Nice occurred in addition to the stopover in London, and thus cannot be deemed jusitified by the above-mentioned considerations.

948. At the same time, it strongly appears from the record that the request for stopovers came from the GOB officials, who also decided to make their own travel arrangements via a travel agency owned by Mr. Farooq's son. It is disputed between the Parties whether the flight itinerary, including the involvement of Mr. Farooq's son in booking the flights, was known to Claimant's representatives prior to the trip. Mr. Farooq testified in second witness statement that "*TCC knew as* [he] *requested permission to do this before going on the trip*."[1189]

949. Mr. Iqbal testified in this regard:

> "*Mr Arndt and I knew that Mr Farooq's son was running a travel agency in Karachi named Elektra Travel International. Mr. Farooq would often suggest that we use his son's agency. Mr Arndt allowed Mr Farooq to arrange the travel tickets to Chile for the GoB officials. I would therefore be very surprised if Mr Arndt did not know about the arrangements*."[1190]

950. Mr. Hargreaves testified in his first witness statement that they "*tried to make the flight arrangements for the GOB delegation, but the GOB delegation did not provide TCC's*

[1188] Transcript (Day 9), p. 2386 line 1 to p. 2388 line 3.
[1189] Farooq II, ¶ 57.
[1190] Iqbal, ¶ 35.

travel agency with information it needed. At the last minute, they told us they would make their own arrangements. They did not provide TCC or Antofagasta any details of those arrangements until after the trip" when they submitted their invoices for reimbursement in early 2007. Mr. Hargreaves further testified that he found out only after the trip that the travel agency used by the GOB was owned by Mr. Farooq's son. He added:

> "*Our review of the invoices suggested that Mr. Farooq and his son had taken advantage of Antofagasta by over-charging for the tickets. I was irritated that they had taken advantage of us, but it would have almost certainly been unsuccessful to dispute those charges at that point since the trip had already occurred*."[1191]

951. According to a "*Summary of invoices received from Elektra Travel International for GOB visit to Chile*" dating from February 2007, which compared the costs charged by this travel agency with those charged by Claimant's own travel agency, Bonds Travel Bureau, for the same flights, the difference amounted to USD 10,101.88.[1192]

952. In his second witness statement, Mr. Hargreaves specifically denied Mr. Farooq's testimony that the latter had requested permission in advance for this arrangement and added that this made no sense "*given* [his] *reaction to finding out about this several months after the trip concluded*." Mr. Hargreaves testified that he "*recall*[ed] *being irritated and expressing that* [they] *had been* 'gouged' *by Mr. Farooq's son*."[1193] During the hearing, Mr. Hargreaves confirmed that despite his testimony that they had "*been taken advantage of*," he did not raise any concern or complaint with those responsible for doing so at the time.[1194]

953. Mr. Flores confirmed Mr. Hargreaves' testimony that Claimant had not known that the GOB officials had used a travel agency owned by Mr. Farooq's son until their requests were submitted to Claimant for expense reimbursements.[1195] During the hearing, he clarified that he personally became aware of this fact only when preparing his witness statement in this arbitration. In response to the question whether, if he had known about this at the time, this would have caused him concern about the propriety of the trip, he stated: "*Absolutely. I consider that a very bad decision from us*."[1196]

954. Based on the evidence set out above, the Tribunal does not consider it established that Claimant's representatives knew about the precise travel itinerary, including the specific number and length of stopovers for each delegate, in advance of the trip. Similarly, the Tribunal does not accept Respondent's argument that Claimant's representatives were

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[1191] Hargreaves I, ¶¶ 55-56.
[1192] **Exhibit RE-297**.
[1193] Hargreaves II, ¶ 45.
[1194] Transcript (Day 9), p. 2407 lines 12-17.
[1195] Flores I, ¶ 43.
[1196] Transcript (Day 10), p. 2563 line 18 to p. 2564 line 10.

aware prior to the trip that the GOB officials would use a travel agency owned by Mr. Farooq's son and, more importantly, that this agency would significantly overcharge for the flight costs. Mr. Farooq only vaguely stated that he requested permission to use this agency, without specifying from whom such permission was sought and whether it included charging a markup to the flight costs as a disguised benefit to Mr. Farooq. In the Tribunal's view, the fact that a detailed comparison between the costs charged by Elektra Travel and Claimant's travel agency was prepared in February 2007 rather indicates the contrary. In addition, neither Mr. Farooq nor Mr. Iqbal testified that Mr. Hargreaves or Mr. Flores knew about this arrangement. While Mr. Iqbal stated that Mr. Arndt let Mr. Farooq arrange for the flight tickets, he only presumed that he also knew of the arrangement with the travel agency of Mr. Farooq's son.

955. At the same time, it is undisputed that the full flight itinerary as well as the overcharge by the travel agency owned by Mr. Farooq's son became clear shortly after the trip when the GOB delegation filed requests for reimbursement of their expeneses. Mr. Hargreaves confirmed that he became aware that they had "*taken advantage of Antofagasta*" in early 2007. It is further undisputed that neither Mr. Hargreaves nor anyone else from Claimant's side raised any complaints *vis-à-vis* Mr. Farooq or any other of the GOB officials regarding either the flights and stopovers or the overcharge. Mr. Flores freely admitted that this was "*a very bad decision.*"

956. As will be discussed further below, the Tribunal considers that this alone cannot be sufficient to establish that Claimant intended to improperly influence the Government officials attending the trip and stopovers in view of the upcoming Mineral Agreement negotiations. In this regard, the Tribunal also takes into account Claimant's argument that "[e]*ven if, in hindsight, it would have been more prudent if TCC had held firm and refused to accept Balochistan's demands, they do not detract from the essential educational purpose of the trip and are not indicative of any corrupt intent or quid pro quo arrangement*."[1197]

(iii) The Involvement of the Chilean Mining Association (SONAMI)

957. In addition, Respondent claims that Claimant and Antofagasta committed an "*accounting fraud*" together with the Chilean National Mining Association, SONAMI, because at least USD 150,000 of the costs of the Chile trip were invoiced to SONAMI but were actually funded by Antofagasta by means of donation payments that it made to SONAMI before the latter actually made the invoiced payments. According to Respondent, "*there is simply no other explanation*" for this arrangement than that the purpose was to conceal the

[1197] Claimant's Post-Hearing Brief, ¶ 155. *See also* Claimant's Opposition, ¶ 213.

expenditures from Antofagasta's books and to disassociate them from Claimant.[1198] Respondent further claims that this arrangement provided "*legal cover*" to the officials from the GOP and GOB attending the trip because Pakistani law would not have permitted them to accept the invitation if it had been known that the trip was at the expense of Claimant or its parent companies.[1199]

958. Claimant acknowledges that the costs of the trip were paid by SONAMI using funds provided by Antofagasta but denies that this was part of an "*elaborate concealment scheme*." Claimant submits that while SONAMI initially intended to cover all costs of the trip, it was agreed during the preparation phase as the budget developed that Antofagasta would reimburse such costs through a donation. According to Claimant, the processing of the expenses within Antofagasta occurred in a transparent manner as they were charged to an account expressly linked to Claimant and invoices were left as backup to the donation made to SONAMI.[1200]

959. While Col. Khan did not mention the involvement of SONAMI in his first witness statement, he testified in his second witness statement:

> "*… I am aware that the Chilean National Mining Association (SONAMI) was the entity which paid for the flights and accommodation of the GoB / GoP delegation for the Chile trip. The Chile trip was jointly arranged by Mr Flores and me. The issue of expenses came up whilst we were planning the trip's details. Mr Flores told me that the expenses for myself, Naseer Ahmed and Hafeez Ur Rehman would be borne by TCC whereas the delegation's expenses would be paid by SONAMI. I was surprised by this and asked Mr Flores why SONAMI was paying for a trip being arranged by TCC. Mr Flores replied that he did not want the expenses of the trip to be linked with TCC, and that Antofagasta would later settle the bill with SONAMI. I am unsure whether it ever did so.*"[1201]

960. In response to Respondent's allegation that the costs were paid by SONAMI in order to avoid an audit trail showing a breach of anti-corruption policies and Pakistani law, Mr. Flores stated in his second witness statement:

> "*The Chile trip was not an attempt to bribe these officials, and none of the arrangements were made to avoid an audit trail. Like Antofagasta and TCC, SONAMI, the Chilean government officials, and the Pakistani delegates all viewed the trip as a valuable opportunity to foster relationships between the Pakistani delegates and the Chilean mining community and to strengthen bilateral relations between Chile and Pakistan. We all recognized that as the oldest mining association in Chile with the broadest membership, SONAMI*

[1198] Respondent's Post-Hearing Brief, ¶¶ 182, 206; Respondent's Supplemental Reply, ¶¶ 16-23.
[1199] Respondent's Post-Hearing Brief, ¶ 184.
[1200] Claimant's Post-Hearing Brief, ¶¶ 162-164; Claimant's Supplemental Rejoinder, ¶¶ 16-20.
[1201] Khan II, ¶ 33.

> *offered an excellent platform for these important objectives. For its part, SONAMI was an active and enthusiastic supporter of the trip: it agreed to be the official sponsor, issued the formal invitations to the federal delegates, and participated in planning several aspects of the agenda, including the meetings with representatives from other mining companies. It also agreed to pay expenses incurred for the trip in the first instance, and Antofagasta reimbursed those expenses through a donation to the association.*"[1202]

961. Respondent places particular emphasis on an e-mail exchange dating from December 2006 in which accounting details regarding the donation payments from Antofagasta to SONAMI were discussed and Antofagasta's Chief of Accounting, Mario Pizarro, suggested that "[i]*n order to disassociate it completely from the visit, we should charge the payment to the Executive Vice Presidency account*."[1203] Mr. Flores responded to this suggestion that "[t]*he payment must be charged to the Pelicano account (cash). While we do not charge Bonds Travel expenses for accounting purposes, they must be left as backup to the donation made to Sonami and is charged to Pelicano. The SPV has nothing to do with the issue.*"[1204]

962. It is undisputed between the Parties and was confirmed by Mr. Flores during the hearing that Project Pelican was the codename used by Antofagasta for its acquisition of Claimant to maintain confidentiality leading up to the transaction.[1205] Respondent further does not dispute Claimant's submission that after the transaction Antofagasta continued to use the code name "*Pelican*" for the cost center it used to track finances associated with TCCA.[1206] Respondent initially alleged that the "*SPV*," which according to Flores had "*nothing to do with the issue*," was a reference to TCCA and thus that Mr. Flores' aim was to disassociate the payment from Claimant.[1207] Claimant pointed out, however, that in the Spanish original of the document, the respective sentence reads: "*La VPE no tiene nada que ver en el tema*" and clarified that Mr. Flores was in fact referring to the suggestion of Mr. Pizarro to charge the payment to the account of "*la vicepresidencia ejecutiva*."[1208]

963. During the hearing, Mr. Flores was asked about Mr. Pizarro's statement to disassociate the payment from the visit and answered: "*I think we did not disassociate. This is an e-mail from the accountant person in Antofagasta giving the--or using the word* 'disassociate.' *We never disassociate. We put together all of the details of the transaction*

[1202] Flores II, ¶ 24.
[1203] **Exhibit RE-511**, p. 15.
[1204] Exhibit RE-511, p. 14.
[1205] Claimant's Supplemental Rejoinder, ¶ 18; Respondent's Supplemental Reply, ¶ 19 lit. b; Transcript (Day 10), p. 2649 lines 20-22. *See also* **Exhibit RE-512**.
[1206] *Cf.* Claimant's Supplemental Rejoinder, ¶ 18, *referring to* **Exhibit CE-729**.
[1207] Respondent's Supplemental Reply, ¶ 19 lit. b.
[1208] Claimant's Supplemental Rejoinder, ¶ 17, *referring to* **Exhibit CE-729**, pp. 3-4.

in each of the books of the company, and that was not--that was never the intention."[1209] Mr. Flores disagreed with Respondent's suggestion that this was a deliberate scheme to hide the cost of the trip from Claimant's and Antofagasta's books and he reiterated that "[t]*he company provided all details, all records, and every single document in terms of the transaction. We, at least at that time, were not hiding anything in terms of the cost*."[1210]

964. Respondent further points out that the formal invitation letter issued by the Chilean Minister for Energy and Mines on 3 November 2006 stated that the trip was "*sponsored by the Chilean Mining Association*."[1211] Similarly, a letter from SONAMI to the Minister for Petroleum & Natural Resources dated 10 November 2006 "*confirm*[ed] *that the Chilean Mining Association will sponsor at its cost the visit of up to 10 delegates from the Governments of Pakistan and Province of Balochistan*."[1212]

965. When confronted with this letter during the hearing, Mr. Flores testified that "[t]*hat was the initial intention. This is a month ahead of the specific details--this is ahead of one month of the visit, and the initial intention was for SONAMI to bring, at their cost. But then, in terms of planning and putting together the budget, it was obvious that this was not going to be put under the SONAMI account.*"[1213] He added that "*the purpose of the letter was basically to start invitation while details were still in progress*."[1214] While Mr. Flores did not confirm that he was familiar with antibribery laws in Pakistan, he testified as follows:

> "*Q. So, would you have been aware, in general terms at least, that it is an offense of corruption for a government official to accept or obtain any valuable thing without consideration from any person that he knows to have been or likely to be concerned in business transacted or about to be transacted?*
>
> *A. I will agree.*
>
> *Q. So, isn't it right that, by providing a letter from SONAMI saying that they were going to pay for the trip at their cost, that would, in effect, provide cover for the potential offense that would otherwise be under Pakistani law if TCC or its shareholders were paying for the trip?*
>
> *A. From what you're saying in terms of the antibribery Pakistani, the answer is yes.*

[1209] Transcript (Day 10), p. 2547 line 18 to p. 2548 line 2.
[1210] Transcript (Day 10), p. 2549 lines 18-21.
[1211] **Exhibit CE-455**.
[1212] **Exhibit RE-287**, p. 5.
[1213] Transcript (Day 10), p. 2536 line 22 to p. 2537 line 6.
[1214] Transcript (Day 10), p. 2538 lines 6-8.

> *Q. And if the letter had said that the trip was at TCC's or its parent company's costs, then the delegation may not have been able to accept it; is that right?*
>
> *A. That's right. We never received any comment, in particular, after sending the letter in the way you're explaining and never rejected.*"[1215]

966. When asked by a member of the Tribunal about the rationale for the arrangement to pay the invoices through SONAMI "*using the funding from Antofagasta*" rather than directly by Antofagasta – with SONAMI nevertheless being the sponsoring entity to invite the delegation – Mr. Flores answered that "[t]*here was no other reason that that was the initial concept we put as the process. We continued, then we realized about the size, and we continued without changes.*"[1216] Finally, in response to the question from the President of the Tribunal whether, retroactively, he considered this way to proceed with those payments as correct, Mr. Flores answered: "*Absolutely not.*"[1217]

967. In light of the above, the Tribunal is not entirely convinced by the explanation provided by Claimant and Mr. Flores regarding the involvement of SONAMI in the payment process for the Chile trip. In particular, it appears noteworthy to the Tribunal that less than one month before the trip was about the start, both the Chilean Minister for Energy and Mines and SONAMI itself stated in official correspondence to the Pakistani Government officials that the trip was sponsored "*at its cost*" by SONAMI – a statement that was apparently never officially corrected.[1218] However, in the Tribunal's view, this does not suffice to assume that Claimant and its parent companies thereby intended to disguise illegitimate benefits to the Pakistani Government officials. In particular, the Tribunal does not accept Respondent's argument that the internal accounting documents of Antofagasta establish the intent to disassociate the donation payments to SONAMI from Claimant and thus an "*accounting fraud,*"[1219] taking into account that Mr. Flores gave explicit instruction to charge the expense to the Pelican account and to keep the invoices as "*backup to the donation.*"[1220]

(b) The March 2007 Trip to Toronto and Nevada

968. The second trip invoked by Respondent occurred on the occasion of the Prospectors & Developers Association of Canada (PDAC) conference in Tokyo and also included a visit to Barrick Gold's Goldstrike mine in Nevada. Mr. Flores described the purpose of this trip as follows:

[1215] Transcript (Day 10), p. 2539 line 3 to p. 2540 line 2.
[1216] Transcript (Day 10, p. 2651 line 6 to p. 2652 line 20.
[1217] Transcript (Day 10), p. 2653 lines 6-13.
[1218] *Cf.* **Exhibit RE-287**, p. 5.
[1219] *Cf.* Respondent's Post-Hearing Brief, ¶ 206.
[1220] **Exhibit RE-511**, p. 14.

> "… [T]*he PDAC conference and visit to Barrick's Nevada mine gave the federal and provincial officials significant opportunities to learn more about the global mining industry and the experience and success of one of TCC's shareholders. PDAC is one of the largest mining conferences in the world, and each year brings together thousands of participants from the public and private sector from a wide range of countries.* … [The] *exchange of information and ideas between and among government representatives happens often at PDAC, and was one of the principal reasons Barrick and TCC organized the visit.*
>
> *The federal and provincial officials who were able to travel to the Goldstrike mine in Nevada also gained an appreciation of the scale and operations at a major gold mine. Those who had gone to Chile had seen Antofagasta's and Codelco's copper mines and related facilities, so this trip gave them the opportunity to see the different methods involved in the extraction and processing of gold ore—a valuable insight, since Reko Diq is a mixed copper-gold deposit. Chief Secretary Rind, who had been unable to attend the Chile trip, expressed to me that he was pleased and thankful that he had the chance to learn about mining operations by observing the Goldstrike mine and discussing operations with Barrick personnel*."[1221]

969. In the context of the March 2007 trip, Respondent has not raised any allegations regarding the itinerary in Toronto or Nevada but notes that the trip again included a three-day stopover in London.[1222]

970. In an e-mail sent to Mr. Flores on 27 February 2007, *i.e.*, a few days before the delegation was to arrive in Toronto, Col. Khan provided an update on the visit and reported, *inter alia*, the following two issues:

> "*We are facing a problem on our return, Mr Farooq is requesting for 3 days holidays in London like before. I have discussed this with both Tims. I have not got an answer.*
>
> *Mr. KB Rind wishes to travel to Rome, London, Karachi while Mr Farooq and Mr Tahir want to go direct to London*."[1223]

971. Mr. Flores responded to this update as follows:

> "*Thank you for the update on the people moving into Canada this week end. In particular, regarding the stopovers request we at Tethyan recommend not to allow visitors to run separate or particular agendas in the way flying back to Pakistan under the company account. This is because there is no reason to break-up the trip while Toronto and Pakistan are well covered by airlines on a single trip. Chile was an exception and we did allow for stopovers while there was no other alternative.*

[1221] Flores II, ¶¶ 34-35. *See also* Boggs IV, ¶¶ 29-30.
[1222] *Cf.* Respondent's Reply, ¶ 339; Respondent's Post-Hearing Brief, ¶ 197.
[1223] **Exhibit CE-523**, p. 2.

> *Hope you can tell our visitors and explain the reasons for not allowing this. In any case, they are free to make any additional changes but under personal charges only.*"[1224]

972. Finally, Ms. Boggs, who had been copied in on Mr. Flores' response, commented:

> *Thanks for this response which is exactly correct. We cannot be seen to be providing* 'holidays' *as a part of this trip as that will invalidate the entire trip for everyone. If the delegates wish to add on days in Toronto or stops along the way, they must be responsible for those personal charges. The delegation is already arriving two days earlier than expected, and we have been planning on them leaving on March 10, so I assume that any stays beyond that day will be picked up by the individuals.*"[1225]

973. In her fourth witness statement, Ms. Boggs explained that she "*was very sensitive to any improper implications, and … made clear that this would be an educational trip with only reasonable expenses.*" She added that she "*obtained extensive legal advice from outside counsel as to how to structure the trip to meet the requirements of the law*." On that basis, Ms. Boggs testified that she gave "*clear instructions that the costs of any stopovers that took place would be paid personally by the official and not by TCC.*"[1226]

974. In his second witness statement, Mr. Flores also made reference to the above quoted correspondence and stated that he was "*disappointed to learn in the course of preparing for these proceedings that, against* [his] *explicit instructions, these requests for stopovers were accommodated at TCC's expense.*" He added that "[h]*ad he known that the officials were still planning to make these stopovers,* [he] *would have instructed that they must bear the costs themselves.*"[1227] Ms. Boggs acknowledged Mr. Flores' statement during the hearing but did not confirm herself that the stopovers were accommodated at Claimant's expense. She further stated that she was "[a]*bsolutely not*" told about the stopovers at the time.[1228]

975. In response to the question who would have authorized the stopovers, Mr. Flores responded that he could not answer that question and reiterated that he had given instructions to the team not to allow the stopovers.[1229] Ms. Boggs assumed that the arrrangements had been made by Col. Khan but also stated that she was "*speculating in the sense that there was a clear understanding of how the trip was to be arranged*" and that she did not expect Mr. Flores to have authorized the trip, which meant that they could have been authorized by no one else but Col. Khan.[1230]

[1224] **Exhibit CE-523**, pp. 1-2.
[1225] **Exhibit CE-523**, p. 1.
[1226] Boggs IV, ¶¶ 30-31.
[1227] Flores II, ¶ 36.
[1228] Transcript (Day 11), p. 2886 line 18 to p. 2887 line 2.
[1229] Transcript (Day 10), p. 2569 line 22 to p. 2570 line 4.
[1230] Transcript (Day 11), p. 2887 line 3 to p. 2888 line 9.

976. Based on the evidence, the Tribunal does not consider it established that either Ms. Boggs or Mr. Flores were aware of the stopovers in London and, for Chief Secretary Rind to Rome, at the time of the trip. At the same time, the Tribunal considers it noteworthy that in spite of the experience that Claimant's representatives had made only a few months earlier as regards the travel arrangements on the Chile trip, it appears that neither Mr. Flores nor Ms. Boggs actually verified at the time whether the clear instructions they had given to Col. Khan in late February 2007 had been followed.

977. Nevertheless, it has again to be noted that it is not for this Tribunal to make findings on whether this lack of supervision has caused possible breaches of Barrick Gold's anti-corruption policies and/or the relevant anti-corruption laws. The relevant question remains whether Claimant did, or at least intended to, improperly influence the Government officials attending the Toronto & Nevada trip and stopovers in view of the upcoming Mineral Agreement negotiations, which cannot be established by showing a lack of supervision.

(c) Causal Link to Claimant's Investment

978. As a further step, the Tribunal recalls its finding above that it is not sufficient for Respondent to establish improper conduct attributable to Claimant but it also has to establish a causal link to Claimant's investment in the sense that such improper conduct must have contributed to obtaining a right or benefit related to Claimant's investment. As noted above, it is disputed between the Parties whether such causal link exists between the two trips to Chile and Toronto/Nevada and any specific steps in the chronology of Claimant's investment, in particular the Mineral Agreement negotiations.

979. Respondent argues that "[t]*hese trips amount to acts of improper influence on the government officials involved, from which it is reasonable to infer that TCC was thereafter treated more favourably by those officials*."[1231] In the Tribunal's view, an inference cannot be based merely on the fact that the trips and stopovers occurred in the way they did but in accordance with the standard of proof established above, there must be "*solid*" and "*persuasive*" evidence on the basis of which the Tribunal can conclude that Claimant's investment was treated more favorably by the Government officials that attended the trips.

980. The Tribunal also notes Respondent's argument that the benefits provided to the Government officials on the trips "*are criminal offences even if there was no tangible effect obtained by TCC.*"[1232] The Tribunal agrees that, in the context of criminal law, improper conduct may not necessarily have to actually achieve the result that it was aimed

[1231] Respondent's Post-Hearing Brief, ¶ 204.
[1232] Respondent's Post-Hearing Brief, ¶ 204.

to achieve in order to amount to a criminal offense. However, the Tribunal must emphasize that it is not assessing whether any of the people or companies involved committed a criminal offense but rather whether the alleged improper conduct has any impact on the protection of Claimant's investment under the Treaty. As the Tribunal has found above, this requires a causal link between the improper conduct and a right or benefit obtained by Claimant in relation to its investment.

981. Consequently, it is not sufficient for the Tribunal to consider it likely that Barrick's and Antofagasta's internal anti-corruption policies were breached on certain aspects of the trips and that the practice of Claimant's purported "*culture of compliance*"[1233] may not have been as spotless as Claimant portrayed it to be. It is also not for this Tribunal to assess whether provisions of the relevant anti-bribery laws, in particular those under Pakistani law or the Foreign Corrupt Practices Act in the US, have been breached. Rather, the Tribunal will examine what Respondent claims to be the results of the two trips in respect of Claimant's investment under the Treaty.

982. In this regard, Respondent acknowledges that what it claims to have been the main intent of the trips, *i.e.*, the signing of a Mineral Agreement, was not achieved. Nevertheless, Respondent alleges that the trips "*did result in a number of delegates acting favourably toward TCC in the wake of the trip*" and invokes three "*example*[s]": (i) during the OC meetings held in 2006 and 2007 where the expansion of Claimant's exploration program to the Western Porphyries was discussed and agreed, the GOB's representatives Mr. Farooq and Mr. Ahmed, who both attended the two trips, did not raise any objections "*despite the fact that the benefits to TCC far outweighed those to the BDA/GoB*"; (ii) Mr. Farooq "*successfully lobbied*" for the approval of Claimant's airstrip lease at a reduced rate and the relaxation of certain applicable criteria for the approval; and (iii) Mr. Ahmed approved the amendment of the order granting the Surface Rights Lease in September 2008.[1234]

983. As for the first "*example*" invoked by Respondent, the Tribunal does not consider it established that Mr. Farooq and Mr. Ahmed's "*decision*" not to raise any objections, and in fact to agree, to the expansion of Claimant's exploration program to the Western Porphyries was caused or facilitated by the attendance on the Chile and Toronto/Nevada trips. The circumstances and reasons leading up to the decision to change the focus of exploration works from Tanjeel to the Western Porphyries have been extensively dealt with in the Draft Decision and the Tribunal has no reason to deviate from its previous findings and to now assume that the benefits of this decision to Claimant "*far outweighed*"

[1233] *Cf.* Claimant's Post-Hearing Brief, ¶¶ 159, 241, 264 *et seq*.
[1234] Respondent's Post-Hearing Brief, ¶ 204.

those to its Joint Venture partner that would in fact have benefitted alike from exploiting the larger reserves identified at the Western Porphyries.

984. As regards the second and third "*example*[s]" relied on by Respondent, the Tribunal does not accept, for reasons that will be set out in further detail below, that the approval of either the airstrip lease or the Surface Rights Lease was caused or facilitated by corruption. In the present context, it suffices to note that there is no indication that in 2007 and 2008, either Mr. Farooq or Mr. Ahmed acted in the way they did as a result of the two trips they had attended months or, in case of the Surface Rights Lease, over a year before the leases were granted.

985. Finally, the Tribunal will address Respondent's argument that the main purpose of particularly the Chile trip was "*currying favour with those government officials on whom TCC relied for … most importantly, the Mineral Agreement.*"[1235] It is undisputed between the Parties that a Mineral Agreement was never signed, *i.e.*, that Claimant ultimately did not obtain the benefit that it allegedly intended to obtain by inviting GOP and GOB officials on the trips to Chile and Toronto/Nevada. The Tribunal further recalls the findings it has made in its Draft Decision as regards the reasons for which the negotiations for the Mineral Agreement stalled as from 2009 and were ultimately abandoned, *i.e.*, most relevantly, the GOB's growing hostility towards the project and its decision to develop its own Government-only project at Reko Diq.

986. On that basis, the only relevant allegation could be that Claimant attempted – albeit unsuccessfully – to improperly influence the Government officials in order to obtain a Mineral Agreement. While the Tribunal considers it doubtful that an attempt to exercise improper influence would be sufficient to establish the necessary causal link to Claimant's investment, it does not need to express a conclusive opinion on this point if it is not convinced that Claimant even attempted and thus intended to exercise such improper influence over the Government officials by means of these trips.

987. In this regard, Respondent places particular emphasis on an internal e-mail written by Mr. Hargreaves on 18 December 2006 as part of a discussion with Mr. Iqbal and Mr. Brett Clark, Claimant's financial controller, regarding the reimbursement and accounting of costs incurred in relation to the Chile trip. In response to a question raised by Mr. Iqbal who would pay the invoices for the three employees of Claimant who participated in the trip, Mr. Hargreaves stated that "[t]*he costs for Sher Khan, Naseer and Hafeez are TCC costs. I would put these costs against the Mineral Agreement budget area of TCCA which was the ultimate objective of the trip.*"[1236]

[1235] Respondent's Post-Hearing Brief, ¶ 188.
[1236] **Exhibit RE-293**, p. 1.

988. In his second witness statement, Mr. Hargreaves explained the rationale behind his e-mail of 18 December 2006 as follows:

> "*In the e-mail, I was addressing a question about the trip-related costs for three national employees of TCC, Sher Khan, Naseer Ahmed, and Hafeez Baloch. Their attendance at the trip was necessary because as the project and Mineral Agreement progressed, they would serve a key role on a grassroots level dealing with the community, staff, and other stakeholders to explain the implications of the Reko Diq project. An important part of our strategy for the Mineral Agreement, quite apart from the negotiations with the Governments, was to conduct outreach in local communities so that they could understand the implications and benefits of a major mining economy and not view it as a threat. The Chile trip, therefore, was also intended to educate the TCC staff as much as the government officials on issues like infrastructure, transportation, and social impacts. If TCC expected the staff to communicate positive messages to the community on these issues, they would be much better prepared to do so after taking in what they saw and learned in Chile. To my mind, there was nothing wrong with allocating the trip-related expense of the TCC staff to the Mineral Agreement budget because their attendance on the trip was legitimately for that ultimate purpose. I am dismayed by Mr. Farooq's attempt to use my statements to convey that they reflected a broader sinister purpose to use the Chile trip to buy out government officials in respect of the Mineral Agreement. This is clearly not the case because I was only referring to TCC's own costs, which had nothing to do with the government officials.*"[1237]

989. Mr. Farooq testified in his first witness statement that "[i]*t was well understood that the purpose of the trip was to win favour with government officials, particularly as TCC wanted to procure the Mineral Agreement and Mining Lease*."[1238] In his second witness statement, he added that as he understood it, Claimant "*wanted favours from us and they wanted the Mineral Agreement to be finalised*."[1239]

990. Mr. Hargreaves rejected the suggestion that Claimant was hoping to have the Mineral Agreement signed without serious review and deliberation as a result of the Chile trip. He emphasized that in December 2006, the parties had not yet started any discussions on the Mineral Agreement for the Western Porphyries project and formal negotiations had not started when he left TCC in July 2007. He added that the Mineral Agreement "*was going to be a detailed and possibly complex document that both governments and whatever advisers they engaged would scrutinize very carefully*," which they expected would "*take a long time*."[1240]

[1237] Hargreaves II, ¶ 39.
[1238] Farooq I, ¶ 22.
[1239] Farooq II, ¶ 55.
[1240] Hargreaves II, ¶ 41.

991. Mr. Flores also testified that Mr. Farooq's testimony was "*disprove*[n]" by the timing of the negotiations, as there was not even a finalized internal draft at the time of the trip and Claimant sent its request to commence negotiations on the Mineral Agreement to the GOB only in June 2007.[1241]

992. The Tribunal notes that that the chronology of the Mineral Agreement negotiations is undisputed, in particular that Claimant formally requested their commencement by letter of 4 July 2007 and the first draft that was exchanged dates from 9 July 2007.[1242] Neverthelesss, the Tribunal considers it realistic and supported by the record that the upcoming negotiations were already on the front of Claimant's representatives' minds when planning for the trip. In fact, as quoted above, Mr. Flores testified in his first witness statement that to achieve the three goals of the trip, *i.e*., demonstrating to the Government officials how a major industrial mining operation was run, explaining and showing to them Antofagasta's experience and success in developing such mining operations, and fostering relationships between Pakistani and Chilean mining officials, was "*very important to the future of TCC, as it would be difficult to negotiate the Mineral Agreement and Shareholders Agreement with the Governments if they did not understand the requirements and benefits of a project like Reko Diq*."[1243]

993. In his second witness statement, Mr. Flores confirmed that "[f]*or TCC the principal purpose of the visit was to introduce these officials, who were responsible for the development of the mining industry in Balochistan and Pakistan, to the demands and potential benefits of modern, large-scale mining, to put them in a position to engage in meaningful negotiations on key agreements down the line*."[1244] During the hearing, Mr. Flores confirmed that the most important agreements coming down the line were the Mineral Agreement and the Shareholders Agreement.[1245] He also confirmed that by February 2007, *i.e*., before the second trip to Toronton/Nevada in March 2007, they had identified the two key individuals on the GOB's side for the negotiations, both of whom attended one of the two trips.[1246]

994. Mr. Hargreaves testified in his second witness statement that, in his view, there was "*nothing nefarious about TCC hoping ultimately to negotiate a suitable Mineral Agreement.*" He testified: "*We firmly believed that the more the GOP and GOB*

[1241] Flores II, ¶ 25.
[1242] **Exhibits CE-214** and **CE-216**.
[1243] Flores I, ¶ 37.
[1244] Flores II, ¶ 22.
[1245] Transcript (Day 10), p. 2504 lines 18-21.
[1246] Transcript (Day 10), p. 2508 line 4 to p. 2509 line 3.

representatives understood about large scale mining operations and the issues associated with them, the more fair and effective our negotiations would be for all parties." [1247]

995. During the hearing, Mr. Hargreaves confirmed that the objective of the Chile trip was "[t]*he process towards a mineral agreement*" and "*the first step on what was to be a very long path*."[1248] He acknowledged that the Mineral Agreement and how they were going to go about negotiating it was part of their thinking already in the summer of 2006 and that it was a key document for Claimant to obtain.[1249] Mr. Hargreaves also testified that "*the ultimate purpose was something far bigger than a mineral agreement … it was developing a mining industry like Chile in a place like Balochistan.*"[1250]

996. Against this background, the Tribunal considers it plausible to assume that the upcoming Mineral Agreement negotiations did play a role in Claimant's planning for the trips, including in the selection of the attending Government officials. However, as the Tribunal has noted above, this does not necessarily mean that Claimant thereby intended to improperly influence or "*to curry favour with*" the attending Government officials in order to procure the signing of a Mineral Agreement without proper review. In this regard, the Tribunal considers that Mr. Flores and Mr. Hargreaves provided a reasonable explanation in relation to the Chile trip, *i.e.*, that they intended to show the Pakistani Government officials how large-scale mining operations had been developed and were now successfully run in a region that was geographically not dissimilar to Balochistan and they wanted them to meet Chilean mining officials who had been dealing with the regulatory and other challenges associated with building such an industry in the past. This in turn was intended to foster the officials' understanding of the position that Claimant would take and the requests it would make in the upcoming Mineral Agreement negotiations.

997. Similarly, in relation to the Toronto trip, Mr. Flores and Ms. Boggs plausibly explained that their intention was for the GOP and GOB officials to meet with mining officials from other countries, in particular, from Canada, on the occasion of the PDAC conference and further to gain an understanding of the operations at Gold Barrick's gold mine and the benefits it entailed for the local community.

998. In the Tribunal's view, none of this can be deemed an exercise of improper influence. As found above, the trips as such, both to Chile in December 2006 and to Toronto and Nevada in March 2007, had a legitimate, educational purpose.

[1247] Hargreaves II, ¶ 40.
[1248] Transcript (Day 9), p. 2368 lines 6-10.
[1249] Transcript (Day 9), p. 2362 lines 7-16.
[1250] Transcript (Day 9), p. 2370 lines lines 14-20.

999. The Tribunal also recalls its finding that the stopovers made on the way back from these trips, in particular those to London, were not justified by the educational purpose of the trips. However, the Tribunal does not consider it established that specifically these parts of the trip were planned by Claimant with the aim to exercise improper influence or to obtain improper benefits. Based on the record, it appears rather clear to the Tribunal that it was the GOB officials who raised requests for multiple stopovers and they in fact made their own travel arrangements which were not known to Claimant until the GOB had filed a request for reimbursement of the flight costs. Therefore, the Tribunal does not accept Respondent's allegation that there was a corrupt intent on Claimant's part to accommodate these stopovers in order to gain undue advantage in the Mineral Agreement negotiations.

1000. In this regard, the Tribunal can agree with Claimant's argument, which was already cited above, that "[e]*ven if, in hindsight, it would have been more prudent if TCC had held firm and refused to accept Balochistan's demands, they do not detract from the essential educational purpose of the trip and are not indicative of any corrupt intent or quid pro quo arrangement*."[1251]

1001. In conclusion, the Tribunal considers that Respondent has failed to establish any causal link between the stopovers that occurred on the way back from the trips to Chile and Toronto/Nevada and any right or benefit that Claimant obtained or at least attempted to obtain in respect of its investment. Consequently, any improper conduct in connection with these stopovers cannot be deemed to have affected or "*tainted*" the investment. As a result, the Tribunal thus does not have to decide whether and to what extent an unsuccessful attempt to improperly obtain such a right or benefit could have an impact on Claimant's claims under the Treaty.

1002. In the absence of such any causal link between improper conduct and Claimant's investment, the Tribunal also finds that Claimant's conduct cannot be deemed to amount to contributory fault or have any further impact on the quantum of its claim for damages under the Treaty.

b. Allegations Relating to the 2007 Airstrip Land Lease

1003. Second, the Tribunal will assess Respondent's allegations in connection with the Airstrip Land Lease that was granted to the Joint Venture in May 2007.

[1251] Claimant's Post-Hearing Brief, ¶ 155. *See also* Claimant's Opposition, ¶ 213.

i. Summary of Respondent's Position

1004. Respondent alleges that witness evidence and the record demonstrates that Claimant engaged in bribery to circumvent Balochistani land law and the mining licensing regime to secure land rights over land in 2006-2007 in relation to an airstrip.

1005. Respondent submits that the following bribes were paid and acts of corruption offered to secure a lease over 3 sq. km. of land to enable Claimant to construct a private airstrip -

a) Col. Khan paid PAK Rs. 400,000 to Mr. Mandokhail (then Senior BoR Member) in May 2007 so that he recommended that the GoB relax the Land Lease Policy's eligibility criteria and allot airstrip land at a 40% discounted rate.[1252]
b) Mr. Asmatullah (BoR Assistant Secretary) did not object this relaxation as he was promised future career assistance.[1253]

1006. Respondent submits that the result was that Claimant obtained a 30-year lease, at a reduced rate, over a sensitive and significant piece of military land.[1254]

1007. Respondent relies on Mr. Farooq, Col. Khan, Mr. Mandokhail and Mr. Asmatullah's evidence to demonstrate that the process of obtaining the lease was far from "*routine*" and "*arms-length.*"[1255] Respondent notes that the Land Lease Policy contains strict eligibility criteria requiring the land to be leased only to local villagers or landless farmers, unless the GoB "*in special cases for* [the] *development of an area, relax*[ed] [the] *eligibility criteria by way of notification in the official gazette*"; however, these obstacles did not deter Claimant.[1256]

1008. Respondent maintains that Mr. Farooq intercepted Mr. Mandokhail's Summary for the Chief Minister dated 3 March 2007 (which proposed that the GOB consider the market rate for the airstrip land – PAK Rs. 10,000/acre) before the Chief Minister could give his approval. Mr. Farooq allegedly then sent his comments on this summary to Chief Secretary Rind, proposing a reduced rate of PAK Rs. 5,000/acre and a relaxation of the eligibility criteria under clause 2 of the Land Lease Policy.[1257] Respondent submits that at the same time, Mr. Farooq was discussing the matter with Mr. Mandokhail and persuaded him to exercise his discretion to recommend that the GOB approve the lease at the lower price and with relaxed criteria, in exchange for payment.[1258]

[1252] Respondent's Post-Hearing Brief, ¶ 169 *referring to* **Exhibit RE-171**, clauses 2 and 6, Farooq I, ¶ 28, Khan I, ¶¶ 14-15, 33, Farooq II, ¶¶ 41-42 *and* Corrected Mandokhail, ¶ 17.
[1253] Respondent's Post-Hearing Brief, ¶ 174 *referring to* **Demonstrative RD-1**, item 18 *citing* Respondent's Reply, ¶ 288(b), 292(j) *and* Asmatullah I, ¶ 4 *and* Farooq II, ¶ 42.
[1254] Respondent's Reply, ¶ 292, 296.
[1255] Respondent's Reply, ¶¶ 290-291 *referring to* Claimant's Opposition, ¶ 188, 190.
[1256] Respondent's Reply, ¶ 292 *referring to* **Exhibit RE-171**, clauses 2, 6(3).
[1257] Respondent's Reply, ¶ 292 *referring to* **Exhibit CE-464**, p. 2, ¶ 6.
[1258] Respondent's Reply, ¶ 292 *referring to* Farooq II, ¶¶ 41-42.

1009. Respondent notes that in the EDO's report dated 27 April 2007, the officer maintained his assessment of the market value of the land at PAK Rs. 10,000/acre but noted that the selection of the "*current price is solely your prerogative.*" Mr. Mandokhail then exercised his discretion on 9 May 2007 both to recommend that the GOB allot the airstrip land at a rate of PAK Rs. 6,000/acre and to relax the eligibility criteria in the Land Lease Policy "*in case of persons to whom a mineral title has been granted under the* [BMR]."[1259] Respondent maintains that the Chief Minister hastily approved the recommendation and, contrary to the GOB Rules of Business 1976, the Law Department was not consulted.[1260]

1010. Respondent argues that Claimant is wrong in stating that the publication of the relaxation means that it was not procured by corruption. While under clause 6(3) of the Land Lease Policy, it was indeed necessary for the relaxation to be made public in order to be valid, Respondent maintains that unusually only 20 copies of the Gazette notification were printed (compared to the habitual 100-200 copies). Respondent thus maintains that this demonstrates that the bribes ensured relaxation was obtained in exactly the form that Claimant wanted and on an accelerated basis.[1261]

1011. Respondent also argues that these actions of Mr. Farooq go far beyond "*appropriate administrative support*" and in fact constitute interference in the standard approval process.[1262]

1012. In its Post-Hearing Brief, Respondent highlighted what it considers to be mischaracterizations made by Claimant in its Rejoinder and at the 2016 Hearing.[1263] Firstly, Respondent rejected the argument that the relaxation was "*not extraordinary*" due to the federal approvals obtained by Claimant to construct an airstrip.[1264] Respondent maintains that Claimant ignores the eligibility criteria which make clear that leases are only granted to local inhabitants and such requirement may be relaxed only in "*special circumstances.*"[1265] Moreover, Respondent submits that the discount was not mere "*pocket change*" as alleged by Mr. Hargreaves, but savings amounted to a substantial PAK Rs. 3 million.[1266]

[1259] Respondent's Reply, ¶ 292 *referring to* **Exhibits CE-466**, p. 1 *and* **CE-464**, p. 3, ¶ 10.
[1260] Respondent's Reply, ¶ 292 *referring to* **Exhibit RE-20**, rules 7(3), 8(1), 14.
[1261] Respondent's Reply, ¶ 294.
[1262] Respondent's Post-Hearing Brief, ¶ 172 *referring to* Claimant's Rejoinder, ¶ 413 *and* **Exhibit CE-1**, Clause 7.2(a).
[1263] Respondent's Post-Hearing Brief, ¶¶ 170-173.
[1264] Claimant's Rejoinder, ¶ 410.
[1265] Respondent's Post-Hearing Brief, ¶ 171 *referring to* **Exhibit RE-171**, clauses 2 and 6(3).
[1266] Respondent's Post-Hearing Brief, ¶ 171 *referring to* Transcript (Day 9), p. 2426 lines 4-7.

ii. Summary of Claimant's Position

1013. Claimant argues that Respondent has failed to prove that the administrative process for the airstrip was anything other than legitimate and routine and suggests that the allegations Respondent makes are based on several false premises.[1267]

1014. Firstly, Claimant submits that Respondent's allegations are premised on its characterization of the land lease granted by the GOB as extraordinary.[1268] According to Claimant, the key requirement for the airstrip was the federal approvals which were duly obtained, something which is not questioned by Respondent.[1269] Additionally, Claimant maintains that Mr. Farooq did not have an improper relationship with TCC; he upheld his obligation to provide "*administrative support as required for the obtaining of all leases, licences… .*"[1270] Claimant argues that as Mr. Hargreaves made clear at the Hearing, the reduced rate was the product of an arms-length negotiation, whilst if there ever was a "*special case*[] *for* [the] *development of the area*" as required by the Balochistan Land Lease Policy, Claimant argues that the establishment of the first modern mine in the history of Pakistan was it.[1271]

1015. Secondly, Claimant submits that Respondent is unable to explain why the Chief Minister's approval of the lease within a day is suspect, when in reality Claimant had obtained the necessary federal approvals, the land had been surveyed and the Board of Revenue had determined an appropriate price for the lease.[1272]

1016. Thirdly, Claimant notes that its witnesses, Mr. Livesey and Mr. Hargreaves, expressly deny Respondent's allegations and maintain that Claimant's only intention was to "*pay the fair amount and move forward with matters,*" explaining why Mr. Farooq's offer to get the lease for free was rejected.[1273] Claimant maintains that in contrast, Respondent's witness testimony is contradictory and unreliable – Mr. Mandokhail adjusted his testimony to conform with other witnesses, dismissing the same error made three times as a "*typing error*" (despite one being handwritten), and Mr. Farooq contradicted himself in relation to Mr. Asmattulah's promised "*career assistance.*"[1274] Specifically in relation to the aforementioned career assistance, Claimant argues that Respondent cannot show

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[1267] Claimant's Rejoinder, ¶ 408.
[1268] Claimant's Rejoinder, ¶ 409.
[1269] Claimant's Post-Hearing Brief, ¶¶ 247-249 *referring to* Livesey IV, ¶ 23, ¶¶ 34-35.
[1270] Claimant's Rejoinder, ¶ 413 *referring to* **Exhibit CE-1**, Clause 7.2(a).
[1271] Claimant's Post-Hearing Brief, ¶ 251 *referring to* Transcript (Day 9), p. 2426 line 4 to p. 2427 line 7 *and* **Exhibit RE-171**, clause 6(3).
[1272] Claimant's Rejoinder, ¶ 414 *referring to* Respondent's Reply, ¶ 292(h), **Exhibits CE-207**, **CE-462**, **CE-466** *and* **CE-464**, p. 464.
[1273] Claimant's Post-Hearing Brief, ¶ 252 *referring to* Transcript (Day 9), p. 2412 lines 20–21, p. 2432 lines 2–7 *and* **Exhibit RE-285**.
[1274] Claimant's Post-Hearing Brief, ¶¶ 253-255.

causation; specifically it cannot show that had he failed to remain silent, the lease would not have been obtained.[1275]

1017. Lastly, Claimant reiterates that in any event, Mr. Farooq and Mr. Asmatullah's actions are not attributable to TCC.[1276] Not only did Mr. Asmatullah testify that no one from TCC ever paid him, but Claimant maintains that Respondent has submitted no evidence that any monies that Mr. Farooq allegedly paid to Mr. Asmatullah were in relation to TCC, instead of just part of the admitted bribery and kickback schemes, which had no connection to TCC or the Reko Diq project.[1277]

iii. Tribunal's Analysis

1018. There is common ground between the Parties that on 10 May 2007, the Board of Revenue, acting through its Senior Member Mr. Mandokhail, issued an order by which it granted the Joint Venture a 30-year land lease over an area of 3 square kilometers (750 acres) for the construction of an airstrip for the Reko Diq project. It is further undisputed that the lease was granted at a rate of PAK Rs. 6,000 per acre and on the basis of a relaxation of the eligibility criteria set out in the applicable Land Lease Policy 2000.[1278]

1019. In this context, Respondent claims that the following bribes were paid or benefits given by Claimant to secure the airstrip lease:[1279]

i. PAK Rs. 400,000 by Col. Khan to Mr. Mandokhail in or around May 2007 "*in return for Mr Mandokhail exercising his discretion to recommend that the GoB allot the landstrip at a below-market rate of PAK Rs. 6,000/acre and relax the eligibility criteria required by the Land Lease Policy that would otherwise have prevented TCC leasing the land, and to sign the order granting TCC the lease*"; and

ii. Career assistance by Mr. Farooq to Mr. Asmatullah in the form of a promotion to Secretary Board of Revenue in December 2007 in return for Mr. Asmatullah "*not object*[ing] *to the relaxation or reduced rate as he should have done*."

1020. In support of these allegations, Respondent relies on the witness testimony of Mr. Farooq, Col. Khan, Mr. Mandokhail and Mr. Asmatullah, which will be addressed in detail below.

1021. Respondent claims that, as a result of these alleged bribes, Claimant was able to obtain "*a blanket relaxation of the Land Lease Policy, without consulting the Law Department*

[1275] Claimant's Post-Hearing Brief, ¶ 256.
[1276] Claimant's Post-Hearing Brief, ¶ 256.
[1277] Claimant's Post-Hearing Brief, ¶ 256 *referring to* Transcript (Day 5), p. 1344 lines 18–20, Farooq I, ¶ 26 *and* Transcript (Day 2), p.568 lines 3–20 *and* p. 572 lines 9–20.
[1278] **Exhibit CE-213**.
[1279] Respondent's Reply, ¶ 288; Respondent's Post-Hearing Brief, ¶¶ 169, 174.

as required" and "*a 30-year lease over a politically sensitive and significant piece of land at a discount of approximately USD 49,500 from the market rate*."[1280]

1022. Based on the documentary record, the Tribunal understands that the chronology of events leading up to the order granting the land lease was as follows. On 17 October 2006, Mr. Flores wrote to the Chairman of the BDA, Mr. Farooq, requesting that the BDA arrange the transfer of 3 square kilometers of land to the Joint Venture for the purposes of constructing an airstrip and attached a map showing the required land. In this letter, Mr. Flores noted that Claimant had received permission from the Civil Aviation Authority to construct the airstrip and was hoping to commence construction by the end of the year.[1281]

1023. According to e-mail exchanges between Mr. Iqbal and Mr. Arndt as well as between Mr. Iqbal and Mr. Hargreaves dating from September and early October 2006, respectively, Mr. Farooq had told Mr. Iqbal that he would attempt to get the land free of costs from the GOB. Mr. Arndt also stated that he remembered Mr. Farooq saying that "*the BDA would make this land available as part of the GOB's contribution to the JV*."[1282]

1024. In a Summary for the Chief Minister dated 3 March 2007, Mr. Mandokhail stated that according to a report submitted by the Executive District Officer (EDO) Revenue Chagai, the prevailing market value of the land in question was PAK Rs. 10,000 per acre and thus proposed that GOB consider leasing out the requested area at that rate.[1283]

1025. On 5 April 2007, Mr. Arndt wrote to Mr. Farooq that Claimant had obtained legal advice, which concluded that the Joint Venture was not eligible to be granted a land lease under clause 2 of the Land Lease Policy but that the GOB had the authority to relax the eligibility criteria under clause 6(3), which required a public notification of the relaxation "*as a special case for development of the district*." The letter attached a draft notification, which Mr. Arndt asked to be issued prior to the land allotment.[1284]

1026. Apparently before the Summary of 3 March 2007 had reached the Chief Minister, Mr. Farooq commented on it on 17 April 2007 that the land was required "*for an important mega project*" and noted that the BOR had recently allotted State land to Claimant as Joint Venture partner of the GOB at a rate of PAK Rs. 5,000 per acre in the same area. He thus considered that the market rate proposed by the EDO "*cannot be termed justified*" and instead proposed to allot the land at the rate of PAK Rs. 5,000 and to relax the eligibility criteria pursuant to clause 6(3) of the Land Lease Policy.[1285]

[1280] Respondent's Post-Hearing Brief, ¶ 175.
[1281] **Exhibit CE-465**, p. 2.
[1282] **Exhibits RE-284** and **RE-285**.
[1283] **Exhibit CE-464**, p. 1.
[1284] **Exhibit RE-173**.
[1285] **Exhibit CE-464**, p. 2.

1027. It is undisputed that Claimant had indeed been granted land at a rate of PAK Rs. 5,000 per acre in late 2005 in connection with the installation of tube wells and pipelines.[1286] While Respondent claims that this was also a below-market rate that was granted only due to the BDA's "*financial constraints*" and that enabled Claimant to obtain the land "*at a significant discount*" of more than USD 3 million,[1287] it does not raise any allegations of corruption in connection with that previous land lease.

1028. Making reference to Mr. Farooq's comments on the Summary, on 24 April 2007, the Board of Revenue requested the EDO to survey the relevant area and to reassess the market value of the land.[1288] In his letter of 27 April 2007 to which he attached his report, the EDO stated in relevant part:

> "*So far as the increase in price of land is concerned, it is submitted that the price increased with land development and increased population. This is tur* [sic] *that earlier the land was allotted to TCC AT Rs 5000 / acre now we have enhanced the price and proposed Rs. 10,000/acres. However the succession of current price is solely your prerogative. We will have no objection in this regard.*
>
> *However, It is suggested to increase the price to 6000 Rs / Acre. This would be reasonable and in favor of Government of Balochistan and for Board of Revenue.*"[1289]

1029. Making express reference to Mr. Farooq's comments on 17 April 2007 as well as the re-submitted report of the EDO, on 9 May 2007, Mr. Mandokhail recommended in the Summary for the Chief Minister that the GOB consider allotting the land at a rate of PAK Rs. 6,000 per acre "*in favour of M/S Tethyan Copper Company Pakistan Ltd. with the relaxation of eligibility criteria stipulated in Clause 2 of LLP 2000 in case of persons to whom a mineral title has been granted under the Balochistan mineral rules, 2002*."[1290]

1030. On the same day, the Chief Minister approved Mr. Mandokhail's recommendation, and on the next day, Mr. Mandokhail issued the order granting a 30-year land lease for the purposes of constructing an airstrip to the Joint Venture, at a rate of PAK Rs. 6,000 per acre and "*with the relaxation of eligibility criteria stipulated in Clause 2 of LLP-2000*."[1291]

[1286] **Exhibit RE-273**.
[1287] Respondent's Reply, ¶ 292 lit. e.
[1288] **Exhibit CE-465**, p. 1.
[1289] **Exhibit CE-466**.
[1290] **Exhibit CE-464**, p. 3.
[1291] **Exhibit CE-213**.

(a) The Alleged Payment of PAK Rs. 400,000 to Mr. Mandokhail

1031. Respondent claims that Mr. Mandokhail exercised his discretion on 9 May 2007 to recommend the land lease at a below-market rate of PAK Rs. 6,000 per acre and the relaxation of the eligibility criteria in return for being paid PAK Rs. 400,000 by Col. Khan in Mr. Farooq's presence. While Respondent also notes the "*breakneck speed*" with which the Chief Minister approved Mr. Mandokhail's recommendation,[1292] it does not raise any allegation that a bribe was paid to the Chief Minister in this regard. Therefore, the Tribunal will limit its assessment to whether Respondent has established that Mr. Mandokhail indeed received an illegitimate payment in connection with his recommendation of 9 May 2007 and the issuance of the order on the following day.

1032. In his witness statement dated 24 June 2015, Mr. Mandokhail testified that in return for approving the Summary to the Chief Minister and signing the order granting the land lease, "*Mr Farooq and Col. Sher Khan came to* [his] *office and Col. Khan gave* [him] *PAK Rs 500,000 in cash.*" He added that the money had been in a brown envelope, which he put in his briefcase.[1293] In his corrected witness statement dated 11 October 2016, which was submitted by Respondent shortly before Mr. Mandokhail gave oral testimony, he corrected, *inter alia*, the amount he purportedly received from Col. Khan to PAK Rs. 400,000.[1294] During the hearing, Mr. Mandokhail stated that the original number of 500,000 had been a "*typing error*."[1295]

1033. Mr. Mandokhail stated that he did not have any record of this payment because it was "*a small amount*" that he did not put in his bank account but spent "*here and there, on* [his] *children's education, and on household expenses*." When asked how he remembered the specific amount of PAK Rs. 400,000, which is recorded in his statement before the Group of Experts of 2 June 2015,[1296] he answered: "*Money is a thing, which you don't forget about.*" He added: "*You have to remember these things*."[1297] When referred to his Section 161 statement before the Public Service Commission dated 12 August 2015, which records that Col. Khan had given him "*Rs. 500,000 (Five Hundred Thousand Rupees),*"[1298] Mr. Mandokhail testified that "[i]*t could be that this one is a typing error as well*."[1299] Similarly, when referred to his Section 164 statement before the Judicial Magistrate in Quetta dated 24 February 2016 which records that he had been given "*RS*

[1292] Respondent's Reply, ¶ 292 lit. h.
[1293] Mandokhail, ¶¶ 16-17.
[1294] Corrected Mandokhail, ¶ 17.
[1295] Transcript (Day 5), p. 1437 lines 2-3.
[1296] **Exhibit RE-440**, ¶ 6.
[1297] Transcript (Day 5), p. 1434 line 15 to p. 1435 line 7.
[1298] **Exhibit RE-450**, p. 3.
[1299] Transcript (Day 5), p. 1438 lines 19-20.

500,000.00 (Five lakh rupees),"[1300] Mr. Mandokhail stated: "*Like I said before, it could be a typing error. I did not write it. Magistrate has written it*."[1301]

1034. In response to the question when he had realized that there was a typing error in his witness statement, Mr. Mandokhail testified: "*With time, when I was preparing for this hearing, I was reading my statements again and again, and then I realized that the amount has been noted incorrectly*."[1302] When asked how he had come to the realization of this inaccuracy, he denied that he had been told what any of the other witnesses had testified and answered: "*One remembers when you try to remember such things, and you do remember that this thing might be wrong*."[1303]

1035. Col. Khan testified in his first witness statement that he had made payments to Mr. Mandokhail but did not mention any specific occasion or amount. He stated that after having had a discussion with Mr. Flores "*in 2006 or 2007*," he "*began paying Mr Farooq to get things done*" who told him that he used that money "*to pay off other department officials, particularly the Board of Revenue (BOR) from whom* [they] *were seeking different leases and concessions (in contradiction to Balochistan rules and legislation).*" Col. Khan further stated that while he asked Mr. Dad to make some of these payments "*as, where possible,* [he] *didn't like to personally hand over bribes,*" he "*did have to deal directly with Mr Mandokhail … since he was a senior Bureaucrat and an ex-Chairman of the BDA.*"[1304] Col. Khan further testified:

> "*The payments to Mr Mandokhail and others allowed us to achieve many things which would otherwise have been difficult or impossible for the Reko Diq project. This included, for example, obtaining the airstrip in a sensitive military area and acquiring surface rights over approximately 600 square kilometres, and obtaining security clearances without due process.*"[1305]

1036. Mr. Farooq confirmed in his first witness statement that he "*witnessed a payment being made to Mr Mandokhail by Col. Sher Khan as a reward for securing the airstrip*."[1306] In his second witness statement, he testified that Claimant "*was desperate to have an airstrip at the Reko Diq site, but this was always going to be a challenge*." He confirmed that he originally thought that he could get the land be granted to Claimant for free due to his relations with Mr. Mandokhail but then found out that Mr. Mandokhail had recommended a rate of PAK Rs. 10,000 to the Chief Minister. Mr. Farooq stated that he "*took the Summary from the CS (Mr K B Rind) before the CM could give his approval*" and

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[1300] **Exhibit RE-483**, ¶ 12.
[1301] Transcript (Day 5), p. 1439 line 21 to p. 1440 line 1.
[1302] Transcript (Day 5), p. 1442 line 22 to p. 1443 line 3.
[1303] Transcript (Day 5), p. 1445 lines 3-5.
[1304] Khan I, ¶ 14.
[1305] Khan I, ¶ 15.
[1306] Farooq I, ¶ 28.

suggested a reduced rate of PAK Rs. 5,000 per acre and also discussed this with Mr. Mandokhail "*beyond the official correspondence*."[1307] Mr. Farooq added:

> "*Had I not made this recommendation and had I not convinced Mr Mandokhail to exercise his discretion to reduce the rate, TCC would have paid Rs. 10,000 per acre, rather than Rs. 6,000 per acre.*
>
> *Mr Mandokhail was paid Rs. 400,000 for his help with the rate reduction and for his recommendation that the eligibility criteria in the Land Lease Policy 2000 (LLP) be relaxed. I was with Col. Sher Khan when this money was paid to Mr Mandokhail. … We did a great favour to TCC by getting the LLP relaxed as per the draft provided by TCC.*"[1308]

1037. Respondent also refers to the testimony of Mr. Livesey, who was Claimant's Project Director at Reko Diq at the time. In his fourth witness statement, which was submitted in the previous phase of the proceedings, Mr. Livesey testified with regard to the airstrip lease:

> "*Both the provincial and federal governments also assisted TCC's work at the site by granting (and later renewing) the permits TCC needed to build and operate a private airstrip at the Reko Diq site. The required permits include a security clearance from the Pakistan military which would allow the issuance of No-Objection Certificates to construct and operate the airstrip from the Balochistan Government, a surface rights lease over the land used, and finally, an airstrip license from Pakistan's Civil Aviation Authority ("CAA"). I recognized that the licensing of an airstrip in such a remote location, close to two international borders, might prove to be challenging. I believed that it would be a good litmus test for our ability to work in the Chagai area, and would also help us to get a sense for the level of support from the military and the provincial and federal governments, as all would be party to the permitting and approvals process.*
>
> *I recall being impressed that both the initial application and renewal processes for the federal airstrip license went exceptionally smoothly, with our applications approved in line with the regulatory guidelines and with the minimum of hassle—sometimes within a matter of weeks. For example, on 29 November 2007 we informed the CAA that construction of the airstrip was complete, and we requested a final inspection so that the necessary license could be issued. The CAA promptly carried out the inspection and issued a private airstrip license to TCCP in early January 2008, which was renewed annually thereafter. Furthermore, Balochistan actively assisted us in obtaining the necessary federal approvals, which further supported my feeling of goodwill for the project from our provincial partners.*"[1309]

1038. In response to Mr. Farooq's testimony that Claimant was "*desperate to have an airstrip at the Reko Diq site*," Mr. Livesey testified in his seventh witness statement that before

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[1307] Farooq II, ¶¶ 40-41.
[1308] Farooq II, ¶¶ 41-42.
[1309] Livesey IV, ¶¶ 34-35.

building its own airstrip, Claimant was using an airstrip within a three-hour drive from Reko Diq, which he considered to be "*adequate access to the site*" and "*not unusual*" in the mining industry, "*especially in the exploration and feasibility stages before initial mine development*." He added that "[t]he*re were obvious advantages to the proposal* [of constructing an airstrip], *including convenience and greater security and safety of TCC personnel*" but denied that this could be qualified as "*desperat*[ion]" as the existing airstrip "*remained a viable alternative*." Mr. Livesey further stated that if the GOB had not been supportive of Claimant's airstrip application, they might have waited until a later stage of the project, which was common in his experience "*because of the substantial outlay required for an airstrip.*"[1310]

1039. Mr. Livesey testified that Claimant "*fully complied with the required proceeses to obtain the required approvals and licenses from both the Provincial and Federal Governments for the airstrip*" and denied the interpretation of his previous testimony as an indication of illicit conduct. He clarified that "*most of the approvals needed to construct the airstrip were actually from the Federal Government, not the Provincial Government*" and referred to "*security clearance from the Pakistani military, which allowed the issuance of (i) an airstrip clearance from Pakistan's Civil Aviation Authority ("CAA"); (ii) No-Objection Certificates from the Balochistan Government for the construction and operation of the airstrip; and (iii) a surface rights lease from the BAlochistan Board of Revenue (BOR") for the land used*."[1311] Mr. Livesey testified that the surface rights lease "*was the least of these requirements*" and explained that obtaining the license from the federal CAA had been a "*multi-step process*," which involved site visits before and after construction of the airstrip, periodic inspections of the runway and equipment, training on firefighting, and installing security checks and procedures. Mr. Livesey stated "[i]*t is because of the many steps in this process that* [he] *was impressed to see the application and renewals by the CAA go so smoothly*."[1312]

1040. During the hearing, Mr. Hargreaves stated that the securing of the airstrip was "*important*" and "*a priority project*" for Claimant at the time but did not confirm the suggestion that he was "*chasing … up*" the application in an e-mail exchange with Mr. Iqbal in October 2006.[1313] In his e-mail of 3 October 2006, Mr. Hargreaves had written: "*Chris* [Arndt] *also mentioned that we had made enquiries to GOB in respect of the lease of land for the airstrip. Can you please confirm and, if so e-mail me a copy of the application*." In response, Mr. Iqbal told him that he had spoken with Mr. Farooq about the land lease, who would attempt to get the land free of cost, but no formal application

[1310] Livesey VII, ¶¶ 18-20.
[1311] Livesey VII, ¶¶ 22-23.
[1312] Livesey VII, ¶ 24.
[1313] Transcript (Day 9), p. 2409 line 18 to p. 2411 line 22.

had yet been filed. Mr. Iqbal added he understood from a different e-mail from Mr. Hargreaves that "*we will decide it after your meeting with BDA during your next visit to Pakistan.*"[1314]

1041. When asked about Mr. Iqbal's report that, *inter alia*, Mr. Farooq would try to get the land free of costs from the GOB, Mr. Hargreaves testified:

> "A. … *This was an offer from offer Farooq to get land for free, which we didn't want. We wanted to pay for the land. This was an insignificant amount of money, and, to me, it was a place we didn't want to go. We just want to pay for the fair amount and move forward with these matters.*
>
> *Q. Well, you don't say that, do you? There is no response to Mr. Iqbal saying—*
>
> *A. I'm not going to tell Zafar; I'll tell that to Farooq. And I told Farooq that we didn't care about getting the land for free. You know, we're there as a foreign company spending millions of dollars. We're not going to go and do a dodgy deal for a bit of free land in the desert. This was a red herring.*"[1315]

1042. Mr. Hargreaves confirmed that Mr. Farooq's offer "*had a smell about it*" and stated that they "*didn't entertain those things.*" He also confirmed that he was aware at the time that there had been a fax dating from July 2005, quoting the rates that Claimant would be charged for the land, and that subject to changes in the rates they would have to pay for the land at the rate set by the Board of Revenue.[1316] Mr. Hargreaves further testified that he had not been aware at the time that Claimant obtained the land at a 40 percent discount from the Board of Revenue's original recommended rate.[1317] When asked whether he left that up to Mr. Farooq, he answered:

> "*I was leaving this up to the people that were, you know, line management. I just find this puzzling. This is such a small amount. This is pocket change. I don't know why they would do this, these things. It just puzzles me. Farooq is trying to ingratiate himself on this transaction. It just makes no sense to me.*"[1318]

1043. Mr. Hargreaves stated that he would not characterize Mr. Farooq's offer as corrupt but rather as unnecessary, adding:

> "*Farooq was trying to tell us*, 'Hey, I can get this for you.' *I'm sure he could have got it for us without paying anything to anybody and just said:* 'Look, we're 25 percent partner in this project. We need to do something for Tethyan. Let's give them this land for free.' *The Chief Minister had that discretion. He*

[1314] **Exhibit RE-285**.
[1315] Transcript (Day 9), p. 2412 line 16 to p. 2413 line 7.
[1316] Transcript (Day 9), p. 2413 line 22 to p. 2416 line 22.
[1317] Transcript (Day 9), p. 2425 lines 9-12.
[1318] Transcript (Day 9), p. 2426 lines 4-10.

> *could have exercised it. But what I was saying is,* 'We don't need that. Let's not use up that political capital on matters like this.'"[1319]

1044. Mr. Hargreaves further confirmed that he was aware of the need for a relaxation of the eligibility criteria in the Land Lease Policy but considered it "*something that should have and would have been granted through … the normal application process*" and not "*something that required some sort of dodgy deal*." He characterized the relaxation as a "*routine process*" and noted that the same had been given to Claimant for other land it had previously leased.[1320]

1045. On the basis of the evidence in the record, the Tribunal does not accept Respondent's allegation that Mr. Mandokhail received a payment of PAK Rs. 400,000 from Col. Khan in or around May 2007 in return for exercising his discretion regarding the rate at which the land would be leased and the relaxations of the eligibility criteria. First of all, the Tribunal considers it noteworthy that in all three written statements of Mr. Mandokhail given before the Public Service Commission, the Magistrate and this Tribunal, respectively, it is recorded that Mr. Mandokhail received an amount of PAK Rs. 500,000 from Col. Khan. While a corrigendum to Mr. Mandokhail's written witness statement in this proceeding was submitted shortly before the hearing, in which he corrected, *inter alia*, the amount he allegedly received in connection with the airstrip lease, the Tribunal does not believe his testimony that all three written statements, which were recorded before different authorities, contain the same "*typing error*." Further, Mr. Mandokhail's testimony that he simply came to remember the correct amount in preparing for this hearing – albeit without being referred to Mr. Farooq's second witness statement in which an amount of PAK 400,000 had been recorded – also does not appear plausible to the Tribunal.

1046. In addition, the Tribunal does not consider it established that Claimant intended to exercise influence over Mr. Mandokhail as regards either the rate to be paid per acre for the lease or the relaxation of the eligibility criteria. As for the rate, Respondent has placed great emphasis on the fact that based on the assessment of the EDO that the prevailing market rate was PAK Rs. 10,000, Mr. Mandokhail initially recommended in his Summary for the Chief Minister in March 2007 that the land be granted to Claimant at that rate, but that upon intervention of Mr. Farooq Mr. Mandokhail then recommended a lower rate in May 2007. In this regard, the Tribunal first notes that while Mr. Farooq did intervene in April 2007 and recommended a rate of PAK Rs. 5,000 which had been used in a previous land lease, this rate was not simply adopted but the Board of Revenue asked the EDO for a further assessment and report. In his report of 27 April 2007, the EDO explained that the rates had increased and that they had therefore proposed a rate of PAK Rs. 10,000.

[1319] Transcript (Day 9), p. 2432 lines 8-16.
[1320] Transcript (Day 9), p. 2427 line 16 to p. 2428 line 17.

However, he explicitly stated that he would have no objection to adopting a lower rate and even "*suggested to increase the price to 6000 Rs / Acre. This would be reasonable and in favor of Government of Balochistan and for Board of Revenue*." On that basis, it appears plausible to the Tribunal that Mr. Mandokhail agreed with the EDO that this was a "*reasonable*" rate and therefore decided to follow his suggestion, which still involved an increase of PAK Rs. 1,000 per acre on the rate adopted in 2005.

1047. In addition, the Tribunal takes note of Mr. Hargreaves' testimony that the amount Claimant "*saved*" through the rate reduction, *i.e.*, USD 49,500, was "*insignificant*" compared to the amounts that Claimant and its parent companies were spending on the Reko Diq project at the time. While the Tribunal does not consider it necessary to adopt the term "*pocket change*" used by Mr. Hargreaves, it agrees that it does not appear very likely that Claimant would have taken the risk of engaging in corrupt activities in return for saving a five-digit amount while investing several million dollars in the exploration of Reko Diq.

1048. While Respondent placed considerable emphasis during the examination of Mr. Hargreaves on Mr. Farooq's initial offer to get the land free of cost, it is clear from the record that this offer did not materialize. In addition, there is no indication that this offer was triggered by Claimant or that Claimant's representatives even considered this to be in their interest. To the contrary, Mr. Hargreaves testified that because this offer "*had a smell about it,*" they did not want to entertain it but rather pay an appropriate rate for the land. It is not documented whether Mr. Hargreaves in fact told that to Mr. Farooq, but the record shows that Mr. Farooq's actual intervention was then limited to suggesting a lower rate in line with what had been determined as the applicable rate in 2005. The Tribunal does not consider it established that this intervention went beyond the obligation of the BDA, as the authority representing the GOB on the Joint Venture, to provide "*appropriate administrative support as required for the obtaining of,*" in this case, necessary land rights under clause 7.2(a) of the CHEJVA.[1321] This obligation was also noted in the Tribunal's Draft Decision as forming part of Claimant's legitimate expectations that the GOB would continue to provide support for, and facilitate, Claimant's investment as it had before and during the time period in which the Novation Agreement was signed.[1322] In any event, even if it were otherwise, the Tribunal does not believe, for the reasons explained by Mr. Hargreaves, that Mr. Farooq was acting on instructions from Claimant and thus that his actions would be attributable to Claimant.

1049. As to the relaxation, it is undisputed that neither Claimant nor the Joint Venture met the elegibility criteria under clause 2 of the Land Lease Policy 2000, which provided that

[1321] **Exhibit CE-1**, Clause 7.2(a).
[1322] Draft Decision, ¶¶ 940-943, *maintained in* Decision on Jurisdiction and Liability, ¶¶ 944-947.

land was to be leased only to residents of the same district or persons that possessed no or less than a certain specified area of land. It is also undisputed that pursuant to clause 6(3) of the same Policy, "[t]*he Government may, in special cases for development of an area, relax eligibility criteria by way of notification in the official gazette*."[1323] While it is not entirely clear to the Tribunal whether a similar relaxation had been granted to Claimant in the past, given that Respondent argues on the one hand that it was of an "*unprecedented blanket nature*"[1324] but refers on the other hand to a previous lease of land to the BDA and Claimant in November 2005,[1325] it was in any event within the discretion of the GOB to grant a relaxation to the Joint Venture for the purposes of constructing the airstrip.

1050. In this regard, the Tribunal takes note of Mr. Livesey's testimony who explained that the land lease was only the final step in obtaining the necessary licenses for the airstrip and that Claimant was in fact much more concerned with fulfilling the requirements for obtaining the license from the federal Civil Aviation Authority. Respondent has not raised any allegations of corruption in connection with any of the federal licenses, which had already been obtained when the Joint Venture applied for the land lease with the Board of Revenue. Consequently, the Tribunal does not consider it conspicuous that the GOB, being Claimant's Joint Venture partner in the Reko Diq project, decided to grant the relaxation.

1051. Respondent argues that contrary to the 1976 Business Rules, the Law Department was not consulted prior to granting the relaxations.[1326] While it may be correct that a consultation was required under the 1976 Business Rules and there is indeed no indication that the views of the Law Department were sought, a failure within the GOB to abide by its own internal rules does not establish that the land lease was obtained by corruption. In particular, Respondent does not allege that the Chief Minister, who approved Mr. Mandokhail's recommendation without consulting the Law Department, received any improper payments or other benefits from Claimant.

1052. Consequently, the Tribunal concludes that in the circumstances, neither the recommendation of the reduced rate of PAK Rs. 6,000 per acre nor the relaxation of the eligibility criteria justify an inference that Mr. Mandokhail was improperly influenced in connection with the airstrip lease. Also, taking into account the credibility concerns expressed above regarding Mr. Mandokhail's testimony on the amount he allegedly

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[1323] **Exhibit RE-171**, clauses 2 and 6(3).
[1324] Respondent's Reply, ¶ 291.
[1325] Respondent's Reply, ¶ 292 lit. e, *referring to* **Exhibit RE-273**. This order does not make reference to any relaxation of the eligibility criteria. It is thus unclear whether a relaxation was required and, more importantly, whether it was obtained in that case.
[1326] Respondent's Reply, ¶ 292 lit. h.

received, the Tribunal thus concludes that Respondent has failed to establish that Claimant made an illegitimate payment to obtain the airstrip lease.

(b) The Alleged Career Assistance Provided to Mr. Asmatullah

1053. Respondent further alleges that Mr. Asmatullah, who was Assistant Secretary to the Board of Revenue at the time, did not object to the reduced rate or the relaxations "*as he should have done*," which was rewarded by career assistance in December 2007 when Mr. Farooq requested that he become Secretary to the Board of Revenue.[1327]

1054. In his witness statement, Mr. Asmatullah testified that Mr. Farooq "*secured a waiver*" of the eligibility criteria under the Land Lease Policy 2000 and added that "[w]*hile there is a power to relax this requirement, there are certain steps that must first be taken. As the steps were not taken, it was my job to raise objections, yet in this case I raised no objection.*"[1328] Mr. Asmatullah did not specify in his witness statement why he did not raise any objections. However, he stated in a more general context that he was posted to the position of Secretary in December 2007 "*at the request of Mr. Farooq*" who told him that "*he wanted* [him] *in the position of Secretary because it would be easy to get things done for TCC*." Mr. Asmatullah further testified that "*Mr. Farooq acted as TCC's personal partner. He was a powerful man and you did not say no to him*" because, otherwise, "*you would lose your job within 15 minutes*."[1329]

1055. Mr. Farooq stated in his first witness statement that he "*made payments to Sheikh Asmatullah for his assistance including in relation to obtaining the airstrip and surface rights*."[1330] In his second witness statement, Mr. Farooq corrected his previous testimony, stating that he "*did not make a monetary payment to Sheikh Asmatullah on this occasion*," *i.e.*, in connection with the land for the airstrip, but explained that he "*now recall*[ed] *that* [he] *made payments to Mr Asmatullah and helped him with his career for his assistance with later events.*" He maintained that they "*did a great favour to TCC by getting the LLP relaxed as per the draft provided by TCC*."[1331]

1056. The Tribunal notes that neither Mr. Asmatullah nor Mr. Farooq confirmed Respondent's allegation that Mr. Asmatullah refrained from raising any objections to the land lease for the airstrip in return for career assistance, which he allegedly received from Mr. Farooq in December 2007, *i.e.*, seven months after the lease had been granted. In fact, Mr. Farooq specifically corrected himself by stating that he helped Mr. Asmatullah with his career "*for his assistance with later events*." Mr. Asmatullah himself also indicated that the

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[1327] Respondent's Post-Hearing Brief, ¶ 174; Respondent's Reply, ¶ 292 lit. j.
[1328] Asmatullah, ¶ 10.
[1329] Asmatullah, ¶¶ 4, 6, 8.
[1330] Farooq I, ¶ 28.
[1331] Farooq II, ¶ 42 (with note 44).

reason for him not raising any objections may have been that he did not want to lose his job; he did not mention that he was promised to receive career assistance at any point before it was allegedly given in December 2007. Consequently, Respondent has not established that any future career assistance would have been the reason for Mr. Asmatullah not raising any objections.

1057. For the reasons set out in connection with the alleged payment to Mr. Mandokhail above, the Tribunal further does not believe that there was any reason for which Ms. Asmatullah "*should have*" objected to the land lease as alleged by Respondent. In addition, even if he had objected, Respondent has not established that the Assistant Secretary to the Board of Revenue would have had any considerable influence on the decision-making process, which, as Respondent recognizes, was a discretionary one. Finally, the Tribunal notes that there is no allegation that Mr. Farooq had any instruction from Claimant to provide career assistance to Mr. Asmatullah. Therefore, any improper benefit involved with that assistance would not be attributable to Claimant.

(c) Conclusion

1058. In conclusion, Respondent has not established that Claimant made any improper payments or gave improper benefits in order to obtain the airstrip lease.

c. Allegations Relating to the 2007/08 Renewal of Exploration License EL-5

1059. Third, the Tribunal will assess Respondent's allegations raised in relation to the renewal of Exploration License EL-5 in December 2007.

i. Summary of Respondent's Position

1060. Respondent alleges that the following payments were made and acts of corruption occurred to ensure that the MMDD found that Claimant's second extension of Exploration License EL-5 over 90% of the exploration area was justified and to secure the grant of various rights and extensions in relation to EL-5 -

a) Mr Farooq testified that he paid bribes of between PAK Rs. 20,000-30,000 to Mr. Ahmed on several occasions during Mr. Ahmed's time as Director General and Secretary of the MMDD.[1332]
b) Col. Khan testified that he made a payment to Mr. Ahmed around the time of the Chile trip for approximately PAK Rs. 30,000-40,000.[1333]
c) In return for payments from Claimant and its assistance in getting Mr. Farooq appointed as BDA Chairman, Mr. Farooq also admitted to not raising challenges

[1332] Respondent's Post-Hearing Brief, ¶ 162 *referring to* Farooq II, ¶ 52 *and* Farooq I, ¶ 16.
[1333] Respondent's Post-Hearing Brief, ¶ 162 *referring to* Khan II, ¶ 34 *and* Transcript (Day 3), p. 843 line 21 to p. 844 line 5.

in Operating Committee Meetings against the EL-5 extension as he should have.[1334]

d) Payments were made by other individuals at TCC, including Mr. Arndt to Mr. Ahmed to secure Claimant's rights in relation to exploration licences.[1335]

1061. Respondent argues that Claimant's argument that it would not have offered a bribe to procure the extension of EL-5 because it was already entitled to the extension under the BM Rules and CHEJVA, misrepresents the operation of the MMDD and the procedure for applying for a second extension.[1336]

1062. Firstly, Respondent submits that even if Claimant met the criteria for obtaining an extension, that would not necessarily mean bribes were not necessary to secure the extension – as Mr. Farooq and Mr. Tahir explained, "*everything would be done on payments"* at the MMDD.[1337] Respondent claims that the various payments to Mr. Ahmed thus make sense since, as both Secretary and Director General of the MMDD, he was effectively running the department.[1338]

1063. Secondly, Respondent submits that Claimant is incorrect in arguing that it was "*entitled*" to the extension.[1339] Respondent notes that under the 2002 BM Rules, each time a renewal is made, it should be for 50% of the exploration area prior to the application date.[1340] For licenses concerning over 50% of the existing area (as is the case here, where the second extension concerned 90%), renewal is discretionary. Respondent maintains that the bribes were thus employed to ensure the MMDD granted the renewal despite there being insufficient "*technical or other reasonable grounds*" to do so.[1341] Respondent refers to Mr. Tahir's testimony in which he explained that renewal of a license over such a large proportion of an exploration area was unprecedented and that Claimant's justifications were inadequate.[1342] Respondent rejects Claimant's justifications for seeking the second renewal, specifically arguing that challenges to EL-5 before the Balochistan High Court did not prevent Claimant undertaking exploration work (as the High Court did not impose any stay on Claimant's work) and mineral agreement negotiations and delays in obtaining Government approvals to open a local office were unconnected to the exploration work and thus should not have affected its progress.[1343]

[1334] Respondent's Reply, ¶ 313, 325 *referring to* Farooq II, ¶ 53.
[1335] Respondent's Reply, ¶ 313 *referring to* Farooq II, ¶ 52.
[1336] Respondent's Reply, ¶ 317.
[1337] Respondent's Reply, ¶ 318 *referring to* Farooq II, ¶ 52 *and* Tahir II, ¶ 30.
[1338] Respondent's Reply, ¶ 318.
[1339] Respondent's Reply, ¶ 319.
[1340] Respondent's Reply, ¶ 319 *referring to* **Exhibit RE-1**, rule 29(2)(c)(ii)-(iii).
[1341] Respondent's Post-Hearing Brief, ¶¶ 164-166; Respondent's Reply, ¶¶ 313-326 *referring to* **Exhibit RE-1**, rules 29(2)(c)(ii)-(iii) *and* Tahir II, ¶ 32.
[1342] Respondent's Reply, ¶ 321 *referring to* Tahir II, ¶ 32 *and* **Exhibit RE-15**, Exhibit 1, p. 318.
[1343] Respondent's Reply, ¶ 323 *referring to* Tahir II, ¶ 33 *and* **Exhibit CE-61**.

1064. Moreover, Respondent condemns Claimant reliance on the Operating Committee meeting in October 2007 which preceded its application for renewal to argue that the BDA "*endorsed and supported*" Claimant's recommendation that that EL-5 be renewed for a further three years since Claimant failed to mention that Mr. Farooq was the only representative of the BDA at this meeting.[1344] Mr. Farooq indeed admitted that he considered Claimant's justifications "*flimsy*" but nonetheless felt obliged to show his support given the payments he had received previously and Claimant's role in securing his appointment as BDA Chairman.[1345]

ii. Summary of Claimant's Position

1065. Firstly, Claimant argues that Respondent has not proven that the EL-5 renewals were corruptly procured, and rather refers to the record which allegedly demonstrates that Claimant applied for and received the renewals in accordance with the 2002 BM Rules.[1346] Claimant maintains that just because it was not automatically entitled to the renewal and the regulator had discretion to deny the application does not mean that there was an abuse of the MMDD's discretion.[1347]

1066. Claimant maintains that the BDA fully endorsed its opinion that there were indeed "*technical or other reasonable grounds*" justifying renewal of the license over more than 50% of the area due to the vast expansion of the scope of Claimant's exploration program in May 2006.[1348]

1067. Secondly, Claimant argues that Respondent's bribery allegations are contradicted by contemporaneous evidence and witness evidence showing that there was "*extensive discussion and careful consideration within the company.*"[1349] Claimant refers to the testimony of Mr. Flores and Mr. James who explained that Claimant understood the renewal to be critical and thus carefully considered its justifications.[1350] Claimant questions why after such hard work and the establishment of a detailed internal strategy document that specifically contemplated two "*fallback alternatives*" in the event the license was not extended, Claimant would resort to bribery to guarantee renewal.[1351]

[1344] Respondent's Reply, ¶ 325 *referring to* Claimant's Opposition, ¶ 174, *further referring to* **Exhibit CE-64**, p. 4.
[1345] Respondent's Reply, ¶ 325 *referring to* Farooq I, ¶ 14 *and* Farooq II, ¶ 53.
[1346] Claimant's Post- Hearing Brief, ¶ 257.
[1347] Claimant's Rejoinder, ¶ 423 *referring to* Respondent's Reply, ¶ 315, 318.
[1348] Claimant's Post- Hearing Brief, ¶ 257 *referring to* **Exhibit CE-64**, p. 4, James I, ¶ 28 and **Exhibit RE-15**, p. 11.
[1349] Claimant's Post- Hearing Brief, ¶ 260 *referring to* James II, ¶ 15. S*ee* **Exhibits CE-20**, **RE-15**, **CE-64** *and* Flores II, ¶ 42.
[1350] Claimant's Post-Hearing Brief, ¶ 260 *referring to* Flores II, ¶ 42 *and* James II, ¶ 15.
[1351] Claimant's Post-Hearing Brief, ¶ 260 *referring to* **Exhibit CE-525**; Claimant's Rejoinder, ¶ 425.

1068. Moreover, Claimant submits that not only do Mr. James and Mr. Flores deny Respondent's allegations, maintaining that Claimant obtained the renewal lawfully and without bribery payments, but such allegations are too vague to test; they provide mere estimations of the amounts and timing of the bribes and cannot specify the alleged *quid pro quo*.[1352] Claimant considers the allegations legally deficient, arguing that Pakistan cannot show that but for such bribes, Claimant would not have obtained the renewal.[1353]

iii. Tribunal's Analysis

1069. There is common ground between the Parties that the Director General of the MMDD, acting as Licensing Authority, granted to the Joint Venture, *inter alia*, the following licenses: (i) on 18 May 2002, Exploration License EL-5 for a 3-year period over an area of 973.75 square kilometers;[1354] (ii) on 9 April 2005, a first extension of EL-5 for a further 3-year period over a reduced area of 482.72 square kilometers;[1355] and (iii) on 1 December 2007, a second extension of EL-5 for a further 3-year period over a slightly reduced area of 435.02 square kilometers.[1356] While Respondent claims that acts of corruption occurred in relation to "*the EL-5 extensions*,"[1357] indicating that it refers to both extensions, its specific allegations concern purported payments made to Mr. Maqbool Ahmed in late 2006 and 2007 and thus relate only to the second extension of EL-5 granted in December 2007. The Tribunal also notes that the first extension granted in April 2005 bears a different signature and thus appears to have been signed by a person different from Mr. Ahmed. In addition, Respondent's arguments regarding the alleged lack of justification for a renewal of EL-5 also relate only to the second extension.

1070. It is further undisputed between the Parties that the second renewal of Exploration License EL-5 was considered and granted pursuant to the particular requirements of Rule 29(2)(c)(ii) and (iii) of the 2002 BM Rules and that the assessment of these requirements involved regulatory discretion to be exercised by the Licensing Authority.[1358] Rule 29(2)(c)(ii) provides that that an application for a second renewal shall not be made "*in respect of an area of land greater in extent than fifty per cent of the exploration area immediately prior to the date of that application, or such other proportion of the exploration area as the licensing authority may determine on good technical or other reasonable grounds*." Rule 29(2)(c)(iii) further provides that an application for a second renewal shall not be made "*unless the application can satisfy the authority that such a*

[1352] Claimant's Post-Hearing Brief, ¶ 262.
[1353] Claimant's Post-Hearing Brief, ¶ 263.
[1354] **Exhibit CE-16**.
[1355] **Exhibit CE-17**.
[1356] **Exhibit CE-20**.
[1357] Respondent's Reply, ¶ 313.
[1358] *Cf.* Respondent's Reply, ¶¶ 319-320; Claimant's Rejoinder, ¶ 423.

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 period of the first renewal."[1359]

1071. Respondent takes the position that the explanations provided by Claimant in its application for the second extension of EL-5 provided "*inadequate*" justification to grant such extension pursuant to the requirements of Rule 29(2)(c)(ii) and (iii).[1360] In support of this argument, it relies on Mr. Tahir who testified that "*the technical and other challenges that TCC relied upon were unconvincing*." In particular, Mr. Tahir considered that neither the challenge to Claimant's right to EL-5 in the Balochistan High Court, nor the negotiations on the draft Mineral Agreement, nor the necessary Government approvals to be obtained to open Claimant's Pakistani branch office, affected Claimant's ability to complete its exploration activities and feasibility study and thus did not justify a second extension of EL-5. In his view, "[b]*y this stage, thirteen years after the CHEJVA's commencement date, it was far too late to be discussing feasibility and extensions.*"[1361]

1072. The Tribunal recalls that it considered the reasons provided by Claimant in support of its application for the second extension of EL-5 already in its Draft Decision. In particular, the Tribunal found that, contrary to Respondent's suggestion, the term "*full feasibility study*" could not commercially reasonably be interpreted to require Claimant to submit a feasibility study on each and every deposit within the exploration area or to prevent a phased development starting with an initial mining project and expanding it over the years once the initial project had paid off.[1362] The Tribunal further held that Claimant's decision to change the focus of its exploration works in the course of 2006 and its plans to conduct a feasibility study over the deposits at the Western Porphyries (instead of that at Tanjeel) was known to the GOB and approved by its representatives on the OC meeting during a meeting held on 26 October 2007.[1363] In addition, the Tribunal noted that this shift in focus was explicitly mentioned in Claimant's second renewal application.[1364]

1073. Respondent points out that the conclusion drawn by the Tribunal in its Draft Decision was that the scope of the Feasibility Study did not provide a valid ground for rejecting the Mining Lease Application in 2011 and argues that no finding was made on the validity of the grounds presented by Claimant in its renewal application.[1365] The Tribunal does not

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[1359] **Exhibit RE-1**, Rule 29(2)(c)(ii) and (iii).
[1360] Respondent's Reply, ¶¶ 321-324. *See also* Respondent's Post-Hearing Brief, ¶ 166.
[1361] Tahir II, ¶¶ 32-33.
[1362] Draft Decision, ¶¶ 1215-1216, *maintained in* Decision on Jurisdiction and Liability, ¶¶ 1219-1220.
[1363] Draft Decision, ¶ 1217, *referring to* **Exhibit CE-64**, p. 3, *maintained in* Decision on Jurisdiction and Liability, ¶ 1221.
[1364] Draft Decision, ¶ 1218, *referring to* **Exhibit RE-15**, p. 10, *maintained in* Decision on Jurisdiction and Liability, ¶ 1222.
[1365] Respondent's Reply, ¶ 324, *referring to* Draft Decision, ¶ 1223.

agree with this latter statement because its finding that the Licensing Authority could not use this as a ground for rejection was in fact based on the consideration that Claimant's renewal application fulfilled the statutory requirements under the 2002 BM Rules, in particular Rule 29(2)(c)(iii), and was thus eligible to be granted by the Licensing Authority.

1074. Claimant's witness Mr. Hugh James testified in his first witness statement that "[t]*he magnitude of the Reko Diq project made it impossible to complete all the necessary work for the Mining Lease by the end of the first extension of EL-5*." He added that it was therefore explained to the BDA at the OC meeting in October 2007 that a second extension over 90% of the current area was needed, and on that basis, the OC authorized Claimant to apply for the second renewal. Mr. James stated that the reasons were explained in the application and "*there was no irregularity and no need to pay bribes; TCC obtained this renewal by complying fully with the regulatory process laid out by the Provincial authorities*."[1366]

1075. In his second witness statement, Mr. James explained that the extension "*was a matter of great importance for TCC*" and "*the subject of extensive discussion and careful consideration within the company*." He further stated that around October 2007, Claimant developed an internal strategy document concerning the renewal, which was prepared based on the input of various teams and himself and approved by the Board. According to Mr. James, this document demonstrates that "*TCC considered the matter at length, including the approach to and requirements of the application, and the rationales to justify relinquishing less than 50% of the area*" and that "*TCC did not take for granted that it would get the extension*" and in fact developed two "*fallback alternatives*" in case the application would be denied.[1367]

1076. The Tribunal recalls the Parties' agreement that Claimant was not entitled to an automatic renewal of EL-5 but that the Licensing Authority's decision involved the exercise of discretion. On that basis and taking into account Mr. James' testimony on the preparation of the application and its approval in the OC meeting of October 2007, Respondent would have to establish that this discretion was exercised in favor of Claimant's application not on the grounds that the new discoveries at the Western Porphyries had led to a change in focus of the exploration works which required additional time to complete the necessary exploration works, but because of the alleged acts of corruption.

1077. In this context, Respondent claims that the following improper payments were made to secure the second extension of EL-5:[1368]

[1366] James I, ¶¶ 28-29.
[1367] James II, ¶¶ 15-16, 18.
[1368] Respondent's Reply, ¶ 313; Respondent's Post-Hearing Brief, ¶ 162.

i. On several occasions, PAK Rs. 20,000 to 30,000 by Mr. Farooq to Mr. Ahmed "*to ensure that TCC was granted the rights and extensions of its exploration licence (El-5) that it wanted*";

ii. Payments from TCC to Mr. Farooq and assistance in getting him appointed as Chairman of the BDA in return for Mr. Farooq "*refrain*[ing] *from speaking up against TCC in the Operating Committee meetings, including to challenge TCC's recommendation in October 2007 that it seek an extension of EL-5 over 90% of the existing exploration area, despite the lack of a proper justification for doing so*";

iii. PAK Rs. 30,000 to 40,000 by Col. Khan to Mr. Ahmed "*at around the time of the Chile trip … in connection with TCC's exploration licenses*"; and

iv. Payments by "*other individuals at TCC, including Mr. Arndt*" to Mr. Ahmed "*to secure TCC's rights to exploration licenses*."

1078. In support of its allegations, Respondent relies on the witness testimony of Mr. Farooq, Col. Khan and Mr. Tahir, which will be addressed in detail below.

1079. Respondent maintains that Claimant's application did not meet the criteria for renewal, but argues that even if did, "*to secure any action at the MMDD, payment was necessary.*"[1369] Mr. Farooq testified in this regard that "*the MMDD was the sort of department where nothing could be done without payment.*"[1370] Similarly, Mr. Tahir stated that "*everything at the MMDD was done by making payments; the clerk dealing with any request would take money and send a share of the money up the chain to the Director General of the MMDD and the Secretary of the MMDD.*" Mr. Tahir added:

> "*Even for a simple task, such as sending a letter to the relevant district administration, money would need to be paid. For larger tasks, like obtaining an exploration licence extension, money would need to be paid directly to the Director General and the Secretary of the MMDD. I know that Mr Maqbool Ahmed, who was Director General of the MMDD from 6 January 2005 to 16 April 2007 and also Secretary of the MMDD from 1 December 2006 until 6 November 2008, used to take payments of this nature and I would not be surprised if he had taken them from Mr Farooq and TCC.*"[1371]

1080. The Tribunal considers that it does not have to decide whether was a general practice of taking corrupt payments at the MMDD, as alleged by Respondent. Even if that were the case, this would not be sufficient to establish that improper payments, attributable to

[1369] Respondent's Reply, ¶ 315.
[1370] Farooq II, ¶ 52.
[1371] Tahir II, ¶ 30.

Claimant, were made to obtain the second extension of EL-5. Therefore, it will now turn to the examination of the individual allegations raised by Respondent.

(a) The Alleged Payments of PAK Rs. 20,000 to 30,000 by Mr. Farooq to Mr. Ahmed

1081. In support of its first allegation, Respondent relies on the witness testimony of Mr. Farooq who stated in his first witness statement that he "*paid Secretary Maqbool of the MMDD on two or three occasions to extend the ELs to cover TCC's delays and notwithstanding that TCC should have been applying for a Mining Lease*."[1372] In his second witness statement, Mr. Farooq confirmed:

> "*I paid Maqbool Ahmed at the MMDD directly small amounts of between Rs. 20,000 to 30,000 on several occasions in exchange for expediting TCC's work and not raising unnecessary objections and including at around the time that the second extension was requested. Mr. Maqbool was my classfellow and friend, so I felt comfortable asking for him to help to get work done for TCC. I am sure that Mr Arndt, Col. Sher Khan and others knew about these payments and were paying Mr Maqbool directly, as he told me that he was getting money from TCC.*"[1373]

1082. The Tribunal agrees with Claimant that both Respondent's submissions and Mr. Farooq's testimony on the alleged payments made by him to Mr. Ahmed are rather vague.[1374] In particular, Mr. Farooq mentioned "*two or three*" or "*several*" occasions on which he allegedly gave money to Mr. Ahmed but did not specify for which purpose the individual payments were made. The same applies to Col. Khan's testimony in his second witness statement that he was aware that "*Mr Farooq used to pay* [Mr. Ahmed] *small amounts for processing and approving certain approvals etc. which TCC required from time to time*."[1375]

1083. In addition, Mr. Farooq did not testify that he received the money or an instruction to pay money from Claimant. He also did not state that he expressly told any of Claimant's representatives about the payments but only suggested that Mr. Arndt, Col. Khan "*and others*" knew about them. Mr. James testified in his second witness statement that he had "*no knowledge of any such bribes, and no reason to believe that any were paid*."[1376]

1084. On that basis, the Tribunal concludes that even if Mr. Farooq made any payments to Mr. Ahmed and even if any of them were made in connection with the second renewal of EL-5, there is no basis for attributing such a payment to Claimant.

[1372] Farooq I, ¶ 16.
[1373] Farooq II, ¶ 52.
[1374] *Cf.* Claimant's Post-Hearing Brief, ¶ 258.
[1375] Khan II, ¶ 34.
[1376] James II, ¶ 17.

(b) The Alleged Payments and Career Assistance to Mr. Farooq

1085. In his second witness statement, Mr. Farooq further testified as follows:

> "*Once TCC had made a decision I would always try to help them, because of the payments that I received from TCC and their role in securing my appointment as Chairman of the BDA. When TCC recommended in the OC meeting on 26 October 200758 that it seek a second extension of EL- 5 over a large majority of the existing exploration area, despite my view that the justifications that it gave for doing so were flimsy, I did not object. I felt I needed to support TCC, whether right or wrong*."[1377]

1086. The Tribunal notes that neither Respondent nor Mr. Farooq raise any specific allegation of a payment being made by a specific person of TCC to Mr. Farooq in the context of the second extension of EL-5. Mr. Farooq rather makes a general reference to "*the payments I received from TCC*," without identifying any specific occasion or payor in this regard.

1087. As to the alleged assistance of Claimant to Mr. Farooq in his becoming appointed Chairman of the BDA in mid-2006, the Tribunal recalls its findings in the context of the allegations relating to the 2006 Novation Agreeements above that Respondent has failed to establish that any of Claimant's representatives would have been in a position to exercise notable influence on the GOB officials who were in charge of nominating the Chairman of the BDA or that they indeed did "*put in a word*" for Mr. Farooq as alleged by Respondent.

1088. Consequently, the Tribunal considers that this second allegation has not been sufficiently substantiated to be examined in any more detail. In any event, the Tribunal does not accept Respondent's argument that Mr. Farooq should have raised any objections during the OC meeting on 26 October 2007 as regards the grounds invoked by Claimant as justification for applying for a second extension of EL-5. In particular, the Tribunal considers that, contrary to Respondent's position, the change in focus of the exploration works to the Western Porphyries, which required additional time before being able to apply for a mining lease, appears to be a reasonable justification for the application – and the Licensing Autority's decision to exercise its discretion in favor of granting this application.

(c) The Alleged Payment of PAK Rs. 30,000 to 40,000 by Col. Khan to Mr. Ahmed

1089. In his first witness statement, Col. Khan did not make any reference to a payment that he allegedly gave to Mr. Ahmed, in connection with the second extension of EL-5 or otherwise. In his second witness statement, Col. Khan then stated that he "*specifically*

[1377] Farooq II, ¶ 53.

recall[ed] *paying* [Mr. Ahmed] *around PAK Rs. 30,000-40,000 before the Chile trip in connection with certain exploration licenses*."[1378] During the hearing, Col. Khan confirmed his testimony that he had made a payment of "*between 30,000 or 40,000 rupees*" to the Secretary of Mines and Minerals in 2006.[1379]

1090. As noted above, Mr. James denied having had any knowledge that payments were made in connection with the second renewal of EL-5 and added that he did not believe that such bribes were in fact paid.[1380]

1091. The Tribunal notes that Col. Khan did not state that the payment he allegedly made to Mr. Ahmed specifically related to the second renewal of EL-5 but rather more vaguely that it was made "*in connection with certain exploration licenses*." In addition, it is noteworthy that Col. Khan did not mention any payment to Mr. Ahmed in his first witness statement but then testified that he "*specifically recall*[ed]" this payment in his second witness statement and referred to it during the hearing as one of the two first payments that he recalled having made on Claimant's behalf.

1092. In any event, the Tribunal notes that Col. Khan stated that he made the payment before the Chile trip, which took place in December 2006. As the second renewal was granted on 1 December 2007, the payment would thus have taken place at least one year before the event to which it allegedly related. The Tribunal therefore considers that even if a payment in late 2006 were to be considered proven, this would not suffice to establish that this contributed to obtaining the second renewal from the Licensing Authority more than a year later.

1093. Consequently, the Tribunal does not have to decide whether a payment from Col. Khan made to obtain a right or benefit for Claimant would have been attributable to Claimant.

(d) Alleged Payments Made by "*Other Individuals*" at TCC, Including Mr. Arndt, to Mr. Ahmed

1094. Finally, Mr. Farooq stated in his second witness statement that he was sure that "*Mr. Arndt, Col. Sher Khan and others knew about these payments* [Mr. Farooq allegedly made to Mr. Ahmed] *and were paying to Mr. Maqbool directly, as he told* [Mr. Farooq] *that he was getting money from TCC.*"[1381]

1095. The Tribunal notes that, even on Mr. Farooq's testimony, he did not witness or know about any payments being made by Mr. Arndt "*and others*" but only presumed that this was the case because Mr. Ahmed had told him that he was receiving money from

[1378] Khan II, ¶ 34.
[1379] Transcript (Day 3), p. 843 line 16 to p. 845 line 6.
[1380] James II, ¶ 17.
[1381] Farooq II, ¶ 52.

Claimant, without specifying any amounts or payors. Consequently, the Tribunal considers that this allegation has not been sufficiently substantiated to be examined in any more detail.

1096. In conclusion, the Tribunal finds that Respondent has failed to establish that any improper payments were made by Claimant or with Claimant's knowledge in connection with the second extension of Exploration License EL-5.

d. Additional Allegation Relating to the Time Period of 2007

1097. Before turning to Respondent's fourth allegation raised in connection with the performance of Claimant's investment, the Tribunal briefly turns to an additional allegation raised in relation to the time period of 2007, *i.e.*, that Mr. Masood Malik who worked at the BDA, received a payment of PAK Rs. 300,000 from Mr. Dad in early 2007 in return for providing Claimant with information from BDA files and facilitate security clearances.[1382]

1098. Mr. Malik testified in his witness statement that after he had witnessed "*a large packet of Rupee notes*" being delivered by Mr. Dad to Mr. Farooq "*in February or March 2007*," he complained to Col. Khan that he should be receiving money too. According to Mr. Malik, "[a] *few days later, Bari Daad visited* [his] *house and gave* [him] *PAK Rs 300,000*," telling him that the money came from Col. Khan. Mr. Malik further stated that after he had provided "*some documents from old files at the BDA relating to the Reko Diq project*" to Col. Khan, he started to receive gifts from him such as ties, perfumes and diaries.[1383]

1099. During the hearing, Mr. Malik confirmed that he received a payment of PAK Rs. 300,000, stating that Col. Khan had asked him in 2006 when the Novation Agreement was signed to provide him with information, "*especially for* [the BDA's] *internal meetings or the secret things that TCC does not come to know about*." Mr. Malik confirmed that he was aware of the contractual arrangement between Claimant and the GOB, including the responsibilities of the BDA to represent the GOB as a partner in the Joint Venture. He added that "*being partner didn't mean that they could ask* [him] *to be a mole on behalf of TCC and ask* [him] *for secret documents*."[1384]

1100. In response to the question why Col. Khan would consider it necessary to pay him PAK Rs. 300,000 if he was meeting with the Chairman of the BDA, Mr. Farooq, at the same time, Mr. Malik stated: "*I was a custodian for the files. I was in charge of all Reko Diq*

[1382] *Cf.* Respondent's Post-Hearing Brief, ¶ 30 lit. f.
[1383] Malik, ¶¶ 5-7.
[1384] Transcript (Day 4), p. 1172 line 18 to p. 1175 line 1.

files. So, obviously, if any secret paper needed to be taken out of the file, any document which had to be written or any attempt … if it was needed … it had to go through me." Mr. Malik confirmed that Mr. Farooq as his boss had access to the files but maintained that he had been paid to provide documents and information to which Mr. Farooq also had access.[1385] In response to the question from a member of the Tribunal which was the most important secret document he gave to Col. Khan from his files, Mr. Malik answered that could not remember any specific document but that Col. Khan asked for "*this document and that document*" and "*some letters to Mines and Mineral Department*," which included the BDA's observations that they had not communicated to Claimant. Mr. Malik also referred to "*some paper*" out of the "*some old files*" from the 1990s but again could not remember any specific secret paper.[1386]

1101. Mr. Dad confirmed in his first witness statement that after delivery of a package to Mr. Farooq in early 2007, he "*delivered a similar package to Masood Malik a few days after*," adding that he remembered this clearly because it was only a few days after he had seen Mr. Malik in Mr. Farooq's office. Mr. Dad testified that Mr. Malik did not open the package in front of him but that he "*strongly suspected*" that it contained bundles of Rupees.[1387] During the hearing, Mr. Dad stated that after the NAB had asked him a direct question whether he had paid PAK Rs. 300,000 to Mr. Malik, he knew that there was money in the money in the package he had delivered.[1388]

1102. Col. Khan did not make reference to any payment he allegedly made (through Mr. Dad) to Mr. Malik in his witness statements.

1103. The Tribunal considers that even if it were correct that Mr. Malik received a payment of PAK Rs. 300,000 by Mr. Dad, it remains unclear for which purpose such payment would have been made. In particular, the Tribunal is not convinced by Mr. Malik's testimony that he provided internal and secret documents from the BDA to Col. Khan. Apart from the fact that the BDA had certain responsibilities and obligations to cooperate with Claimant as the GOB's Joint Venture partner under the CHEJVA, Mr. Malik himself testified that Mr. Farooq also received payments from Claimant in return for his co-operation on the Reko Diq project. According to Mr. Malik, Mr. Farooq as his boss further had access to all the files that he, Mr. Malik, had in his custody. In addition, Mr. Malik could not identify a single specific document that he allegedly provided to Col. Khan.

1104. Consequently, on Mr. Malik's own testimony, the Tribunal does not consider it plausible that Col. Khan paid him in return for access to information and documents or for being Claimant's "*mole*" within the BDA. In any event, in the absence of any specific document

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[1385] Transcript (Day 4), p. 1177 line 15 to p. 1180 line 19.
[1386] Transcript (Day 4), p. 1186 line 18 to p. 1187 line 12.
[1387] Dad I, ¶ 10.
[1388] Transcript (Day 5), p. 1289 line 22 to p. 1290 line 6.

identified as being illegitimately provided to Claimant, Respondent has also failed to substantiate a causal link between the alleged act of corruption and any right of benefit obtained by Claimant in relation to its investment.

e. Allegations Relating to the 2008 Surface Rights Lease

1105. Fourth, the Tribunal will address Respondent's allegations raised in connection with the two Surface Rights Lease orders granted to the Joint Venture in May and September 2008, respectively.

i. Summary of Respondent's Position

1106. Respondent alleges that the following payments were made in an attempt to circumvent the Balochistan mining leasing regime and secure extensive surface rights over 585 sq. km of land –

a) Col. Khan and Mr. Dad made two separate payments totaling PAK Rs. 1,400,000 to Mr. Farooq in April 2008 to orchestrate the grant of the surface rights over 147 sq. km. in May 2008 and subsequently over 585 sq. km. in September 2008.[1389]
b) Mr. Aziz paid PAK Rs. 200,000 to Mr. Asmatullah (of the PAK Rs. 1,400,000 paid to Mr Farooq) in April 2008 in return for Mr. Asmatullah's assistance with obtaining surface rights.[1390]
c) Col. Khan paid Mr. Mandokhail PAK Rs. 400,000 in late September 2008 and gave him an Umrah trip to amend the Surface Rights Lease Order.[1391]

(a) Col. Khan and Mr. Dad's Payments to Mr. Farooq

1107. Respondent relies on the respective testimonies of Col. Khan, Mr. Dad, Mr. Aziz and Mr. Farooq as well as Mr. Aziz's diaries to support the allegation that these payments were made to Mr. Farooq in order to orchestrate obtaining surface rights for TCC "*subvert[ing] the proper process for the granting of* [the Surface Rights Lease]."[1392]

1108. As will be addressed in more detail below, Respondent maintains that Mr. Aziz's diaries record: (i) a payment of PAK Rs. 600,000 received from "*Bari Dad of TCC*" on 14 April 2008; and (ii) a payment of PAK Rs. 800,000 received in "*cash from Col. Khan.*"[1393] Although this second entry is undated, Respondent notes that Mr. Aziz clearly recollected on cross-examination that the date of this transaction was on 10 or 11 April 2008.[1394]

[1389] Respondent's Post-Hearing Brief, ¶¶ 139-140; Respondent's Reply, ¶ 297(a).
[1390] Respondent's Post-Hearing Brief, ¶¶ 141-142.
[1391] Respondent's Post-Hearing Brief, ¶¶ 143-146.
[1392] Respondent's Application, ¶ 44.
[1393] Respondent's Post-Hearing Brief, ¶ 139 *referring to* Transcript (Day 7), p. 1629 line 10 to p. 1630 line 15, **Exhibit AA-1 / RE-228**, p. 12, Transcript (Day 7), p. 1658 lines 5-19 *and* **Exhibit AA-2 / RE-229**, p. 2.
[1394] Respondent's Post-Hearing Brief, ¶ 139(b) *referring to* Transcript (Day 7), p. 1658 lines 5-19.

1109. As a result, Respondent submits that Mr. Farooq orchestrated the grant by:

a) manipulating the Summary for the Chief Minister to refer to an area of 147 sq. km (not the full 585 sq. km) and avoiding potential objection to this by ensuring that the Board of Revenue only received this summary after it had received Chief Minister Bhotani's sign off (due to the close relationship between Chief Minister Bhotani and Claimant)[1395]; and
b) colluding with Mr. Asmatullah, Secretary Revenue at the Board of Revenue (who was indebted to him for securing his promotion and "*in TCC's pocket, assisting it with other matters in exchange for small monthly payments*") to generate an order over the 147 sq. km, but which referred to the amount of acres equivalent to the exploration area of 585 sq. km that Claimant wanted (144, 568 acres).[1396] The intention was that once generated, Claimant would pay the acreage amount for the full exploration area (*i.e.*, 585 sq. km) before requesting that the order be corrected (shortly after Mr. Mandokhail was reappointed as Senior BoR Member) to read 585 sq. km given that TCC had paid such amount.[1397]

(b) Mr Aziz's Payment to Mr. Asmatullah

1110. Secondly, Respondent alleges that PAK Rs. 200,000 (from the money paid by Mr. Dad to Mr. Farooq) was paid to Mr. Asmatullah by Mr. Aziz (on Mr. Farooq's behalf) on 14 April 2008 in return for Mr. Asmatullah's involvement in ensuring that Claimant was granted surface rights over the full 585 sq. km. and for not raising any objection in relation to Mr. Farooq's circumventing proper procedures.[1398]

1111. Respondent maintains that Mr. Aziz made the payment in the evening of 14 April 2008 and recorded this in his diary the following day.[1399] In return for this bribe, Respondent submits that Mr. Asmatullah refrained from raising objections to Mr. Farooq's disregard for the mining license regime.[1400] In this regard, Respondent refers to Mr. Mandokhail (Senior BoR Member) amending the First Order without the necessary Chief Minister approval, following a threat of redundancy and a payment from Col. Khan.[1401] Respondent rejects the claim that Mr. Asmatullah expanded his role in cross-examination

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[1395] Respondent's Post-Hearing Brief, ¶ 140 and Respondent's Reply, ¶ 300(c), 307 *referring to* Farooq II, ¶¶ 46-48 *and* Khan II, ¶¶ 37-39.
[1396] Respondent's Post-Hearing Brief, ¶ 140 *referring to* Farooq II, ¶¶ 45-47 and Asmatullah, ¶¶ 6-7, 9-12.
[1397] Respondent's Post-Hearing Brief, ¶ 140 *referring to* Farooq II, ¶ 47, Khan II, ¶¶ 40-41 *and* Transcript (Day 5), p. 1368 lines 2-22.
[1398] Respondent's Reply, ¶ 297.
[1399] Respondent's Post-Hearing Brief, ¶ 141 *referring to* Transcript (Day 7), p. 1665 lines 9-18 and p. 1691 line 13 to p. 1692 line 19, Aziz, ¶ 18 *and* **Exhibit AA-1 / RE-228**, p. 13.
[1400] Respondent's Post-Hearing Brief, ¶¶ 141-142 *referring to* **Demonstrative RD-1**, item 21, *citing* Aziz, ¶¶ 17-18, Farooq I, ¶ 18 *and* Farooq II, ¶ 47; Respondent's Reply, ¶ 297(b) , 310 *referring to* Khan I, ¶ 33, Asmatullah, ¶¶ 11-13, Transcript (Day 5), p. 1372 line 3 to p. 1373 line 2, Transcript (Day 7), p. 1693 lines 5-17 *and* Transcript (Day 2), p. 576 lines 5-15, p. 577 line 19 to p. 578 line 6 *and* p. 580 lines 2-7.
[1401] Respondent's Post-Hearing Brief, ¶¶ 143-144 *referring to* Transcript (Day 5), p. 1446 line 21 to p. 1447 line 13 *and* p.1454 line 9 to p.1455 line 3; Respondent's Reply, ¶ 300(e) *referring to* **Exhibit CE-66**.

compared to his witness statement, arguing that he explained his role fully in his Affidavit.[1402]

(c) Col. Khan's Payment to Mr. Mandokhail

1112. Thirdly, Respondent submits that PAK Rs. 400,000 were paid by Col. Khan to Mr. Mandokhail in late September 2008, and an Umrah trip for Mr. Mandokhail's family paid for in full by Claimant (through Mr. Farooq) in 2009, in return for Mr. Mandokhail's assistance in issuing the order amending the area of the Surface Rights Lease.[1403] In addition to these bribes, Respondent submits that Mr. Farooq threatened that Mr. Mandokhail would lose his job and official residence in Quetta if he did not issue the amended order avoiding the necessary Chief Minister approval.[1404]

1113. Respondent relies on the testimony of Col. Khan, Mr. Mandokhail and Mr. Farooq to corroborate this payment.[1405] Respondent denies that inaccuracies in Mr. Mandokhail's testimony demonstrate the falsity of his evidence, highlighting that many of Claimant's own witnesses also amended their testimonies – without the courtesy of submitting a revised statement in advance.[1406]

1114. Moreover, Respondent argues that Claimant misstates Pakistan's case when it labels Mr. Mandokhail's correction of his appointment as Senior Member of BoR as leading to the "*disintegrat*[ion]" of Respondent's surface rights case.[1407] Respondent maintains that the scheme turned on Mr. Mandokhail being appointed before Claimant sought the order (which is what happened – he was appointed in June and the order sought on 1 September 2008).[1408]

(d) Result

1115. As a result of such bribery, Respondent submits that Claimant was able to subvert the mining license regime to supplement and extend its rights under EL-5 and obtain rights of ownership over a vast area of land until at least 2038 – "*a land grab in simple terms.*"[1409]

[1402] Respondent's Post-Hearing Brief, ¶ 142 *referring to* **Exhibit RE-438**, ¶¶ 2-7.
[1403] Respondent's Reply, ¶ 297.
[1404] Respondent's Post-Hearing Brief, ¶ 144 *referring to* Transcript (Day 5), p. 1446 line 21 to p. 1447 line 13 *and* p. 1454 line 9 to p. 1455 line 3.
[1405] Respondent's Post-Hearing Brief, ¶¶ 143-146 *referring to* **Demonstrative RD-1**, item 24, *citing* Corrected Mandokhail, ¶ 23, Khan I, ¶¶ 14-15 and 33, Farooq I, ¶ 16, 18 *and* Farooq II, ¶ 50; Respondent's Reply, ¶ 297(b), 311(f) *referring to* Transcript (Day 5), p. 1447 lines 3-5.
[1406] Respondent's Post-Hearing Brief, ¶ 145.
[1407] Respondent's Post-Hearing Brief, ¶ 146 *referring to* LaPorte Response, ¶ 8.
[1408] Respondent's Post-Hearing Brief, ¶ 146 *referring to* LaPorte Response, ¶ 9, Khan II, ¶ 41, Transcript (Day 5), p. 1376 lines 1-16, Farooq II, ¶ 49 *and* Corrected Mandokhail, ¶ 22.
[1409] Respondent's Reply, ¶ 304, 312; Respondent's Post-Hearing Brief, ¶ 147.

1116. Respondent emphasizes the inherent value of surface rights compared to the rights under an exploration license, as Mr. James admitted reluctantly at the Hearing.[1410] Respondent submits that they have a longer duration and entitle the holder to full property use and ownership rights.[1411]

1117. Respondent considers that Claimant's case as to why it required these surface rights has shifted, since Mr. Livesey and Mr. James offered contrasting explanations.[1412] Respondent claims that Claimant applied for such rights over the land it held under EL-5 as well as the additional 147 sq. km area in order to tie-up the whole area so that no other entity could access it without Claimant's consent, leaving it in a strong position if anyone else sought to pursue development of the area.[1413] Respondent emphasizes that, Claimant, whom it considers not to have achieved anything significant in commercial development for nearly two decades, now had the ability to exclude all other exploration development for up to 60 years. Respondent perceives this, coupled with the inconsistent testimony of Mr. James, to justify careful scrutiny on the Tribunal's part.[1414]

1118. Regardless of which explanation as to why the surface rights were sought is accepted, Respondent argues that the fact remains that the process of obtaining this lease circumvented due process.[1415] Respondent submits that Claimant should not have been able to seek surface rights over the area covered by EL-5 since it already had exploration rights in relation to this and furthermore, by seeking surface rights over the additional area, Claimant unlawfully expanded the area of land that it had tied up.[1416] Respondent rejects Claimant's argument that, because it paid the correct price, there was no corruption involved in the securing of the lease – Respondent emphasizes that it does not allege that the intention was to obtain land at an undervalue, but to circumvent due process.[1417]

1119. Respondent rebutted the following allegations made at the 2016 Hearing and in the La Porte Response.

1120. Firstly, as to Claimant's argument that Mr. Asmatullah and Mr. Farooq's plan was "*implausible,*" Respondent questions the assumptions on which this implausibility is premised, relying on Mr. Mandokhail, Mr. Farooq and Mr. Asmatullah's respective evidence to show that these assumptions were "*littered with errors and*

[1410] Respondent's Reply, ¶ 301; Respondent's Post-Hearing Brief, ¶¶ 148-151 *referring to* Transcript (Day 10), p. 2715 lines 11-18.
[1411] Respondent's Post-Hearing Brief, ¶ 150.
[1412] Respondent's Post-Hearing Brief, ¶ 152.
[1413] Respondent's Post-Hearing Brief, ¶ 153.
[1414] Respondent's Post-Hearing Brief, ¶¶ 149-151.
[1415] Respondent's Post-Hearing Brief, ¶ 153.
[1416] Respondent's Post-Hearing Brief, ¶ 153 *referring to* **Exhibit RE-320** *and* Transcript (Day 3), p. 849 lines 2-8.
[1417] Respondent's Reply, ¶ 299 *referring to* Claimant's Opposition, ¶ 183.

mischaracterisations."[1418] Respondent maintains that not only was it common knowledge that BoR Senior Member Mr. Kasi was going to retire, but Mr. Farooq spoke with Chief Secretary Rind (not Chief Minister Raisani as alleged) to procure Mr. Mandokhail's subsequent appointment and Claimant further mischaracterizes Mr. Asmatullah's evidence in an attempt to question the timing of his payment.[1419]

1121. Secondly, Respondent maintains that the suggestion that the discrepancy between square kilometers and acres in the First Order was "*simply a benign clerical error that was corrected as soon as it was discovered*," has been undermined by evidence from Mr. Farooq, Mr. Asmatullah and Col. Khan.[1420] Moreover, Respondent submits that Mr. James confirmed that the so-called error was not corrected on discovery, revealing a casual approach to managing the application and a disregard for how it obtained the desired rights.[1421]

(e) Mr. Aziz's Diaries

1122. As discussed in Section VII.C above in relation to the Standard and Burden of Proof, Pakistan submits that Mr. Aziz's diaries corroborate witness evidence demonstrating Claimant's improper surface rights payments and also provide evidence that bribes were paid in respect of other events, ultimately serving as authentic documentary evidence, debunking TCC's "*grand conspiracy*" theory.[1422]

1123. The Parties' dispute relates to the three specific aforementioned entries:

a) The entry on page 12, under the heading "*RECEIPTS*": "*14/4 Cash received from Bari Dad of TCC 600,000*" ("**First Entry"**);
b) The entry on page 14, under the heading "*Distributions*": "*15/4* [Paid to] *Sh. Asmatullah BoR. 200,000 "* ("**Second Entry"**); and
c) The entry on a standalone two-sided piece of paper (the "**Q2B Document**"), under the heading "*RECEIPT*": "*5.* [Cash from] *Col. Sher Khan 800,000 -*" ("**Third Entry"**).[1423]

1124. Respondent contends that since it has successfully discharged its initial burden of establishing *prima facie* authenticity of the diaries, the burden shifts to Claimant to make good its fabrication claim. At the February 2017 Hearing, Respondent directed the

[1418] Respondent's Post-Hearing Brief, ¶¶ 156-157.
[1419] Respondent's Post-Hearing Brief, ¶ 156 *referring to* Haqqani Opening Slides, p. 35 (repeated in Claimant's Forensic Hearing Opening Slides at p. 10), Transcript (Day 5), p. 1480 line 13 to p. 1481 line 2, TCC's Haqqani Opening Slides at p. 35, Transcript (Day 8), p. 1823 line 16 to p. 1824 line 3, Transcript (Day 3), p. 899 lines 10-12, Farooq II, ¶ 49, Transcript (Day 2), p. 551 lines 14-22, Haqqani Opening Slides at p. 36 *and* Transcript (Day 7), p. 1826 lines 4-18.
[1420] Respondent's Post-Hearing Brief, ¶ 158 *referring to* Transcript (Day 3), p. 867 lines 18-22 *and* Transcript (Day 5), p. 1314 line 12 to p. 1370 line 6.
[1421] Respondent's Post-Hearing Brief, ¶¶ 158-160.
[1422] Respondent's Post-Hearing Brief, ¶¶ 233-253.
[1423] Respondent's Post-Hearing Brief, ¶ 233.

Tribunal to consider a number of hypothetic questions that point to the inherent implausibility of fabrication and maintains that it has disproved the following issues raised by Claimant as purported evidence of fabrication.[1424]

1125. Firstly, Respondent maintains that it has gone beyond establishing *prima facie* authenticity by putting forward Mr. LaPorte's expert evidence which found no indication that the diaries were fabricated.[1425] Respondent rejects Mr. Radley's challenge to the ESDA analysis, including his attack on the poor test strip quality, the 'blotting'/'tad' method and Mr. LaPorte's failure to conduct a sequencing analysis. Respondent maintains that Mr. LaPorte justified these decisions on his "*professional opinion*" and Mr. Radley later acknowledged the appropriateness of Mr. LaPorte's approach.[1426] Mr. Radley later accepted that: (i) sequencing of pages 12 and 14 was not possible due to the missing page 13 and blank page 15; (ii) sequencing is not helpful where the writer might have been flipping from one page to another (as may be the case here where there are receipts on one page and distributions on another); and (iii) ESDA testing does not work well for non-ballpoint inks (*i.e.*, the Q2B Document).[1427]

1126. Respondent notes that Mr. LaPorte confirmed that the missing page 13 was not a "*red flag*" as alleged by Mr. Radley; it was not the only page missing and it would be "*irresponsible*" to conclude that this is proof of fabrication as alleged by Claimant because there could have been many reasons for its removal.[1428] Moreover, Respondent refers to Mr. LaPorte's testimony that there were multiple pages missing from the journal, meaning that the individual who authored it "*obviously had a habit of tearing pages out of a book,*" showing that page 13 was not an isolated incident.[1429]

1127. Secondly, Respondent submits that the ink analysis revealed no signs of fabrication. Respondent argues that the fact that pages 12 and 14 contained two distinct ink types that could not be distinguished, one of which was used for the first four entries on page 12 (Ink Type 1) and the second of which (Ink Type 2) was used for the First and Second Entries, is not evidence of fabrication.[1430] Contrary to Claimant's suggestion that the use of Ink Type 2 for the First and Second Entries is strong evidence of fabrication, Respondent submits that the same ink type does not decisively mean the same pen, or

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[1424] Respondent's Post-Hearing Brief, ¶ 252 *referring to* Transcript (21 February 2017), p.16 line 15 to p. 19 line 2.
[1425] Respondent's Post-Hearing Brief, ¶ 240.
[1426] Respondent's Post-Hearing Brief, ¶¶ 249-250 *referring to* Transcript (21 February 2017), p. 139 lines 5-7.
[1427] Respondent's Post-Hearing Brief, ¶ 247.
[1428] Respondent's Post-Hearing Brief, ¶ 248 *referring to* Radley Report, ¶ 40 *and* Transcript (21 February 2017), p. 23 lines 11-12 *and* p. 183 line 21 to p. 186 line 10.
[1429] Respondent's Post-Hearing Brief, ¶ 248 *referring to* Transcript (21 February 2017), p. 49 lines 1-4.
[1430] Respondent's Post-Hearing Brief, ¶ 249 *referring to* LaPorte Report, ¶ 40 *and* Transcript (21 February 2017), p. 204 lines 1-5.

even the same ink – there is no way of knowing whether the two entries were made in one sitting years after they were alleged to have been made.[1431] Respondent also maintains that there was no evidence of fabrication with regard to the Q2B Document, contrary to Mr. Radley's conclusion that there is "*no evidence whatsoever to shed light on the crucial point of when the writing of the entire "Receipt" portion of Q2B was written.*"[1432] Respondent maintains that the difficulty in analyzing the Q2B Document and the Third Entry is that it is written in non-ballpoint ink and it is again not possible to know whether these entries were written with the same ink and pen.[1433]

1128. Thirdly, Respondent emphasizes that Mr. Radley, as a self-proclaimed "*handwriting and document expert,*" has confirmed that there was "*nothing untoward*" in respect of the diaries, whilst Mr. LaPorte has confirmed that the physical condition of the diaries and the paper therein is consistent with them being at least seven years old.[1434] Respondent maintains that Mr. Radley's lack of balance is evident from his Report where he only refers to handwriting consistencies, without referring to the many inconsistencies.[1435] Respondent maintains that the reason for this is that consistency throughout a document may suggest it was fabricated and written in one go; therefore, the presence of inconsistencies can denote authenticity.[1436]

1129. Respondent also emphasizes that despite being prevented from performing an ink-dating analysis, Mr. LaPorte explained that it would have been "*highly unlikely*" to have assisted in determining the entry dates due to ink exposure to certain Pakistani climatic conditions and the type of ink used.[1437] Respondent submits that Claimant opportunistically changes its opinion – from firstly seeing the analysis of little importance, to seeing it as "*critical…to properly assess the authenticity of the documents.*"[1438]

1130. Respondent further maintains that the strength of Mr. Aziz's testimony supports its argument that Mr. Aziz's diaries are not a product of fabrication. Firstly, in respect of the Third Entry, Claimant suggests that Mr. Aziz could not "*credibly explain how a document on its face indicates that* [it dates] *from 2009 and 2010 when the payment is from*

[1431] Respondent's Post-Hearing Brief, ¶ 249 *referring to* LaPorte Report, ¶ 40, 43, Transcript (21 February 2017), p. 32 line 13 to p. 33 line 7 *and* p. 49 lines 15-22.
[1432] Respondent's Post-Hearing Brief, ¶ 250 *referring to* Radley Report, ¶¶ 48-52.
[1433] Respondent's Post-Hearing Brief, ¶ 249 *referring to* LaPorte Report, ¶ 54, 56.
[1434] Respondent's Post-Hearing Brief, ¶ 251 *referring to* Transcript (21 February 2017), p. 161 lines 19-22 and p. 182 lines 9-14 *and* LaPorte Report, ¶ 36, 59.
[1435] Respondent's Post-Hearing Brief, ¶ 251 *referring to* Radley Report, ¶ 86 *and* Transcript (21 February 2017), p. 172 line 3 to p. 180 line 18.
[1436] Respondent's Post-Hearing Brief, ¶ 251.
[1437] Respondent's Post-Hearing Brief, ¶¶ 242-245 *referring to* LaPorte Report, ¶ 6, Mr LaPorte's Opening Presentation at Side 6, Transcript (21 February 2017), p. 42 line 14 to p. 45 line 20 *and* p. 121 line 17 to p. 124 line 25.
[1438] Respondent's Post-Hearing Brief, ¶ 245 *referring to* LaPorte Response, ¶ 22.

2008."[1439] However, Mr. Aziz has confirmed the payment recorded in the Third Entry was made on 10 or 11 April 2008, and that the reason the remainder of the document relates to payments from 2009/2010 is because Mr. Farooq told him not to write in the diary following his suspension in April 2008 and only instructed Mr Aziz to resume in October 2009 when he (Mr. Farooq) retired.[1440] Moreover, Mr. Aziz explained that he presented records of the Second and Third Payments to the Local Expert Group but these were mistakenly not included as Annexures to the final Affidavit. Respondent maintains that the fact that they were not appended in June 2015 does not mean that they did not exist at the time.[1441]

1131. Ultimately, Respondent emphasizes that even if the Tribunal does not accept Pakistan's position with regard to surface rights, it should nevertheless find that Mr. Aziz's diaries are evidence of Claimant's corruption. Respondent argues that if these three payments were not bribes in respect of surface rights, they must have been paid for some other reason, a reason for which TCC has never advanced an explanation.[1442]

(f) Attributability of Col. Khan's Conduct

1132. Respondent submits that Col. Khan's (as well as Mr. Dad's and Mr. Farooq's) bribes in respect of the Surface Rights Lease were paid for and on behalf of Claimant and that Claimant, through its CEOs and management, participated in or had knowledge of those corrupt acts.[1443]

1133. Respondent highlighted in its Application that in the circumstances it is clear that the acts of Mr. Dad, someone Claimant acknowledged as a "*longtime TCC employee who has worked in recent years as an administrative officer in TCC's Quetta office*," should also be taken as the acts of TCC.[1444]

1134. As to the attributability of Col. Khan's conduct, Respondent argues that while he may have done the bribing, it was Claimant that undoubtedly benefited from this and as such, Respondent maintains that Claimant must be held responsible for his conduct.[1445]

1135. Firstly, Respondent submits that by its own admission, Col. Khan was a representative of TCC, acting as a government liaison with the official title of Director of Public Affairs

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[1439] Respondent's Post-Hearing Brief, ¶ 236 *referring to* Transcript (21 February 2017), pp. 18-20.
[1440] Respondent's Post-Hearing Brief, ¶ 236 *referring to* Transcript (Day 7), p. 1643 lines 17-18, p. 1658 lines 8-9, 16-19 and lines 16-17, p. 1659 lines 19-20, p. 1630 lines 14-18, p. 1670 lines 18-22, p. 1695 lines 4-6 and lines 11-15, p. 1707 lines 7-9 and lines 14-16 *and* p. 1708 lines 9-15.
[1441] Respondent's Post-Hearing Brief, ¶ 237 *referring to* Transcript (Day 7), p. 1621 line 18 to p. 1639 line 20.
[1442] Respondent's Post-Hearing Brief, ¶¶ 252-253.
[1443] Respondent's Post-Hearing Brief, ¶¶ 356-371.
[1444] Respondent's Application, ¶¶ 58-62 *referring to* Claimant's letter to the Respondent dated 25 August 2015.
[1445] Respondent's Post-Hearing Brief, ¶ 370.

and Security.[1446] Moreover, Respondent notes that the witness statements submitted by Respondent's witnesses clearly implicate him as the key conduit between TCC and the GOB officials for corrupt payments.[1447]

1136. Respondent claims that Col. Khan was instructed by various TCC CEOs and Managers, including Mr. Flores, Mr. Hargreaves, Mr. James and Mr. Arndt, to make such bribes. Although denied by these witnesses, Respondent emphasizes the consistency of Col. Khan's testimony and the lack of credibility of Claimant's witnesses (specifically referring to Mr. Hargreaves and Mr. Flores' involvement in the Chile trip, which self-evidently breached law and policy).[1448]

1137. Besides what it considers to be convincing evidence that TCC officials knew of Col. Khan's corruption, Respondent argues that whether or not Claimant had direct knowledge, it is in any event responsible for it.[1449] Respondent urges the Tribunal to determine this responsibility as a matter of civil law according to the doctrine of vicarious liability and not, as Claimant suggests, on the basis of corporate criminal liability.[1450]

1138. Respondent argues that in its Rejoinder, Claimant misrepresented Pakistan's explanation of the applicable test (submitted in the Reply).[1451] Respondent explains that it applied the test for vicarious liability from *Mohamud v. WM Morrison Supermarkets plc* and concluded that: (i) there was a clear employment relationship between the wrongdoer and the company; and (ii) Col. Khan's wrongdoing was so closely connected with his employment (given that he was the key interface between Claimant and Government officials) that it would be just to hold Claimant liable.[1452]

1139. Respondent rejects Claimant's dismissal of the vicarious liability test by downplaying Col. Khan's role at TCC, saying that "[h]*e bore no responsibility for TCC's mining activities, played no substantive role in the negotiation of the main agreements for the project, and was not tasked with obtaining any of the rights or approvals which Pakistan claims TCC obtained through bribery.*" Respondent submits that he was in fact Claimant's most senior and highly paid employee in Pakistan, was responsible for

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[1446] Respondent's Application, ¶ 57 *referring to* Transcript Day 5/1350/10-20, **Exhibits CE-90** and **Ex CE-91** *and* **Ex RE-175**.
[1447] Respondent's Application, ¶ 57.
[1448] Respondent's Post-Hearing Brief, ¶¶ 356-360 *referring to* Khan II, ¶¶ 7-8, Transcript (Day 4), p. 957 lines 17-20 *and* p. 960 lines 1-4.
[1449] Respondent's Post-Hearing Brief, ¶ 361.
[1450] Respondent's Post-Hearing Brief, ¶¶ 362-366.
[1451] Respondent's Post-Hearing Brief, ¶ 362 *referring to* Claimant's Rejoinder, ¶ 207 *and* Respondent's Reply, ¶ 67.
[1452] Respondent's Reply, ¶¶ 67-70.

working with Mr. Farooq on day-to-day matters such as permits and approvals and played a key role in securing the Surface Rights Lease.[1453]

1140. Moreover, relying on *Meridan Global Funds Management Asia Ltd v. Securities Commission*, Respondent argues that Claimant's reliance on the "*directing mind and will*" standard is misplaced since the Tribunal must consider the purpose of Pakistan's anti-corruption legislation in order to determine whose acts, knowledge or state of mind can be attributed to the company. Ultimately, Respondent argues that if Col. Khan's knowledge does not count as knowledge of Claimant, the policy behind these laws would be defeated and companies like TCC would be able to avoid responsibility for corrupt acts simply by delegating the activity to a company not at such a senior level and not technically "*directing the mind and will*" of the company.[1454]

ii. Summary of Claimant's Position

1141. Claimant relies on Mr. Livesey and Mr. James' testimonies to demonstrate that TCC had perfectly legitimate reasons to request the surface rights and such rights were obtained in compliance with a routine bureaucratic process (despite a minor clerical error which had no effect on the outcome).[1455]

1142. Claimant submits that the application was in anticipation of a future mining venture and following an assessment of the future project's needs, Claimant's technical team concluded that this land was necessary for the successful mine operation.[1456] Consequently, Claimant maintains that the decision to request surface rights over an area extending over the entire mine footprint ensured that structures would not be built in the way, impacting mine development. Claimant submits that the lease was to benefit the project; it was not a "*land grab*" as Respondent suggests.[1457]

1143. Claimant notes that there is no dispute that it paid the full price for the lease and that Claimant's original letter to the BDA contained a map showing the exact boundaries of the land and listed the correct area in both acres and square kilometers, both of which were attached to the Summary for the Chief Minister.[1458] Claimant asserts that the only factual dispute is whether the error in the kilometer equivalent of the acreage amount was intentional. Claimant submits that Mr. Farooq's Summary referred to only "*the surface*

[1453] Respondent's Post-Hearing Brief, ¶ 365 *referring to* Claimant's Rejoinder, ¶ 208.
[1454] Respondent's Post-Hearing Brief, ¶¶ 367-370 *citing to Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 A.C. 500 [**CA-298**].
[1455] Claimant's Rejoinder, ¶ 417 *referring to* Livesey VII, ¶ 29, James I, ¶ 24 *and* James II, ¶ 11; Claimant's Post-Hearing Brief, ¶¶ 176-179.
[1456] Claimant's Rejoinder, ¶ 416 *referring to* Livesey VI, ¶ 31.
[1457] Claimant's Rejoinder, ¶ 417 *referring to* Respondent's Reply, ¶ 304.
[1458] Claimant's Rejoinder, ¶ 418.

right for additional area falling outside the granted area" (*i.e.,* the 147 sq. km outside EL-5) because this mirrored the MMDD Secretary's advice, who had ultimately misunderstood TCC's desire to obtain surface rights over the full 585 sq. km area – despite the enclosed map showing the actual area requested.[1459] Claimant maintains that Ms. Boggs confirmed to the Tribunal that this was merely "*one of those administrative corrections*" which was made on 27 September 2008.[1460]

1144. Claimant further disputes that Chief Minister Bhotani approved the lease due to his "*close relationship with TCC*" or that he was influenced by a gift. Claimant notes that Mr. James, who is alleged to have given him this gift, does not recall ever meeting Chief Minister Bhotani.[1461]

1145. Claimant considers that Respondent's witnesses fell apart on cross-examination, leaving no credible testimony that there were improper payments, and further questions Respondent's "*convoluted conspiracy theories*" as follows.[1462]

1146. Firstly, Claimant questions why, if TCC's management were willing to offer bribes, they would not have secured the correct order from the outset rather than pursuing a complex plan requiring a variety of factors to successfully fall into place.[1463] Such factors included Mr. Farooq and Col. Khan accurately predicting the death of Mr. Kasi, Mr. Farooq somehow convincing Chief Minister Raisani to replace Mr. Kasi with Mr. Mandokhail (despite Mr. Farooq having fallen out of Chief Minister Raisani's favor) and the payment of extensive bribes, only to end up paying the full amount for the lease.[1464]

1147. Secondly, Claimant questions Col. Khan's shifting testimony as to the source of the funds behind the bribes and the lack of evidence to substantiate his claim that they were paid from his own pocket.[1465] Claimant submits that Col. Khan was in fact not at all involved in technical or commercial discussions surrounding the lease and thus perceives his testimony to be entirely unsupported.[1466]

1148. Claimant argues that the central premise of Respondent's theory, *i.e*., that TCC had to wait until Mr. Mandokhail was appointed in September 2008 to correct the order, was

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[1459] Claimant's Rejoinder, ¶ 418 *referring to* James, ¶ 26; Claimant's Post-Hearing Brief, ¶ 179 *referring to* **Exhibits RE-320** *and* **RE-322**, ¶¶ 2-3.
[1460] Claimant's Post-Hearing Brief, ¶ 179 *referring to* Transcript (Day 11), p. 2955 lines 18-19.
[1461] Claimant's Rejoinder, ¶ 420 *referring to* Respondent's Reply, ¶ 307, Farooq II, ¶ 46 *and* James II, ¶ 14.
[1462] Claimant's Post-Hearing Brief, ¶ 321(a), 180.
[1463] Claimant's Post-Hearing Brief, ¶ 181.
[1464] Claimant's Post-Hearing Brief, ¶¶ 181-183 *referring to* Khan II, ¶ 41, Transcript (Day 3), p. 898 lines 13–15, Farooq II, ¶ 48 and Transcript (Day 3), p. 898 line 16 to p. 899 line 3.
[1465] Claimant's Post-Hearing Brief, ¶ 181 *referring to* Khan II, ¶ 17, 41-42, Transcript (Day 3), p. 893 line 15 to p. 897 line 7, p. 902 lines 9-13, p. 905 lines 1-20, p. 896 lines 14-21, p. 888 lines 14-22, Transcript (Day 4), p. 925 line 8 to p. 927 line 7, *and* p. 941 line 8 to p. 943 line 10.
[1466] Claimant's Rejoinder, ¶ 421 *referring to* James II, ¶ 12 *and* Boggs IV, ¶ 18.

proven to be false at the Paris Hearing.[1467] In his original statement, Mr. Mandokhail testified that he was appointed in September 2008 but then "*corrected*" this to admit that he took over from Mr. Kasi in June 2008 (attributing the former date to a typing error).[1468] Claimant notes that other witnesses then followed suit, amending their recollection of the date;[1469] Col. Khan, however, had already given evidence stating that Claimant waited to request the amendment in September, "*purposefully delaying until Mandokhail took office.*"[1470] In Claimant's view, this further strengthens the conclusion that Respondent's witnesses' early testimony on this point had been fabricated to connect the timing of TCC's September 2008 letter and Respondent's plot.[1471]

1149. Claimant further dismisses Respondent's remaining surface rights allegations on the basis of a variety of witness testimony, which confirmed: (i) that the Umrah trip for Mr. Mandokhail was paid for using Mr. Farooq's share from the BDA kickback scheme and had nothing to do with TCC; (ii) the questionable existence of the alleged regular payments to Mr. Asmatullah, which if they did exist, had nothing to do with the surface rights application; and (iii) fabrication of the payment to Mr. Mandokhail for correcting the discrepancy in the First Order.[1472]

(a) Mr. Aziz's Diaries

1150. As discussed in Section VII.C above in relation to the Standard and Burden of Proof, Claimant asserts that the Tribunal should draw inferences and make a positive finding of fabrication.[1473]

1151. Firstly, Claimant submits that Respondent failed to produce originals as requested and the copies that were produced showed various anomalies – they were incomplete, blurry and even indicated that the disputed entries could have been tacked on in an attempt to support Respondent's claims.[1474]

[1467] Claimant's Post-Hearing Brief, ¶¶ 184-186.
[1468] Claimant's Post-Hearing Brief, ¶ 185 *referring to* Mandokhail, ¶ 22, Mandokhail Corrected, ¶ 8, 22 *and* Transcript (Day 5), p. 1450 lines 18–20.
[1469] Claimant's Post-Hearing Brief, ¶ 186 *referring to* Transcript (Day 3), p. 789 lines 1–3, p. 790 line 2 to p. 791 line 5.
[1470] Claimant's Post-Hearing Brief, ¶ 186 *referring to* Transcript (Day 3), p. 897 lines 16–19.
[1471] Claimant's Post-Hearing Brief, ¶ 186.
[1472] Claimant's Post-Hearing Brief, ¶¶ 209-212 *referring to* Transcript (Day 3), p. 614 lines 1-3, p. 615 line 18 to p. 616 line 2, Transcript (Day 4), p. 1161 lines 6-15, Transcript (Day 5), p. 1351 lines 20-21, Transcript (Day 2), p. 564 lines 3-7, p. 576 lines 16-20, p. 581 lines 7-9, Transcript (Day 5), p. 1353 lines 5-16, **Exhibit RE-456**, p. 3, Khan II, ¶ 42, Transcript (Day 3), p. 887 line 22 to p. 888 line 6.
[1473] Claimant's Post-Hearing Brief, ¶ 187.
[1474] Claimant's Post-Hearing Brief, ¶ 190 *referring to* Ruling on Claimant's Redfern Requests Nos. 20, 21, Claimant's Letter to the Tribunal dated 2 November 2016, at 1-8, Claimant's Letter to the Respondent dated 9 September 2016, at 1, Respondent's Letter to Claimant dated 14 September 2016, at 1, Claimant's Letter to the Respondent dated 23 September 2016, at 1 *and* **Exhibit CE-816.**

1152. Secondly, Claimant submits that the failure to disclose that page 13 had been removed until: (i) eighteen months after it originally exhibited them; (ii) after representing that the copies produced were complete; and (iii) after Mr. Aziz's testimony (denying Claimant the ability to cross-examine him), casts further suspicion on the authenticity of the diaries.[1475] Moreover, Claimant dismisses Mr. LaPorte's guesses as to the reasons for the page removal, arguing that the distinguishing features about the page suggest that it was originally the last page which was removed and recreated on page 14 with the concocted Asmatullah entry.[1476] Ultimately, Claimant argues that far from explaining away the significance of page 13, the pattern of page removal strongly suggests that this page was removed "*to ensure that* [its] *contents* [we]*re not disclosed.*"[1477]

1153. Thirdly, Claimant submits that the use of different inks on page 12 for the First Entry suggests that Mr. Aziz added this later in support of Respondent's claims.[1478] Additionally, Claimant argues that Respondent's attempt to explain why the Third Entry was recorded on a loose sheet of paper which otherwise reflected transactions from 2009-2010 (a year and a half after Mr. Aziz claims this bribe was paid) is unconvincing. Claimant submits that the suggestion that Mr. Farooq told Mr. Aziz to record this separately after his removal from office, is unconvincing given the timing of the firing and the alleged payments; if the Dad and Asmatullah entries were genuine, they should also have been recorded separately.[1479]

1154. Finally, Claimant submits that the record suggests that the pages purporting to document the Asmatullah and Khan transactions were not created in April 2008, but instead sometime in June 2015.[1480] Claimant argues that not only were there inconsistencies between Mr. Aziz's testimony, other evidence on the record and the diaries itself, but Mr. Aziz's failure to append the corresponding pages with his affidavit before the Local Expert Group and the way in which he described the Asmatullah payment further suggests that the page did not exist at the time it was allegedly executed.[1481]

1155. According to Claimant, these aforementioned issues demonstrate the fictional nature of the surface rights tale. In addition, it claims that inferences must be drawn from Respondent's intentional obstruction of any meaningful forensic examination.[1482] Claimant submits that the expert testimony confirms that three types of examination could

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[1475] Claimant's Post-Hearing Brief, ¶¶ 193-194.
[1476] Claimant's Post-Hearing Brief, ¶ 196 *referring to* Transcript (21 February 2017), pp. 22-23.
[1477] Claimant's Post-Hearing Brief, ¶ 196 *referring to* Radley, ¶ 40.
[1478] Claimant's Post-Hearing Brief, ¶ 197.
[1479] Claimant's Post-Hearing Brief, ¶¶ 199-200, 321(b) *referring to* Farooq II, ¶ 48, **Exhibits RE-229** *and* **RE-228**, pp. 12 and 13.
[1480] Claimant's Post-Hearing Brief, ¶ 204.
[1481] Claimant's Post-Hearing Brief, ¶¶ 205-206.
[1482] Claimant's Post-Hearing Brief, ¶ 326.

have proven fabrication, all of which Respondent refused to allow.[1483] Accordingly, Claimant asks the Tribunal to draw the "*strong inference*" that this was because the documents "*would not withstand forensic scrutiny*" which would have demonstrated that they were fabricated in support of Respondent's bribery allegations in respect of the surface rights.[1484]

1156. Claimant submits that the purpose of the first of these three examination types, *i.e.*, the ESDA indentation examination, is to detect the presence of impressions of writings from pages "*superimposed over the questioned material.*"[1485] Claimant maintains that Mr. Radley confirmed that if performed properly, it had the potential to reveal that extracts of the diaries submitted as AA-1 were fabricated;[1486] however, the examination was executed far below professionally accepted standards.[1487] Claimant submits that the quality of the test strips was so poor that Mr. LaPorte could not have confidence that the machine was at optimal functionality, and it used the 'TAD' method to take impressions leading to "*a messy result*"; Mr. LaPorte later admitted that another method may well have given better impressions.[1488]

1157. Claimant also submits that Mr. LaPorte failed: (i) to take ESDA lifts on every page; (ii) to rerun any of the ESDA lifts despite raising weak impressions and the "*red flag*" that indicated that page 13 had been removed and its entries re-written onto page 14; and (iii) to take impressions on the reverse side of the questioned pages as well as taking digital photographs of the impressions.[1489] Claimant alleges that these numerous failures demonstrate that Mr. LaPorte lacked the requisite qualification to carry out this examination.[1490]

1158. As for the second examination type, *i.e.*, the ESDA sequencing examination, Claimant submits, the examiner obtains lifts of all of the pages in question and determines the sequence of the writings. Claimant relies on Mr. Radley's testimony to explain that this could have challenged Mr. Aziz's testimony as to the order of these recordings in the

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[1483] Claimant's Post-Hearing Brief, ¶¶ 327-387.
[1484] Claimant's Post-Hearing Brief, ¶¶ 388-390 *citing to Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, dated 13 August 2009 [**RLA-228**], ¶ 152 *and* IBA Rules, Art. 9(5).
[1485] Claimant's Post Hearing Brief, ¶ 328 *referring to* LaPorte, ¶ 30.
[1486] Claimant's Post-Hearing Brief, ¶ 334.
[1487] Claimant's Post-Hearing Brief, ¶ 365.
[1488] Claimant's Post-Hearing Brief, ¶¶ 365-375 *referring to* Radley, ¶ 64, Transcript (21 February 2017), p. 139 line 8 to p. 140 line 6, p. 104 lines 14-20, p. 145 line 9 *and* p. 147 lines 3-6.
[1489] Claimant's Post-Hearing Brief, ¶¶ 365-375 *referring to* LaPorte, ¶¶ 47-48, Transcript (21 February 2017), p. 130 line 19 to p. 133 line 18, p. 141 lines 7-11, p. 150 lines 5-12, p. 148 line 7 to p. 149 line 1, p. 195 line 23, p. 146 lines 8-16 *and* p. 149 lines 10-19.
[1490] Claimant's Post-Hearing Brief, ¶¶ 374-375.

diaries and the loose sheets submitted as AA-2;[1491] however, the examination was not even attempted due to the poor clarity of the impressions obtained. Claimant suggests that this is unsurprising given the aforementioned inadequacies in the ESDA indentation examination.[1492]

1159. Finally, as regards the third examination type, *i.e.*, the ink-dating analysis, Claimant notes that Respondent consistently represented that this test could show whether a document "*was written in the last 24 months.*"[1493] Claimant submits that Mr. LaPorte's trip to Lahore in December 2016 was within 20 months of when Claimant alleges the diaries to have been fabricated *i.e.*, between April and June 2015. Thus, Claimant argues that such testing could have proven the falsity of Pakistan's allegations;[1494] however, Mr. LaPorte states that he "*was not granted permission*" to perform this examination.

1160. Given Mr. LaPorte's suggestion that this did not hinder his conclusions, Claimant considers that he attempted to whitewash the consequences of the NAB's refusal to allow him to conduct this examination. Claimant suggests that Mr. LaPorte incorrectly stated to the NAB that ink dating was a destructive technique possibly resulting in spoliation of the diaries, which it considers entirely belied by the evidence, (including the examination protocol describing it as "*minimally invasive*").[1495]

1161. Claimant further questions why a "*constitutionally independent public body*" with "*a duty to investigate potential breaches of Pakistani anti-corruption laws*" would not use this examination to determine whether this evidence had been fabricated as alleged.[1496]

(b) Attributability of Col. Khan's Conduct

1162. Claimant argues that Respondent's allegations would in any event fail because the alleged corrupt acts of Mr. Farooq, Col. Khan and Mr. Dad cannot be attributed to Claimant.[1497] Claimant submits that far from "*directing mind and will"* of the company, Mr. Dad was a low-level TCC employee, who on Respondent's own case acted only at the behest of Mr. Farooq or Col. Khan.[1498]

[1491] Claimant's Post-Hearing Brief, ¶¶ 335-338 *referring to* Transcript (21 February 2017), p. 133 lines 19-24, p. 134 lines 16-20 *and* p. 112 lines 15-20.
[1492] Claimant's Post-Hearing Brief, ¶¶ 376-377 *referring to* Transcript (21 February 2017), p. 51 lines 6-25, p. 155 lines 11-20 *and* p. 200 lines 10-14.
[1493] Claimant's Post-Hearing Brief, ¶ 340 *referring to* Respondent's 19 September 2016 Letter, p. 3, **Exhibit CE-880**, p. 9 *and* Transcript (21 February 2017), p. 118 line 22 to p. 119 line 1.
[1494] Claimant's Post-Hearing Brief, ¶ 341.
[1495] Claimant's Post-Hearing Brief, ¶ 380 *referring to* Transcript (21 February 2017), p. 42 line 14 to p. 43 line 10, LaPorte, ¶ 6 *and* **Ex. CE-889**, ¶ 11, 13.
[1496] Claimant's Post-Hearing Brief, ¶ 386 *referring to* Respondent's Reply, ¶ 45 *and* Respondent's Application, ¶ 74.
[1497] Claimant's Post-Hearing Brief, ¶¶ 213-222.
[1498] Claimant's Post-Hearing Brief, ¶ 222 *referring to* Dad I, ¶¶ 9-10 *and* Farooq I, ¶ 19.

1163. As to Col. Khan, Claimant firstly argues that contrary to Respondent's allegations, Claimant's CEOs have testified that they did not know of the bribes which Col. Khan described (and in fact repeatedly told him that he was not permitted to pay such bribes). Col. Khan expressly acknowledged in Paris that "*Ms. Boggs, Peter Jezek, Tim Livesey, and David Moore…wouldn't have known*" about the payments he had previously claimed he was "*open and transparent*" with the CEOs about.[1499]

1164. Claimant perceives Respondent's argument to be as follows: Col. Khan's conduct must be attributable to Claimant and render it criminally liable under Pakistani law because TCC would necessarily be "*vicariously liable in tort*" for his actions.[1500] Claimant argues that Respondent misrepresents the authorities it cites to support this argument.[1501] Claimant asserts that as Respondent itself notes, the *mens rea* for the offence of corruption is intention, therefore contrary to Respondent's assertions, attribution cannot be established through applying principles of vicarious liability.[1502]

1165. Moreover, Claimant argues that even if Col. Khan's actions could be attributed to TCC for the purposes of criminal liability, Col. Khan would have to be the "*directing mind and will*" of the company.[1503] Claimant maintains that Col. Khan participated in training about anti-bribery and corruption and admitted that his alleged acts of corruption were undertaken with full knowledge that he was acting contrary to company policy.[1504] Claimant therefore urges the Tribunal to reach the conclusion that he cannot be considered as "*directing mind and will*" of TCC.

1166. Claimant further maintains that even if the test for vicarious liability were at all relevant, it would still not be responsible for Col. Khan's conduct since he was not the person "*upon whom TCC depended to drive the project forward*" with no responsibility for mining activities or obtaining the rights and approvals which Respondent claims were obtained through bribery.[1505]

[1499] Claimant's Post-Hearing Brief, ¶¶ 219-220 *referring to* Khan I, ¶ 17, Khan II, ¶ 4 *and* Transcript (Day 4), p. 960 lines 5-14.
[1500] Claimant's Rejoinder, ¶¶ 207-208 *referring to* Respondent's Reply, ¶ 207.
[1501] Claimant's Rejoinder, ¶¶ 207-208 *referring to* Respondent's Reply, ¶ 67.
[1502] Claimant's Post-Hearing Brief, ¶ 28 *referring to* Respondent's Reply, ¶¶ 508-510.
[1503] Claimant's Rejoinder, ¶ 208 *citing to Tesco Supermarkets v. Nattrass* [1972] A.C. 153 [**CA 299**], p. 180 (Lord Morris) *and Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 A.C. 500 [**CA 298**], p. 511 (Lord Hoffmann); Claimant's Post-Hearing Brief, ¶¶ 25-29.
[1504] Claimant's Post-Hearing Brief, ¶¶ 215-216 *referring to* Transcript (Day 11), p. 2797 line 17 to p. 2798 line 1, p. 2799 lines 10–22, Transcript (Day 3), p. 827 lines 3–19, p. 828 lines 12–15, p. 829 lines 3–6 *and* p. 839 lines 10–17.
[1505] Claimant's Rejoinder, ¶ 208 *referring to* Respondent's Reply, ¶ 69.

iii. Tribunal's Analysis

1167. It is undisputed between the Parties that in respect of the Surface Rights Lease, two orders were issued by the respective Senior Member of the Board of Revenue: (i) a first order dated 22 May 2008, signed by Mr. Muhammad Irfan Kasi, by which Claimant was granted "*surface right of state land measuring (147 Sq. Kilometers) which comes 144568-0-0 acres*";[1506] and (ii) a second order dated 27 September 2008, signed by Mr. Mandokhail, by which a "*partial modification/elaboration*" was granted: "*The measurement of land in Sq. Kilometers may be read as (585.05 Sq. Kilometers) instead of (147 Sq. Kilometers).*"[1507] The Parties are in dispute as to whether the second order corrected an inadvertent mistake made in the first order, as alleged by Claimant, or whether both orders were part of a deliberate scheme made possible by several acts of correuption to obtain surface rights over the entire area in breach of the mining licensing regime, as claimed by Respondent.

1168. The contemporaneous documentary record shows that by letters of 4 and 21 February 2008, Claimant wrote to Mr. Farooq as Chairman of the BDA, asking him to request on behalf of the Joint Venture that surface rights be granted for a 99-year term over an area of 582.108 square kilometers or 143,841 acres as detailed in a map that was attached to both letters.[1508] In its letter of 21 February 2008, Claimant stated that this land would be required "*to develop infrastructure in and around the mine site for carrying out mining operations*" and explained what kind of infrastructure it was referring to.[1509]

1169. In response to a letter from Mr. Farooq dated 9 February 2008, which is not in the record, Mr. Ahmed, acting as Secretary of the MMDD, made reference in his letter of 16 February 2008 to the rights granted to exploration license holders under Rule 23(1)(b) and to mining lease holders under Rule 45(1)(b)(ii) of the 2002 BM Rules and added:

> "*In this case, the surface right for an area of 582.106 Sq Km has been* [illegible] *mentioned in the map enclosed, the exploration area granted to TCC under* [illegible] *435.02 Sq Km thereby exceeding 147 Sq Km the surface right for additional area* [illegible] *Sq km falling outside the granted area needs to be acquired through the reveneue department as was done in case of Airstrip*."[1510]

1170. In a summary to the Chief Minister dated 6 March 2008, Mr. Farooq informed that Claimant required surface rights "*to enable them to proceed further in the matter*" and had therefore requested that the BDA approach the authorities concerned for the grant of such rights to the Joint Venture "*for the subject area*." Mr. Farooq further reported that

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[1506] **Exhibit CE-43**.
[1507] **Exhibit CE-66**.
[1508] **Exhibits CE-220** and **CE-221**.
[1509] **Exhibit CE-221**.
[1510] **Exhibit RE-320**.

he had requested the surface rights from the MMDD but was infomed that the requested area exceeded the exploration area granted to Claimant by 147 square kilometers and that the surface rights for this additional area had to be acquired from the Revenue Department. Mr. Farooq therefore requested approval from the Chief Minister "*for the grant of surface right for additional area of 147 Sq. km, as shown in the map attached with TCC's letter placed at (F/A) to the above Joint Venture*."[1511] In an addition to the summary, Mr. Ahmed confirmed that the MMDD endorsed the proposal of Mr. Farooq. The summary was approved by the Chief Minister on 11 March 2008.[1512]

1171. By letter of 17 April 2008, Mr. Asmatullah, in his function as Secretary (Revenue) to the Board of Revenue, forwarded to the Executive District Officer (EDO) a copy of Claimant's letter of 4 February 2008 and the enclosed map and asked him to "*please go through the contents of the letter and submit detailed report in the matter*."[1513] On 9 May 2008, the EDO responded by sending his report along with enclosures from the Assistant Collector, who had reported, *inter alia*, that "[t]*he measurement of proposed land was carried out by the revenue staff as per sketch/map, and its total area came to 144568 Acres*." On that basis, the EDO "*recommended that the proposed land may kindly be allotted in favour of Reko-Dig* [sic] *Project under the land lease policy 2000. The price of land according to provailing* [sic] *market Rs: 5000/- Per Acre*."[1514]

1172. In a notesheet of 15 May 2008, Mr. Asmatullah reported that the report from the EDO in response to his request had been received and that the "*EDO (R) Chagai has stated that 144568 acres is available for Surface Right of Reko Diq Project at a rate of RS 5000,- per acre*." Mr. Asmatullah submitted the note "*for perusal and order please*." On 22 May 2008, after the note had been signed by various officials, among them the "*SMBR*" with the instruction "*Process*," Mr. Asmatullah added on a separate sheet: "*Draft lease order is prepared and placed below for approval please*."[1515]

1173. On 22 May 2008, the Board of Revenue, acting through its Senior Member Mr. Kasi, issued a first order granting to Claimant surface rights over an area "*measuring (147 Sq. Kilometers) which comes 144568-0-0 acres*" at a rate of PAK 5,000 per acre. The surface rights were granted for a term of 30 years and on the condition that Claimant would pay the entire amount pertaining to the surface rights to the indicated bank account.[1516]

1174. By letter of 28 May 2008, Claimant wrote to Mr. Asmatullah that it had deposited a first installment of PAK Rs. 272,000,000 in the designated bank account and would deposit

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[1511] **Exhibit RE-322**, p. 1.
[1512] **Exhibit RE-322**, p. 2.
[1513] **Exhibit RE-323**.
[1514] **Exhibit RE-326**, pp. 1, 7.
[1515] **Exhibit RE-438**, pp. 35-36.
[1516] **Exhibit CE-43**, p. 1.

the outstanding balance of PAK Rs. 450,840,000 "*as per the agreement between the Board of Revenue and the Company*."[1517] According to the receipts stamped by the National Bank of Pakistan, the two payments were made on 30 May and 4 June 2008, respectively.[1518] Claimant thus made a total payment of PAK Rs. 722,840,000 in respect of its surface rights, equaling a rate of PAK Rs. 5,000 per acre for 144,568 acres. According to the Parties, the amount paid equalled USD 10-11 million.[1519]

1175. In a Joint Steering Committee meeting of 10 July 2008, which was chaired by Mr. Livesey, it was reported, *inter alia*: "*Surface Rights to 147km² awarded ($10.3m).*"[1520]

1176. By letter of 1 September 2008 addressed to Mr. Ahmed as Secretary of the MMDD, Claimant requested that Mr. Ahmed instruct the Board of Revenue to amend the order issued on 22 May 2008, stating that it contained a correct acreage figure but an incorrect conversion into square kilometers, which should have been 585.05 square kilometers. Claimant noted that "*TCCP has paid for 144568-0-0 acres and therefore TCCP wants the Order to reflect the correct conversion of this acreage into sq. km.*"[1521]

1177. By letter of 4 September 2008, Mr. Ahmed wrote to the Senior Member of the Board of Revenue and requested that a correction letter amending the square kilometers figure be issued to Claimant.[1522]

1178. On 27 September 2008, the Board of Revenue, acting through Mr. Mandokhail, who had taken office as Senior Member in June 2008, issued a second order "[i]*n partial modification/elaboration*" of the previous order by which surface rights had been granted over an area measuring 147 square kilometers. The second order provided for the following change: "*The measurement of land in Sq. Kilometers may be read as (585.05 Sq. Kilometers) instead of (147 Sq. Kilometers).*"[1523]

1179. The Parties are in dispute as to how it came about that Claimant ultimately obtained surface rights over the entire area sought, *i.e.*, the exploration area and the additional area. According to Claimant, Claimant did so "*through a straightforward process, in which an initial mistake by the Balochistan bureaucracy had no effect on the outcome*" as Claimant was granted and paid for the correct amount of acres assessed by Balochistan's surveyors.[1524] Respondent claims, on the other hand, that Claimant obtained the surface rights by a plan orchestrated by Mr. Farooq pursuant to which a first order would be

[1517] **Exhibit CE-469**.
[1518] **Exhibit CE-43**, pp. 2-3.
[1519] Claimant's Opposition, ¶ 185; Respondent's Reply, ¶ 311 lit. c.
[1520] **Exhibit RE-331**, p. 2.
[1521] **Exhibit CE-471**.
[1522] **Exhibit CE-229**.
[1523] **Exhibit CE-66**.
[1524] Claimant's Post-Hearing Brief, ¶ 176.

issued granting the 147 square kilometers approved by the Chief Minister and, after having paid the amount for the full area it had sought, Claimant would request a correction of the order to reflect the 585 square kilometers on the basis that it had paid for them. Respondent claims that this was made possible through various acts of corruption intended "*to circumvent the Balochistan mining licensing regime and secure far-reaching and unprecedented surface rights*" over a vast area of land.[1525]

1180. Specifically, Respondent claims that the following bribes were paid in connection with the Surface Rights Lease:[1526]

i. PAK Rs. 800,000 by Col. Khan to Mr. Farooq on 10 or 11 April 2008 "*to orchestrate obtaining surface rights for TCC in breach of the Balochistan mining licensing regime*," *i.e.*, "*over 147 sq. km. in May 2008 and subsequently over 585 sq. km. in September 2008*";

ii. PAK Rs. 600,000 by Mr. Bari Dad to Mr. Farooq on 14 April 2008 for the same purpose;

iii. PAK 200,000 by Mr. Aziz (on behalf of Mr. Farooq) to Mr. Asmatullah – out of the amount paid to Mr. Farooq by Mr. Dad – in the evening of 14 April 2008 in return for "*refrain*[ing] *from raising any objections to Mr. Farooq's disregard for the Balochistan mining licensing regime, despite it being his duty to do so*" and "*assist*[ing] *Mr. Farooq with the plan to obtain surface rights over 585 sq. km. despite only having the CM approval for 147 sq. km.*";

iv. PAK 400,000 by Col. Khan to Mr. Mandokhail in late September 2008, and an Umrah trip for Mr. Mandokhail's family "*paid for in full by TCC (through Mr Farooq)*" in return for his "*assistance in issuing the order amending the area of the Surface Rights Lease*";

v. PAK 4,000 to 5,000 per month by Mr. Farooq to Mr. Asmatullah for a period of six to seven months starting in December 2007 in return for "*endorsing all decisions relating to TCC and refraining from raising objections*" in relation to the airstrip lease and the Surface Rights Lease.

1181. In support of these allegations, Respondent relies on the witness testimony of Col. Khan, Mr. Dad, Mr. Farooq, Mr. Asmatullah and Mr. Aziz, which will be addressed in detail below. In addition, as regards the first three alleged payments, Respondent relies on the entries that Mr Aziz purportedly made into a diary he kept of payments made to and by Mr. Farooq. The evidentiary value of Mr. Aziz's diaries will also be discussed in detail below.

[1525] Respondent's Post-Hearing Brief, ¶¶ 138-140.
[1526] Respondent's Post-Hearing Brief, ¶¶ 139, 141-143; Respondent's Reply, ¶ 297; Asmatullah, ¶ 7.

1182. The Tribunal is aware that, in addition to the five allegations summarized above, Respondent further considers that the Summary initiated by Mr. Farooq on 6 March 2008 was approved by Chief Minister Saleh Bhotani "*at lightning speed*" on 11 March 2008 and, according to Respondent, in contravention to the 1976 Business Ruless because the Board of Revenue received the Summary only after it had already been approved by the Chief Minister.[1527] Respondent claims that this was due to "*the close relationship between CM Bhotani and TCC (in particular Mr Luksic),*" which, according to Col. Khan, resulted from a hunting trip hosted by Mr. Bhotani in Jaunary 2007 before he became caretaker Chief Minister in November 2007.[1528] Col. Khan described this trip as "*one example of the culture of lavish gift buying for senior officials.*" He also testified that soon after Mr. Bhotani's appointment, Mr. James provided him with a gift on behalf of Mr. Luksic and noted that Claimant would soon be requesting surface rights requiring his approval, in response to which Mr. Bhotani allegedly said that they did not need to worry and that he would see to it.[1529]

1183. The Tribunal notes that Mr. Hargreaves, who participated in the hunting trip, denied in his second witness statement that any lavish gifts were given during the trip. He further stated that, contrary to Col. Khan's suggestion, this trip had not been arranged by Claimant or Antofagasta but rather arose out of a personal invitation of the then-Chief Minister Yousaf in December 2006 for Mr. Luksic and a number of Antofagasta and TCC representatives.[1530]

1184. As Respondent does not explicitly raise any allegation of corruption in connection with Chief Minister Bhotani's involvement, which was limited to the approval of surface rights over the additional area of 147 square kilometers, or the hunting trip in January 2007, the Tribunal will not address this aspect any further in the following assessment of the events surrounding the Surface Rights Lease.

1185. Respondent claims that, as a result of the acts of corruption it does allege, Claimant "*was able to subvert the mining licence regime …, both to supplement and extend its rights under EL-5 to obtain what were essentially rights of ownership, to the exclusion of anyone else, over a vast area of prospective mining land until at least 2038.*"[1531] Specifically, Respondent argues that Claimant circumvented the 2002 BM Rules because under Pakistani law, the exploration license and surface rights are subject to different regimes and grant different rights to their holders, with the surface rights granted by the BOR lasting longer and granting more valuable rights than the exploration license granted by

[1527] Respondent's Post-Hearing Brief, ¶ 140 lit. a; Respondent's Reply, ¶ 307.
[1528] Respondent's Reply, ¶ 307; Khan II, ¶ 37.
[1529] Khan II, ¶¶ 20, 38.
[1530] Hargreaves II, ¶¶ 47-50.
[1531] Respondent's Post-Hearing Brief, ¶ 147.

the MMDD, entitling its holder to full property use and owernship rights for a period of 30 years.[1532]

1186. It appears to the Tribunal that the added value of holding surface rights over the exploration area – in addition to the rights granted to an exploration license holder under the 2002 BM Rules – is undisputed between the Parties and was in fact one of the reasons for Claimant to apply for the Surface Rights Lease over the entire area instead of only the additional area not covered by Exploration License EL-5.

1187. Mr. Livesey explained in his fourth witness statement, which was submitted in the previous phase of this arbitration, that the Surface Rights Lease was needed for a larger area than the anticipated Mining Area because "*the proposed project would require a number of civil constructions, including large waste rock dumps, tailings and freshwater dams, a power plant, and an accommodation village. The area necessary to accommodate these facilities exceeds the 100-square-kilometer maximum area permitted for a Mining Lease. Furthermore, certain of these facilities must be strategically placed to account for physical and environmental factors such as wind direction and topography, and must also lie outside a 500-meter buffer zone around the mine pit. As a result, TCC planned to construct a significant part of the infrastructure outside of the contemplated Mining Area, on non-mineralized land covered by the proposed surface lease area.*"[1533]

1188. In his seventh witness statement, which was submitted in the present phase of the arbitration, Mr. Livesey further stated that they "*understood that, as in a number of other jurisdictions, surface rights in Balochistan were separate from the rights granted by the Mining Lease. TCC's application therefore requested surface rights that overlapped with the mining license area. This was not unusual. It is common practice in mining projects, where local laws allow, to apply for a land lease over the entire footprint of a mine. This ensures that other structures will not be built within the mine area in a way that could potentially delay or impact mine development.*"[1534]

1189. Mr. James also testified in his first witness statement on the reasons why Claimant requested surface rights over the entire area of land:

> "*TCC had the choice of keeping the existing allocation of land, which would be costly and wasteful because TCC would have to build over the areas proposed for future mineral exploration and extraction and then have to tear down infrastructure and rebuild elsewhere, or it could seek to obtain surface rights for a greater area, so that facilities and infrastructure needed for mining operations could be constructed away from the planned mine pits.*

[1532] Respondent's Post-Hearing Brief, ¶¶ 148-150.
[1533] Livesey IV, ¶ 43. *See also* Livesey II, ¶ 13.
[1534] Livesey VII, ¶ 30.

> *From the perspective of operational planning and avoiding unnecessary costs, it made sense to seek additional surface rights*."[1535]

1190. In his second witness statement, Mr. James confirmed that it was decided based on a review of the site development plan and a discussion on the impact of seeking surface rights over a smaller area that the application should be filed for the entire area, *i.e.*, including the Mining Lease Area.[1536] As pointed out by Mr. James, this conclusion is reflected in the letters and enclosed map sent by Claimant to the BDA in February 2008.[1537]

1191. During the hearing, Mr. James confirmed his understanding that Claimant needed surface rights over the entire area "*in order to be able to have everything for unobstructed mining and a need not to reconstruct things throughout the life of the mine.*"[1538] Specifically in response to the suggestion that the right to build on the land within the exploration area was already within the scope of rights granted to an exploration license holder under Rule 23(1)(b) of the 2002 BM Rules, Mr. James testified:

> "*We had two groups—Colt, an Australian company; another group, Bintech—who were endeavouring to expand into our area and be disruptive, and you have here* 'subject to the rights of the surface-holder,' *with the surface-holder, who is the Government of Pakistan at that point.*
>
> *These companies were approaching that government for various Surface Rights of their own and various other rights because they had adjacent ELs to our EL. So, in order to have the continuity of our property, we would have to have those Surface Rights secure. Otherwise, somebody, at some time, could come along and essentially acquire those Surface Rights over our area*."[1539]

1192. Mr. Farooq testified in his second witness statement that in meetings with Mr. Flores, Mr. Ahmed and Col. Khan, he expressed the view that "*there was no need to obtain surface rights for such a huge area of land and* [he] *was unclear why they wanted to pay so much money for these rights* [and] *that it would be difficult to obtain such rights.*"[1540] Col. Khan confirmed in his second witness statement that he and Mr. Flores had met with Mr. Farooq and Mr. Ahmed "*at least twice to gauge the possibility of obtaining*" a surface rights lease over an area of almost 600 square kilometers. He stated that while "*Mr Farooq's initial reaction was that it would not be possible to procure surface rights over such a huge area*," he and Mr. Flores were able to convince him that it could be done.[1541] Mr.

[1535] James I, ¶ 24.
[1536] James II, ¶ 11.
[1537] *Cf.* **Exhibits CE-220** and **CE-221.**
[1538] Transcript (Day 10), p. 2715 line 19 to p. 2716 line 1.
[1539] Transcript (Day 10), p. 2720 line 19 to p. 2721 line 10.
[1540] Farooq II, ¶ 44.
[1541] Khan II, ¶ 36.

Mandokhail stated in his witness statement that while he was not involved in the early events regarding the surface rights, he understood from his discussions with Mr. Farooq at the time that "*TCC wanted to secure the surface rights to the whole area (582 square kilometres) in order to prevent any other developers gaining access of being granted rights*."[1542]

1193. Mr. Farooq further testified that when he received Claimant's request in February 2008, he "*was unclear how to process this request.*" Following his exchange with Mr. Ahmed, he initiated a summary to the Chief Minister even though, according to Mr. Farooq, this would have been for the Board of Revenue to do, but he "*knew that TCC had no right to ask for surface rights over auch a large area of land, particularly as exploration work was still going on*," as a result of which he "*purposefully referred to the area outside of TCC's exploration license*."[1543] Mr. Asmatullah confirmed in his witness statement that the summary for the Chief Minister should have been issued by the BOR and stated that he refrained from raising any objection at the time.[1544]

1194. Mr. Farooq also stated that Col. Khan told him shortly after the Chief Minister's approval that Claimant actually needed to obtain surface rights over the full area, as a result of which he "*discussed with Mr Asmatullah that we would first get an order passed mentioning the 147 sq. km. that had been approved, as well as the correct acreage figure. After payment was made for the full area, we would then get an amendment to the order for the full 585 sq.km*."[1545] Col. Khan confirmed that after the approval of the smaller area, he discussed the need for obtaining surface rights over the entire area with Mr. Farooq and that "*provided that it got done …* [he] *didn't mind what it cost*."[1546]

1195. During the hearing, Mr. Asmatullah confirmed that he was consulted by Mr. Farooq after the approval in March and stated that he "*advised him what we could do is if we write the correct kilometers, and we put down the incorrect acreage, of 585, and make an order, if we get stuck anywhere of if there's an issue, and we would say that that this has been a miscalculation. It's a mistake. And if not, then tell Sher Khan to have this contact the office after three or four months to correct this, so the issue gets cooled down by then, and it disappears from people's minds*."[1547] When asked whether he was suggesting that he had actually come up with the idea of the discrepancy, which he had not mentioned in his witness statement, Mr. Asmatullah stated that he "*was the revenue expert, Farooq did not know what to make make or what to do, and* [he] *was a partner of Farooq in this*

[1542] Mandokhail, ¶ 19.
[1543] Farooq II, ¶¶ 45-46.
[1544] Asmatullah, ¶ 12.
[1545] Farooq II, ¶ 47.
[1546] Khan II, ¶ 40.
[1547] Transcript (Day 5), p. 1368 lines 9-17.

plan." He added that "[f]*rom the beginning until the end*, [he had] *been involved in this*."[1548]

1196. Mr. Farooq stated that while he was temporarily suspended from the office by the new Chief Minister on 16 April 2008 until his re-appointment as Chairman of the BDA on 16 December 2008, he "*stayed informed of on-going matters and in contact with Mr Asmatullah*" and was aware that "*TCC managed to get a Board of Revenue order passed on 22 May 2008*" and that he saw that order before it was circulated.[1549] Mr. Asmatullah testified that this order had been drafted by Mr. Farooq, although being signed by Mr. Kasi, and that Mr. Farooq "*was deliberately trying to create this discrepancy* [between square kilometers and acres] *to be used in TCC's favour down the line*," which he, Mr. Asmatullah, was aware of but did not object to at the time.[1550] Mr. Mandokhail also confirmed that he understood "*based on* [his] *discussions with Mr. Farooq at the time, that this discrepancy was deliberate and that Mr Farooq ultimately intended to secure for TCC surface rights for the full 585 sq. km*."[1551] Col. Khan testified that he was advised by Mr. Farooq at the time that Claimant "*should immediately pay the required surface rights fees as per the acres stated in the Order (and that TCC could then have the Order amended to correct the sq. km. figure).*" Col. Khan added that Mr. James quickly approved this payment and knew that they would later apply for an amendment of the order.[1552] Mr. Asmatullah that "[t]*his was preplanne*d" and added that, "[i]*f this was done with clean hands they would have clarified this ambiguity before depositing the money*."[1553]

1197. According to Mr. Farooq, when the Senior Member of the Board of Revenue had to be replaced, he requested with the Chief Secretary that Mr. Mandokhail be appointed and when that had occurred in August 2008, he "*told him that TCC had helped him with his appointment and the he needed to their job of amending the surface rights order*," which he did following a discussion of Claimant's amendment request with Mr. Farooq and Mr. Asmatullah.[1554] Mr. Mandokhail confirmed that Mr. Farooq spoke to him before his appointment "[i]*n September 2008, when Mr Kasi retired*," telling him that he would be asked to issue an amended order and that Claimant had already paid for the full 585 square kilometers. Mr. Mandokhail further testified that Mr. Farooq threatened him that he would lose his job and be transferred out of Quetta and lose his official residence, which Mr. Mandokhail described as "*extremely important*" to him and led him to sign the

[1548] Transcript (Day 5), p. 1371 line 18 to p. 1372 line 9.
[1549] Farooq II, ¶ 48.
[1550] Asmatullah, ¶ 12.
[1551] Mandokhail, ¶ 21.
[1552] Khan II, ¶ 40.
[1553] Transcript (Day 5), p. 1369 lines 2-5.
[1554] Farooq II, ¶¶ 49-50.

amended order.[1555] Col. Khan stated that "[a]*lthough Mr Farooq had been temporarily removed as Chairman of the BDA, he continued to manage the amendment process through his contacts at the Board of Revenue (Sheikh Asmatullah) and kept me informed by phone*." He added that "*Mr Farooq suggested waiting until Mr Mandokhail took office as the Senior Member of the Board of Revenue before seeking the amendment*."[1556]

1198. During the hearing, Col. Khan confirmed that the Senior Member of the Board of Revenue is appointed by the Chief Minister, *i.e.*, in that case by Chief Minister Raisani, who had suspended Mr. Farooq from the office in April 2008. Col. Khan also confirmed that the plan to have the order amended depended on Mr. Mandokhail taking office, which in turn depended on Mr. Kasi, who held the office of Senior Member at the time of the original order, retiring or dying or otherwise leaving office.[1557]

1199. In a corrigendum to Mr. Mandokhail's witness statement, which was submitted by Respondent shortly before he gave oral testimony to the Tribunal, Mr. Mandokhail corrected that he was appointed as Senior Member of the Board of Revenue not in September 2008 but already in June 2008.[1558] During the hearing, Mr. Mandokhail stated that this was a "*typing error*" but did not provide a clear answer to the question as to when he had come to realize this mistake.[1559] He confirmed having had a conversation with Mr. Farooq about the amendment of the surface rights order and that he could do so only once he was appointed Senior Member of the Board of Revenue but could not provide any clarification as to when this conversation had taken place.[1560]

1200. During the hearing, Mr. Farooq also testified that he remembered having recommended Mr. Mandokhail in June 2008 but confirmed that at the time he submitted his second witness statement, he thought it was in August.[1561] Mr. Farooq denied having any knowledge about the corrigendum submitted by Mr. Mandokhail.[1562] When asked at what point he had recalled that the appointment was in June, he answered: "*Some days back, I was recalling, maybe June. It was not August. It was June because I am a retired man. I don't know the exact dates. I come to know when I made recommendations for him. But the dates may be different. Because I was not in … the office, I don't have the exact dates with me*."[1563]

[1555] Mandokhail, ¶ 22.
[1556] Khan II, ¶ 41.
[1557] Transcript (Day 3), p. 898 line 5 to p. 899 line 14.
[1558] Corrected Mandokhail, ¶ 22.
[1559] Transcript (Day 5), p. 1450 lines 18-20 and p. 1456 line 21 to p. 1460 line 6.
[1560] Transcript (Day 5), p. 141450 line 21 to p. 1456 line 20.
[1561] Transcript (Day 3), p. 789 line 19 to p. 790 line 5.
[1562] Transcript (Day 3), p. 790 lines 6-9.
[1563] Transcript (Day 3), p. 790 lines 13-18.

1201. When Mr. James was confronted with the testimony of Respondent's witnesses during the hearing, in particular the evidence of Col. Khan that he had been told by Mr. James that the first order was not sufficient and that he should ensure that they would get surface rights over the entire area, Mr. James stated that "*that's not what happened at all*." According to Mr. James, the events following the issuance of the first order were as follows:

> "*I had Asad Rehman call the Mines Department. Asad Rehman came back and said, Boss, we got everything that we asked for, the whole 585,000, whatever the number is, of acres.*
>
> *And the only thing that counts in terms of payment of the fee to the Government of Balochistan is acres. There is no such thing as a Surface Rights payment based on square kilometers. They still use acres. And I invite you to talk to the Project team about that because I think Balochistan, when it writes these things, was getting a lot of clerical errors trying to keep track because they were going between units. And it makes no sense in a country on metric to be doing things in both sets of units.*"[1564]

1202. Mr. James confirmed that when he received the order of 22 May 2008, he noticed a discrepancy between the two figures and therefore instructed his engineer to put the question to the MMDD: "*There's an inconsistency here. What were we granted?*" and received the answer that "*Well, the acres, is the controlling number. The acres is what you pay,*" which is why the engineer came back to him saying that "*They have made a clerical error or something over there. It makes no sense. We have to pay the acres*." Mr. James agreed that this happened within "*an incredibly short time*" due to an upcoming Board meeting at which he would have to explain "*if it was a bigger error or a bigger problem*."[1565] He also confirmed that he decided to proceed with the payment based on the acreage figure based on "*a verbal conversation with the MMDD, and a verbal conversation with* [his] *engineer*" because he considered that "*that was the expectation of the Department of Revenue. It was time to pay the bill*."[1566] When asked whether he intended to have the error clarified, Mr. James testified that it was his intention "*to have that done*" upon his return from the Board meeting but that he would not have done so himself because it was "*a minor thing*" and he would have asked "*the same engineer draft up and do it*." He added that he never did return to Pakistan in his role as CEO after that Board meeting.[1567]

1203. In response to a question from the President of the Tribunal whether, after having personally filed an application in February 2008 for 585 square kilometers and then

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[1564] Transcript (Day 10), p. 2746 line 14 to p. 2747 line 6.
[1565] Transcript (Day 10), p. 2750 line 12 to p. 2751 line 13.
[1566] Transcript (Day 10), p. 2754 lines 1-8.
[1567] Transcript (Day 10), p. 2754 lines 12-21.

receiving an order over 147 square kilometers, one could be surprised that he did not react to the first order *vis-à-vis* the authority that issued the order, Mr. James answered:

> "*I did react to it. I had the engineer call to find out what we had actually been awarded. If he had come back and he had said we had only been awarded 147 square kilometers, obviously, I would have had a lot of reaction. The fact that he came back with a number that the technical people said--because it is slightly less than what was requested, the fact that he came back with that number and that's the only number that counts in terms of making payments to the Government of Balochistan and the Government of Balochistan confirmed that, and then the Revenue Department took that money, which was sent into tranches, that, in itself, was a confirmation of it.*
>
> *So, I felt comfortable with it. And I would not have done much. I certainly would not have gotten myself involved in trying to negotiate a correction on it because the process that we were putting in place was to have the technical people who were responsible for things to deal with the technical people who were responsible for things. We were moving to a full company with people who had expertise*."[1568]

1204. When Ms. Boggs, who took office as Claimant's CEO in June 2008, was asked about the discrepancy and her request in September 2008 to correct it, she answered that "*it would have been one of those administrative corrections that needed to get done*." She did not recall why it had taken three months to file the request for correction but nevertheless considered it a "*routine question*."[1569] In response to the question, whether she recalled having spoken to Mr. James on this issue, she answered:

> "*I don't recall if we--if I had a specific discussion with him about the discrepancy. I'm sure that I would have had discussions with Mr. Livesey around the difference. And I would have--I would have said, look, we need to get it corrected. Even though the acreage was correct and the amount paid--that we paid for the surface lease was--reflected that acreage, we needed to get the Order corrected just so there wouldn't be any confusion going forward*."[1570]

1205. Mr. Livesey also confirmed that he stood by his previous testimony that "*the alleged discrepancy in the surface rights lease … was merely an error the Board of Revenue corrected in September 2008*," which he considered confirmed by the amount paid by Claimant calculated based on the acreage figure.[1571] He further confirmed that this "*was consistent with* [his] *understanding of how the BOR calculated its assessments, in which*

[1568] Transcript (Day 10), p. 2756 line 3 to p. 2757 line 3.
[1569] Transcript (Day 11), p. 2955 line 17 to p. 2956 line 4.
[1570] Transcript (Day 11), p. 2956 lines 9-17.
[1571] Livesey VI, ¶¶ 32-33.

the default unit of measurement was acreage," which meant that the reference to 147 square kilometers was a "*clerical or conversion error*."[1572]

1206. On the basis of both the documentary evidence and the witness testimony, the Tribunal considers it clear that Claimant was seeking surface rights over the entire area of 582 square kilometers and openly communicated this request to the BDA and the MMDD both in meetings and its written correspondence of 4 and 21 February 2008. While it appears that both Mr. Ahmed and Mr. Farooq initially took the position that surface rights should be granted only over the additional area that was not covered by Exploration License EL-5 and on that basis prepared the summary for the Chief Minister in early March 2008 in which Mr. Farooq requested approval for the additional area, the Tribunal does not consider it plausible that Claimant had any involvement in this development. To the contrary, it appears undisputed that once the Chief Minister had approved the additional area, Claimant made clear to Mr. Farooq as representative of the BDA that it was in fact seeking surface rights over the entire area.

1207. In the Tribunal's view, it is not entirely clear from the record whether in his order of 22 May 2008, the then-Senior Member of the Board of Revenue, Mr. Kasi, who was not involved in the alleged plan, actually intended to grant surface rights over: (i) the additional area of 147 square kilometers as approved by the Chief Minister in March 2008; or (ii) the entire area of 144,568 acres as it had been measured and determined in the report sent by the EDO in April 2008. As confirmed by Mr. Asmatullah during the hearing, Mr. Kasi signed both the Summary approved by the Chief Minister in March and a note sheet prepared by Mr. Asmatullah in which he reported about the result of the EDO's assessment and requested that "*Draft Lease Order is prepared and placed below for approval, please.*"[1573]

1208. In any event, the Tribunal does not consider it established that Mr. Farooq "*orchestrated*" an elaborate plan to deliberately have a first order granting surface rights over the additional area in square kilometers (but providing for the correct figure in acres) and then later ask for a correction to obtain the entire area in square kilometers after having paid the full lease fee. Apart from the fact that Mr. Farooq and Mr. Asmatullah gave deviating testimony as to who came up with this alleged plan, there is also a discrepancy as to Mr. Farooq's involvement after he became suspended in April 2008. In particular, Mr. Asmatullah testified that the first order was actually drafted by Mr. Farooq, while Mr. Farooq himself stated that he only saw the order before it was being circulated and that it was TCC that "*managed*" to obtain this order.

[1572] Livesey VII, ¶ 27.
[1573] Transcript (Day 5), p. 1364 line 18 to p. 1367 line 3.

1209. Col. Khan further testified that an essential step of the plan was for Mr. Mandokhail to become Senior Member of the Board of Revenue before a correction request could be filed. Apart from the remarkable fact that the alleged plan involved that Mr. Kasi would retire or die shortly after issuing the first order, the Tribunal takes note of the inconsistencies in the testimony of Respondent's witnesses concerning the timing of Mr. Mandokhail's taking office. While Mr. Farooq initially testified that he recommended Mr. Mandokhail in August 2008 and Mr. Mandokhail stated that he took office in September 2008, this testimony was corrected shortly before and during the hearing where both witnesses emphasized that they now remembered that Mr. Mandokhail had actually taken office already in June 2008. Neither witness provided a convincing explanation as to why and how they realized in preparation for the hearing that the alleged discussion between them had actually taken place in June, *i.e.*, three months before Claimant filed its correction request.

1210. As to the decision taken by Mr. James to pay the full amount based on the (correct) acreage figure in the first order, the Tribunal is not entirely convinced by Mr. James' explanation that he considered the arguable ambiguity of the order fully clarified based on a verbal confirmation received by one of his engineers that the acreage figure was the relevant one – something that he remembered only during the hearing. The Tribunal recognizes that the applicable lease rate was to be determined at PAK Rs. 5,000 per acre, *i.e.*, the lease fee was to be calculated based on the acreage figure. Nevertheless, taking into account that the order also referred to the square kilometers figure approved by the Chief Minister, which was limited to the additional area, the Tribunal considers that there would have been reason to obtain a written clarification on the scope of the order before actually making the payment.

1211. This does not establish, however, that Claimant had been involved in a plan orchestrated by Mr. Farooq and Mr. Asmatullah in order to circumvent the MMDD's authority in respect of the rights over the exploration area. In any event, the Tribunal also notes Mr. James' explanation that the reason for making the payment quickly, and without obtaining a written clarification first, was an upcoming Board meeting at which he was to report about the project. As Mr. James ceased to be CEO very shortly after this Board meeting, this may also be the reason why it took three months before the new incoming CEO, Ms. Boggs, filed a request for correction on 1 September 2008. Respondent explicitly accepts that Ms. Boggs, who considered this an "*administrative correction*" that needed to be made, was not involved in the alleged plan regarding the Surface Rights Lease.[1574]

1212. As to Respondent's argument that Claimant intended to circumvent the mining licensing regime and the jurisdiction of the MMDD by applying for surface rights over the entire

[1574] Respondent's Post-Hearing Brief, ¶ 146.

area, *i.e.*, including the area covered by Exploration License EL-5, the Tribunal notes that Claimant's correction request of 1 September 2008 was actually addressed to Mr. Ahmed, the Secretary of the MMDD, who then approached the Board of Revenue and asked for the correction to be made. In the Tribunal's view, it it is not entirely clear from Mr. Ahmed's 16 February 2008 letter, in which he advised that surface rights should be sought only over the additional area, whether at the time time he considered it impermissible or simply unnecessary to obtain surface rights over the area covered by EL-5. However, there is in any event no indication that Mr. Ahmed had any objections to the correction requested by Claimant in September 2008 and he actually endorsed it *vis-à-vis* the Board of Revenue. Consequently, it does not appear as if there was any intention to circumvent the competence of the MMDD.

1213. In addition, the reasons explained by Mr. Livesey and Mr. James for requesting surface rights over the entire area appear plausible and legitimate to the Tribunal. In particular, the rights granted to an exploration license holder under Rule 23(1)(b) of the 2002 BM Rules are expressly "*subject to the rights of the surface holder*," which according to Mr. James were with the Government of Pakistan at the time but which could have been granted to a third company at any time. In light of the considerable amounts that Claimant was planning to invest into the mine development at Reko Diq, the Tribunal considers it legitimate and in fact prudent for Claimant to ensure that no third party could intervene and jeopardize the project by acquiring surface rights over the exploration area and, more importantly, what was to become the Mining Lease Area – regardless of whether there was a concrete indication of any third company intending to do so at the time.

1214. In the Tribunal's view, Respondent has therefore failed to establish that Claimant was involved in a plan to obtain the Surface Rights Lease over the full area of 582 square kilometers via a deliberately incorrect first order and in contravention of the applicable law. Taking into account its findings above, the Tribunal will now turn to the examination of the individual allegations of improper payments made in the context of the Surface Rights Lease.

(a) The Alleged Payment of PAK Rs. 800,000 by Col. Khan to Mr. Farooq

1215. In support of its first allegation raised in this regard, *i.e.*, a payment of PAK Rs. 800,000 allegedly made by Col. Khan to Mr. Farooq on 10 or 11 April 2008, Respondent relies on the witness testimony of Col. Khan, Mr. Farooq and Mr. Aziz as well as on an entry in Mr. Aziz's diary that allegedly records the making of this payment.

1216. Col. Khan testified in his first witness statement that he "*began paying Mr Farooq to get things done*" following a discussion he had had with Mr. Flores "*in 2006 or 2007*" in which Mr. Flores had told him that he "*needed to manage things on* [his] *own without implicating TCC*" and that he was being paid "*handsomely*." Col. Khan stated that Mr.

Farooq used the money he paid to him "*to pay off other department officials, particularly the Board of Revenue (BOR) from whom* [TCC was] *seeking different leases and concessions (in contradiction to Balochistan rules and legislation).*"[1575] While making particular reference to cash payments made to Mr. Mandokhail in connection with the Surface Rights,[1576] Col. Khan did not mention any individual payments or specific amounts that he paid to Mr. Farooq.

1217. In his second witness statement, Col. Khan testified in considerably more detail about the Surface Rights Lease and stated in that context that he "*remember*[ed] *making a large payment (PAK Rs. 800,000) to Mr Farooq in his office in April 2008 after the Surface Rights Lease had been obtained. This was to thank him for his efforts and to cover his expenses incurred in connection with the surface rights (such as bribes he himself had paid to get things done).*"[1577]

1218. During the hearing, Col. Khan was pointed to the statement he had made under oath before the magistrate on 4 February 2016.[1578] He confirmed that he had not withheld any information at that time but had told the magistrate "[e]*verything that* [he] *remembered*"; he further confirmed that the statement did not make any reference to a payment being made in connection with surface rights.[1579] Col. Khan also confirmed that the payment of PAK 800,000 he was referring to in his second witness statement was "*the single largest payment that* [he had] *claimed in any of* [his] *Witness Statements*" but that this specific payment was not mentioned in any of his three previous statements, *i.e.*, his first witness statement, the Section 161 statement before the NAB and the Section 164 statement before the magistrate. Col. Khan made reference to his Section 161 statement and recalled to have stated there that he had paid "*more than 2 million Pakistani rupees and bribes to all these people*" but acknowledged that he had not mentioned any specific payment made to Mr. Farooq. [1580]

1219. In response to the question at what point the had remembered that he had paid precisely PAK Rs. 800,000 to Mr. Farooq, Col. Khan testified that he "*deliberately started looking for things*" and that "*slowly, slowly, slowly, it came to* [him]" and he "*checked up as to*

[1575] Khan I, ¶¶ 13-14.
[1576] *Cf.* Khan I, ¶¶ 15, 33.
[1577] Khan II, ¶ 42.
[1578] **Exhibit RE-468**.
[1579] Transcript (Day 3), p. 854 line 18 to p. 855 line 22.
[1580] Transcript (Day 3), p. 868 line 14 to p. 871 line 18. It appears from the Section 161 statement that Col. Khan in fact referred to payments made to Mr. Mandokhail in stating that "[w]*hile I don't remember exact amounts and occasions and no record is held with me, I can confirm that somewhere around Rs. 2 Millions were paid by me to him as bribe through cash*." **Exhibit RE-456**, p. 3. During the hearing, Col. Khan stated, however, that "*what* [he] *meant was here that 2 million rupees were the money that* [he] *paid to these bureaucrats*," *i.e.*, including to Mr. Farooq. Transcript (Day 3), p. 884 line 12 to p. 886 line 20.

how much [he] *had paid*." He confirmed that he did not have any records of the payments to Mr. Farooq and Mr. Mandokhail but was referring to a search of his own memory and "*small chits*" that he had. Col. Khan further stated that he also reviewed his own bank statements and "*from all the information* [he] *gathered … made a rough estimate as to how much money* [he] *had spent*."[1581]

1220. When pointed to his written testimony that he had made the payment to Mr. Farooq in April 2008 "*after the Surface Rights Lease had been obtained*" and the fact that the first order was issued only on 22 May 2008, Col. Khan answered that "*these dates will confuse you. But we had one subject, and the subject was Surface Rights. And for the Surface Rights, I had paid this money to Mr. Farooq.*" He added that "*the Surface Rights … were not done in one goal. It was … in bits and pieces, and we had problems … in many places. So, it took a long time for the Surface Righs to be finally approved*."[1582] Col. Khan confirmed his testimony that he had made the payment to Mr. Farooq to correct the erroneous order providing for 147 square kilometers but added that "[i]*t was not only correction. There was so many other things. Mr. Farooq had told me that he had to pay so many people in the process. … He was naming so many people. And I said … I fully understand this was very, very important. It has to be done. And it has to be corrected all for … this lump-sum money was paid to Mr. Farooq by me*."[1583] Col. Khan maintained that this was "*all deliberate by Mr. Farooq*" and when again pointed to the timing of the alleged payment and the order containing the error that needed to be corrected, considered that "[t]*here is no need for the counsel to get involved in the dates. It is one subject, Surface Rights. The Surface Rights order … has just come out. And when it's come out, it has come out wrong. And for that---my CEO was not very happy. He said:* 'It has to be corrected.'"[1584]

1221. Mr. Farooq testified in his first witness statement that he helped Claimant to obtain, *inter alia*, "[t]*he grant of a surface rights lease in violation of the Balochistan land lease policy and laid down procedures*" and specifically recalled having made payments and gifts to Mr. Mandokhail and Asmatullah in this context.[1585] He further stated:

> "*All payments made to me by TCC were made by Col. Khan or Bari Dad. I received numerous amounts of money from them, ranging from Rs. 200,000 to Rs. 300,000 to larger payments of Rs. 600,000 to Rs. 800,000. These payments were always received in cash at my office at the BDA. I would often hand this money over to my personal secretary, to redistribute to other GOB officials for their assistance with TCC related tasks. Mr Aziz knew that I*

[1581] Transcript (Day 3), p. 887 line 16 to p. 889 line 21.
[1582] Transcript (Day 3), p. 872 lines 18-21 and p. 873 lines 14-18.
[1583] Transcript (Day 3), p. 876 line 9 to p. 877 line 20.
[1584] Transcript (Day 3), p. 880 line 3 to p. 882 line 2
[1585] Farooq I, ¶¶ 16, 18.

> *received illegal payments from TCC and he saw me receive such payments, and I was quite open with him about the fact that TCC were bribing me. I am aware that Mr Aziz kept a record of payments going and out.*"[1586]

1222. In his second witness statement, Mr. Farooq stated that when Mr. Nawab Aslam Raisani became Chief Minister in April 2008, he knew that he would be removed from his post as Chairman of the BDA, as was in fact the case on 16 April 2008. Mr. Farooq further testified:

> "*I remember asking Col. Sher Khan for money shortly before I was replaced, including for the work I was doing on surface rights, as I wanted to get as much money as I could before CM Raisani removed me from office, and I told him that I needed money to pay other people*."[1587]

1223. In a footnote to this statement, Mr. Farooq further noted that the two payments of PAK Rs. 800,000 and 600,000 referred to by Mr. Aziz in his witness statement corresponded to the payments he had mentioned in his first witness statement and added: "*I think they did relate to the surface rights issue.*"[1588]

1224. Mr. Aziz testified in his witness statement that he had personally witnessed two payments made to Mr. Farooq by representatives of Claimant in April 2008, both of which he recorded in his diary.[1589] As to the first payment allegedly made by Col Khan, he stated:

> "*The first was made by Col. Sher Khan on 10 or 11 April 2008. On that day, I recall Col. Sher Khan coming to my office and asking whether Mr Farooq was available. I said he was, and Col. Sher Khan went into his office. A few minutes later, Mr Farooq called me and asked me to step into his office. Col. Sher Khan was still sitting in there. Mr Farooq handed me PAK Rs 800,000 and said this had been given to him by Col. Sher Khan on behalf of TCC. The money was in a white envelope with TCC printed on the front*."[1590]

1225. According to Mr. Aziz, he recorded this payment in his diary, which was appended to his witness statement.[1591] In fact, as clarified by Mr. Aziz during the hearing,[1592] the alleged payment from Col Khan is not recorded in his bound diary but on a loose sheet of paper bearing the title "*RECEIPT*," in which the fifth entry records a cash payment from Col. Sher Khan of PAK Rs. 800,000. The entries on this paper, which was also appended to Mr. Aziz's witness statement, bear no date; the entries on the opposite page bearing the

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[1586] Farooq I, ¶ 20. *See also* ¶ 28.
[1587] Farooq II, ¶ 48.
[1588] Farooq II, ¶ 48 (note 51).
[1589] Aziz, ¶ 15.
[1590] Aziz, ¶ 16.
[1591] Aziz, ¶ 19, *referring to* **Exhibit AA-1**.
[1592] Transcript (Day 7), p. 1608 line 11 and p. 1649 line 12-13 to p. 2650 line 20.

title "*DISTRIBUTION*" date from November and December 2009 as well as January 2010.[1593]

1226. During the hearing, Mr. Aziz was confronted with his affidavit of 3 June 2015, which recorded his statement before the Group of Experts in which he also referred to a payment of "*Rs. 8 lacs (Rs. 8,00,000)*" received by Mr. Farooq from Col. Khan with the relevant extract of his diary attached as Annexure A.[1594] When pointed to the fact that Annexure A was the bound diary that did not record any payment from Col. Khan, Mr. Aziz confirmed that the alleged payment from Col. Khan was recorded "*on a separate sheet*" that he had shown and provided to the Group of Experts and, while not being able to find it within the annexures, maintained that this sheet had been attached when he signed the affidavit.[1595] When asked about further details provided in his witness statement such as the date and circumstances of the payment that were not recorded in his affidavit, Mr. Aziz answered that he "*did tell them the details*" but that "[t]*hey didn't mention it*."[1596]

1227. Mr. Aziz confirmed that the dates recorded on the "*DISTRIBUTION*" page of the loose sheet of paper were all in the range from 5 November 2009 to 20 January 2010 but maintained with regard to the entries on the "*RECEIPT*" page that, albeit undated, "[a]*ll these payments are 10th and 11th April* [2008]*, those two days*." Mr. Aziz added that he remembered this "*because after that Mr. Farooq was suspended, and he told me write this on a loose paper, and to write nothing in the diary from now onwards.*"[1597] He maintained that the payment "*was made in those days*" and that he was told to keep the money with him but that "*the date* [he] *forgot to write it at the time*."[1598]

1228. Based on the evidence above, the Tribunal does not consider it established that Col. Khan made a payment of PAK Rs. 800,000 to Mr. Farooq in connection with the Surface Rights Lease. First of all, the Tribunal notes that neither Col. Khan nor Mr. Farooq referred to this specific payment in their first witness statements even though particularly Col. Khan recognized that this was the single largest payment he claims to have made on Claimant's behalf. The Tribunal also does not consider it plausible that while Col. Khan stated before the NAB that he did not remember any specific amounts or occasions, he came to realize at some point before his second witness statement, without any written records that would have been provided to the Tribunal, that he made this specific payment to Mr. Farooq.

1229. In addition, the Tribunal considers that Col. Khan's testimony regarding the timing of the payment also raises doubts when considering the purpose for which it was allegedly

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[1593] **Exhibit AA-2**.
[1594] **Exhibit RE-441**, ¶ 5.
[1595] Transcript (Day 7), pp. 1630-1635.
[1596] Transcript (Day 7), p. 1646 line 1 to p. 1648 line 9.
[1597] Transcript (Day 7), pp. 1653-1658.
[1598] Transcript (Day 7), p. 1659 lines 14-22.

made. Apart from the fact that Col. Khan initially testified that he made the payment after the Surface Rights Lease had been obtained to thank Mr. Farooq for his efforts, Col. Khan repeatedly stated throughout his cross-examination that the dominant purpose of the payment was to have the erroneous reference to 147 square kilometers in the first order corrected. While it appears that Col. Khan took the stance that that this error was known before the order was even issued because this was all part of a deliberate plan made by Mr. Farooq, the Tribunal already found above that the existence of a plan to first obtain an erroneous order and then have it corrected has not been established.

1230. As for Mr. Aziz's testimony, the Tribunal notes that his oral testimony is closely related to the entry on the loose sheet of paper that he allegedly made of the payment. In this regard, the Tribunal considers it noteworthy that the relevant entry, as well as the other entries on the "*RECEIPT*" page, are all undated, with the entries of the opposite page bearing dates from one and a half years later. The Tribunal is also not convinced by Mr. Aziz's explanation that he was told to make this entry on a loose sheet of paper and to not record anything further for the time period until November 2009 because Mr. Farooq was suspended from the office a few days later. If Mr. Aziz's recollection that the payment was made on 10 or 11 April 2008 were correct, the payment would have been made and recorded before Mr. Farooq was suspended on 16 April 2008. On his own testimony, Mr. Aziz further continued to make entries into his bound diary until 14 April 2008, as will be discussed in the context of the alleged payment made by Mr. Dad below. The Tribunal also agrees with Claimant that it does not appear plausible to the Tribunal that Mr. Farooq asked Mr. Aziz to hold on to the amount of money recorded on the "*RECEIPT*" page, *i.e.*, a total of PAK Rs. 3,430,000, for one and a half years before distributing it to the recipients recorded on the "*DISTRIBUTION*" page.[1599] Such distributions would then also be entirely unrelated to the surface rights, which contradicts Col. Khan's testimony that Mr. Farooq was naming many people to him who had requested to be paid in connection with the surface rights. Finally, it is undisputed that Mr. Farooq was suspended from the office only until December 2008, which does not accord with Mr. Aziz's testimony that the absence of any further entries until November 2009 is explained by Mr. Farooq's suspension. By contrast, it has to be noted that, as pointed out by Claimant and confirmed by Mr. Farooq, he retired from his post as Chairman of the BDA in 2009 and had already left Pakistan and moved to Saudi Arabia by the time the dated entries on the "*DISTRIBUTION*" page were made.[1600]

1231. In light of the inconsistencies identified above, the Tribunal considers that the undated entry on the loose sheet of paper cannot establish Respondent's allegation that a payment was made by Col. Khan to Mr. Farooq on 10 or 11 April 2008. This conclusion is

[1599] *Cf.* Claimant's LaPorte Response, ¶ 16.
[1600] *Cf.* Claimant's LaPorte Response, ¶ 16; Farooq II, ¶ 8.

reinforced by the unexplained absence of the sheet of paper from the annexures to the affidavit recording Mr. Aziz's testimony before the Group of Experts in early June 2015.

1232. As to the entry itself, the Tribunal notes that there has been considerable debate between the Parties, and forensic experts were consulted to examine and evaluate the authenticity of the relevant entries both in the bound diary and on the loose sheet of paper. Respondent's forensic expert Mr. Gerald M. LaPorte examined, *inter alia*, the sheet of paper recording the alleged payment by Col. Khan to Farooq, which he labelled "**Q2B**".[1601] With regard to this document, Mr. LaPorte stated in his Conclusions:

> "*The forensic examination of Q2B did not reveal any evidence of alteration, insertion, obliteration, or other irregularities that may be present when documents are altered or fraudulently produced. The general condition of the paper is consistent with a piece of paper that is at least seven years old – and not something that was created in the last 1-2 years. The questioned entry reflecting a payment from Col. Sher Khan in the amount of 800,000 is positioned in the middle of several other entries and there are no scientific findings from the examinations in this case to suggest that the entry was inserted at a much later date. The results from the microscopic and VSC 6000 examination indicate the presence of a single black non-ballpoint ink (e.g., fiber tip type pen) that was used for all of the entries on the same side of the page. An additional blue ballpoint ink was used in the margin.*"[1602]

1233. Based on his examination, Mr. LaPorte concluded that "*there is no evidence to indicate that the Aziz Journal or Q2B, including the three questioned entries, were created at any other time than on or around their purported dates.*"[1603] Respondent concludes from Mr. LaPorte's findings on Q2B and the bound diary that "*there is no basis to question the authenticity of the Aziz Diaries.*"[1604]

1234. Claimant's expert Mr. Robert Radley, who for reasons discussed in detail above, did not examine the bound diary or the loose sheet of paper himself but commented on the examination by Mr. LaPorte, stated that "*when Mr LaPorte's evidence is assessed in an objective fashion, it can be seen that there is no demonstrable evidence available to show whether the documents in question are genuinely dated or whether they have been created at a later time.*"[1605] As for the conclusion drawn by Mr. LaPorte, Mr. Radley stated:

> "*In my opinion, from the work that Mr LaPorte has conducted, it is **equally** accurate to conclude that there is no evidence that the entries **were** created on or around their purported dates. The fact is, in my opinion, that either of these contrasting statements is equally likely. Consequently, overall, the*

[1601] Appendix 4 to LaPorte Report; **Exhibit RE-537**.
[1602] LaPorte Report, ¶ 59.
[1603] La Porte Report, ¶ 24.
[1604] Respondent's LaPorte Submission, ¶ 32.
[1605] Radley Report, ¶ 2.

> *evidence derived from Mr LaPorte's examination has to be regarded as inconclusive*."[1606]

1235. Specifically with regard to Mr. LaPorte's examination of Q2B, Mr. Radley opined that "[t]*here is no evidence whatsoever to shed light on the crucial point of when the writing of the entire* 'Receipt' *portion of Q2B was written*." While identifying certain points that, in Mr. Radley's view, Mr. LaPorte failed to address in his report, Mr. Radley concluded that "[t]*he truth of the matter, with respect to this document, could only be established by dating the ink but as the ink is from a fibre tip pen, there is no scientific technique available which will facilitate this and consequently, clearly identify the documents as being genuine or fraudulently produced*."[1607] Claimant further contends that Mr. LaPorte's findings "*are consistent with fabrication*," arguing that he considered it possible that only one pen was used, *i.e.*, "*precisely what one would expect if the entire page was written fraudulently*," but also that more than one ink was used, which Claimant considers "*consistent with the theory that AA-2 was altered to add the Col. Khan entry using a different ink*."[1608]

1236. At this point, the Tribunal recalls that it does not need to make a positive finding of fabrication in relation to the questioned entries or Mr. Aziz's diaries as a whole. For the reasons set out in detail in the context of the applicable standard and burden of proof above, the Tribunal cannot draw an inference from the absence of evidence of forgery that the relevant entries must be authentic. Therefore, and while the Tribunal does not agree with Claimant's submission that Mr. LaPorte's findings are consistent with or even indicate that the sheet of paper recording the alleged payment made by Col. Khan to Mr. Farooq was prepared or altered in a fraudulent manner, it cannot be inferred from the absence of such indication that it has positive evidentiary value supporting Respondent's allegation. In particular, as has become clear from the Parties' experts' reports, Mr. LaPorte's examination established neither that the entries were created on or around their purported dates nor that that they were created on any other dates. In addition, and by contrast to the entries in the bound diary that will be discussed further below, the entries on Q2B were written using a fibre tip pen, as a result of which an ink dating analysis would not have been able to yield a conclusive result that the page or at least the relevant entry was written within the last two years.

1237. In light of the Tribunal's findings regarding the witness evidence presented by Respondent, in particular the testimony of Mr. Aziz as regards the circumstances in which the loose sheet of paper was allegedly created, the Tribunal considers that the evidentiary value of the undated entry is very limited and, in any event, does not suffice to consider

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[1606] Radley Report, ¶ 4 (emphasis in original).
[1607] Radley Report, ¶¶ 48-50.
[1608] Claimant's LaPorte Response, ¶ 35.

it established that a payment was made by Col. Khan to Mr. Farooq in connection with the Surface Rights Lease.

1238. Consequently, the Tribunal does not have to decide whether such payment would have been attributable to Claimant even though Col. Khan claims to have made improper payments out of his own pocket and to have been asked to manage things on his own "*without implicating TCC*."[1609] In this regard, it suffices to note that in his written testimony, Col. Khan stated that he was reimbursed by Claimant for this and other improper payments via salary increases and regular bonuses, in particular the bonus of close to PAK Rs. 1 million that he was granted by Ms. Boggs in December 2008 after having informed her of the developments regarding the Surface Rights Lease.[1610] During the hearing, however, Col. Khan stated that he "*did not talk to Cassie Boggs*" about the "*Surface Right thing*."[1611] Respondent also "*accepts that the evidence does not indicate that Ms Boggs, who requested the correction in September 2008, was involved in the Surface Rights scheme*."[1612]

(b) The Alleged Payment of PAK Rs. 600,000 by Mr. Dad to Mr. Farooq

1239. Respondent's second allegation concerns an alleged payment of PAK Rs. 600,000 by Mr. Bari Dad to Mr. Farooq on 14 April 2008. In support of this allegation, Respondent relies on the witness evidence of Mr. Dad, Col. Khan, Mr. Farooq and Mr. Aziz as well as on a further entry in Mr. Aziz's diary that allegedly records the making of this payment.

1240. Mr. Dad testified in his first witness statement that "[b]*eginning in early 2007, Col. Sher Khan asked* [him] *to deliver certain packages*" to, *inter alia*, Mr. Farooq, which he received personally from Col. Khan. Mr. Dad stated that he remembered delivering "*three or four of these packages directly to Mr Farooq on the instructions of Col. Sher Khan*," the first one "*in early 2007*" and the final one "*in early 2008*." As regards the latter, Mr. Dad testified that he went to Mr. Farooq's office at the BDA and that "*Mr Farooq called in Abdul Aziz – his personal secretary – and handed him the package* [Mr. Dad] *had just delivered and told him to note it down*."[1613]

1241. Mr. Dad added that Mr. Farooq did not open the packages he delivered in front of him, but he "*strongly suspected that they contained bundles of Rupees, and* [that his] *deliveries were the means of TCC making cash payments to Mr Farooq*." Mr. Dad stated that "[e]*ach*

[1609] *Cf.* Khan I, ¶ 13; Khan II, ¶¶ 16-17.
[1610] Khan II, ¶¶ 17 and 42.
[1611] Transcript (Day 3), p. 902 lines 9-13.
[1612] Respondent's Post-Hearing Brief, ¶ 146.
[1613] Dad I, ¶¶ 9-10.

of the envelopes Col. Sher Khan gave [him] *had a number on the front (for example, 3, 4, and 6) and the contents were approximately the size of a corresponding bundle of Rupees for 3, 4 and 6 lac (PAK Rs. 100,000).*" In response to his question what he was delivering and why, Col. Khan told him "*not to ask more questions*."[1614]

1242. During the hearing, Mr. Dad confirmed that the final delivery he made to Mr. Farooq was in March or April 2008.[1615] When asked how he remembered the timing of his deliveries to Mr. Farooq, Mr. Dad confirmed that he "*did not write any dates on any calendar*" but stated that "*these things were not that* [he] *could forget, and these were the special packages that* [Col. Khan] *had given to* [him]" and that he "*was a bit worried about them later on*."[1616] Mr. Dad further confirmed that when he asked Col. Khan about the packages, he was told not to ask questions and just do what he was asked to do. At the same time, Mr. Dad testified that Col. Khan also told him that he was the "*most trusted and trustworthy person*" in Quetta, which is why there was "*no reason for* [him] *to forget these*."[1617]

1243. In response to the question whether he rememberd any other significant events in his work life during 2007, Mr. Dad stated that he remembered "*a lot of things*" but could not identify any specific event. He maintained that he remembered the packages he delivered on behalf of Col. Khan "*very well*" but confirmed that he did not know why or for which purpose they were delivered.[1618]

1244. During the hearing, Mr. Dad further testified: "*I definitely knew that there used to be cash money in that, and through me, this cash money was being delivered to government officials.*" When confronted with his written testimony that Col. Khan had not told him what was in the package, he stated: "*He did not tell me verbally, but I felt it myself, and I judged myself that there was money in it*."[1619] Mr. Dad added that he judged this from the different sizes of the packages, which in his view corresponded to the numbers on the "*brown colored envelopes*" indicating how many "*lacs*" each package contained.[1620] He further confirmed that none of the envelopes he delivered in 2007 or 2008 was opened in front of him and that he never saw their contents but only judged that they must have contained money "[b]*ecause of the size of them*."[1621]

[1614] Dad I, ¶ 11.
[1615] Transcript (Day 4), p. 1201 lines 2-14.
[1616] Transcript (Day 4), p. 1203 lines 8-16.
[1617] Transcript (Day 4), p. 1203 line 17 to p. 1204 line 11.
[1618] Transcript (Day 4), p. 1204 line 12 to p. 1206 line 1.
[1619] Transcript (Day 4), p. 1206 line 18 to p. 1208 line 3.
[1620] Transcript (Day 4), p. 1208 line 7 to p. 1209 line 19.
[1621] Transcript (Day 4), p. 1213 line 20 to p. 1214 line 9.

1245. Col. Khan confirmed in his first witness statement that he "*used Bari Dad to make some of these payments* [to Mr. Farooq] *as, where possible,* [he] *didn't like to personally hand over bribes.*"[1622] He did not make reference to any specific payments that he allegedly made via Mr. Dad. In his second witness statement, Col. Khan referred to a payment that he claimed to have personally made to Mr. Farooq,[1623] but did not mention any payment made through Mr. Dad.

1246. Mr. Farooq testified in his first witness statement that he received "*numerous amounts of money*" from Col. Khan and Mr. Dad, "*ranging from Rs. 200,000 to Rs. 300,000 to larger payments of Rs. 600,000 to Rs. 800,000,*" which he "*always received in cash at* [his] *office at the BDA.*" Mr. Farooq added that he often handed these amounts to Mr. Aziz "*to redistribute to other GOB officials for their assistance with TCC related tasks.*" Mr. Farooq further stated that he was "*aware that Mr Aziz kept a record payments going in and out.*"[1624]

1247. In his second witness statement, Mr. Farooq testified that he remembered asking Col. Khan for money shortly before he was suspended from the office on 16 April 2008, but did not specifically refer to Mr. Dad or a payment delivered by him. In a footnote, he made reference to two payments referred to by Mr. Aziz, including the relevant payment of PAK Rs. 600,000 by Mr. Dad, and confirmed that he was referring to these payments in his first witness statement. He added: "*I think they did relate to the surface rights issue.*"[1625]

1248. Mr. Aziz testified that he "*personally witnessed two particular payments made to Mr Farooq by representatives of TCC,*" both of which were made in April 2008 and recorded in his diary.[1626] As to the second payment, he stated:

> "*The second payment was made to Mr Farooq by Bari Daad of TCC on 14 April* [2008][1627]*. I was in my office and Mr Daad came to see me. He asked for Mr Farooq but I told him he was in a meeting. Mr Daad waited for him to finish. Roughly 15 minutes later, Mr Farooq finished his meeting and called Mr Daad and I into his office. Mr Bari Daad then gave Mr Farooq PAK Rs 600,000. This money was also in a white envelope with TCC printed on the front. Mr Farooq gave me the envelope.*"[1628]

[1622] Khan I, ¶ 14.
[1623] *Cf.* Khan II, ¶ 42.
[1624] Farooq I, ¶ 20.
[1625] Farooq II, ¶ 48 (with note 51).
[1626] Aziz, ¶ 15.
[1627] In his witness statement, it is stated that the payment was made on 14 April 2014. During the hearing, Mr. Aziz corrected that it should read 14 April 2008. Transcript (Day 7), p. 1608 lines 9-10. There was no dispute with regard to this correction.
[1628] Aziz, ¶ 17.

1249. During the hearing, Mr. Aziz was pointed to his affidavit of 3 June 2015, recording his testimony before the Group of Experts, in which reference was made to a payment of PAK Rs. 600,000 from Mr. Dad but no further detail was given.[1629] Mr. Aziz stated that he "*had told them the detail, the manner in which the payment was made*" but could not explain why only the amount was recorded in the affidavit.[1630]

1250. Mr. Aziz further confirmed that he had recorded the payment he was testifying about in his diary. The relevant entry bears the date of 14 April 2008 and records a payment of PAK Rs. 600,000 in "*Cash received from Bari Dad of TCC.*"[1631] When pointed to the fact that, except for this entry, he had not recorded the affiliation of any payor, Mr. Aziz explained that the other payors on this page were "*all contractors, except for Bari Dad*" and confirmed that his intention had been to ensure that Mr. Dad's affiliation was clear to any reader.[1632]

1251. Mr. Aziz further stated that, contrary to the other pages of the diary, the page recording Mr. Dad's payment (as well as a second page recording a payment to Mr. Asmatullah, which will be discussed further below) did not contain any cross-outs because he had first written the entries on rough paper and then entered them into the diary. Mr. Aziz also confirmed that there was no balance as on other pages of the diary and explained that this was because "*after this, Mr. Farooq was suspended. So, I gave him this account statement, and whatever money was left, I gave that to him as well, so the matter ended.*"[1633] Mr. Aziz testified that he showed the diary to Mr. Farooq at the time but did not have the time to balance the figures but just gave to him "*whatever money is left.*"[1634]

1252. Based on the witness evidence presented by Respondent, the Tribunal does not consider it established that Mr. Dad delivered a payment of PAK Rs. 600,000 on behalf of Col. Khan to Mr. Farooq. Mr. Dad confirmed that he had never seen the contents of any of the packages that he allegedly delivered for Col. Khan but simply judged for himself that the packages contained bundles of Rupees. In addition, the Tribunal is not convinced by his explanation as to how he remembered specifically when he delivered the packages and in particular the final one he claimed to have made "*in early 2008.*" Col. Khan, who testified in detail about a payment he claims to have made himself to Mr. Farooq on 10 or 11 April 2008, did not mention any additional payment made for the same purposes via Mr. Dad only a few days later. Mr. Farooq himself appeared not to remember any specific

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[1629] **Exhibit RE-441**.
[1630] Transcript (Day 7), p. 1626 lines 12-21 and p. 1661 line 20 to p. 1662 line 21.
[1631] Transcript (Day 7), p. 1662 line 22 to p. 1663 line 13, *reading from* **Exhibit AA-1**, p. 12.
[1632] Transcript (Day 7), p. 1663 line 14 to p. 1665 line 18.
[1633] Transcript (Day 7), p. 1668 line 11 to p. 1669 line 18.
[1634] Transcript (Day 7), p. 1671 lines 1-12.

payments and only vaguely confirmed Mr. Aziz's testimony regarding the payment from Mr. Dad, stating that he thought that it related to the Surface Rights Lease.

1253. Finally, Mr. Aziz could not explain why the details about the payment recorded in his witness statement that he allegedly provided to the Group of Experts were not recorded in his affidavit. In addition, the Tribunal notes that while both Mr. Dad and Mr. Aziz claim to remember remarkable details about an event that occurred several years ago, these details do not fully accord with one another. While Mr. Dad testified during the hearing that the packages he delivered were in regular brown, legal size envelopes, Mr. Aziz stated in his witness statement that the money was contained in a white envelope with TCC printed on the front. Mr. Dad further stated that Mr. Aziz was called into the office after he had delivered the package to Mr. Farooq; Mr. Aziz, on the other hand, stated that they were called in together and that Mr. Dad gave the envelope to Mr. Farooq in his presence.

1254. As for Mr. Aziz's testimony regarding the entry into his diary, the Tribunal again considers that his evidence is closely related to the debate between the Parties and the forensic experts regarding the authenticity of the relevant entry into the bound diary. Respondent's expert Mr. LaPorte, who also examined the bound diary to which he referred as the "**Aziz Journal**," concluded with regard to the Aziz Journal:

> "*Based on my professional experience, established scientific principles, and full consideration of the findings from the forensic examination, there is no evidence to indicate that the Aziz Journal or the two questioned entries were created at any time other than on or around their purported dates. I did not find any inconsistencies in the Aziz Journal to indicate there was any evidence of alteration, insertion, obliteration, or other irregularities that may be present when documents are altered or fraudulently produced. Moreover, there is no evidence to suggest that the questioned entries were created at a much later date than April 2008.*"[1635]

1255. Mr. LaPorte reached this conclusion despite detecting certain peculiarities that the Tribunal considers noteworthy in this context. First, Mr. LaPorte's examination showed that at least two different ballpoint inks were used to write the entries on page 12 recording the payment made by Mr. Dad and, remarkably, that the questioned entry was the first one on the page for which the second type of ink had been used. This second type of ink was further the same ink used for the entries on page 14, including the second questioned entry in the diary regarding a payment made to Mr. Asmatullah, which will be discussed further below.[1636] Mr. LaPorte nevertheless concluded that "*there is no*

[1635] LaPorte Report, ¶ 58.
[1636] LaPorte Report, ¶ 40 with Table 2.

evidence to indicate that the questioned entry was placed in the Aziz Journal on any date other than 14 April 2008."[1637]

1256. Second, Mr. LaPorte's examination revealed that the diary originally contained a page 13 between page 12 recording the payment made by Mr. Dad and page 14 recording the payment made to Mr. Asmatullah but that page 13 had been removed at some point in time.[1638] Moreover, Mr. LaPorte reported that an ESDA examination of page 14 revealed that it "*did bear portions of written entries that did not originate from any of the previous pages*" and concluded that "*it appear*[ed] *that the* 'unsourced' *entries originated from the page 13 that was removed.*" Mr. LaPorte further noted that some of these "*unsourced*" entries were consistent with the entries on page 14 and assumed that the entries were originally written on page 13, which "*was then removed, and the writer re-wrote the entries onto page 14*."[1639] Mr. LaPorte noted that "*there can be various reasons for certain actions and habits when people create diaries or record a series of written transactions, including to make corrections*," and concluded that "*it would be mere speculation for* [him] *to offer a reasons for why and when page 13 was removed*."[1640]

1257. As noted above, Respondent concludes from Mr. LaPorte's findings that "*there is no basis to question the authenticity of the Aziz Diaries*" and that the Tribunal "*should place due weight on them when considering the merits of Pakistan's case of corruption.*"[1641]

1258. As also noted above, Claimant's expert Mr. Radley questioned Mr. LaPorte's conclusion, arguing that it was "***equally** accurate to conclude that there is no evidence that the entries **were** created on or around their purported dates*" and that Mr. LaPorte's examination thus had resulted in evidence that had to be considered inconclusive.[1642] In respect of the entries into the Aziz Journal, Mr. Radley further opined that Mr. LaPorte could have performed additional examinations that "*may have shed light on the way in which these documents have been created*."[1643]

1259. Specifically with regard to the missing page 13, Mr. Radley noted that Mr. LaPorte had presented "*no facts one way or the other about the reasons why the page was removed and* [did] *not mention having taken any steps to investigate that question*." Mr. Radley stated that, in his view, the removal "*could potentially be highly significant*" and, in his experience, raised a "*red flag*" warranting "*detailed examination and consideration*." In particular, Mr. Radley raised the question why the page had been removed as opposed to

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[1637] LaPorte Report, ¶ 43.
[1638] LaPorte Report, ¶ 37 with Table 1.
[1639] LaPorte Report, ¶ 48.
[1640] LaPorte Report, ¶ 50.
[1641] Respondent's LaPorte Submission, ¶¶ 32-33.
[1642] Radley Report, ¶ 4 (emphasis in original).
[1643] Radley Report, ¶ 5.

crossing out and re-writing entries as it had been done on other pages of the diary. He added that the impressions from this torn out page on page 14 should have been scrutinized carefully as they might have indicated the reason of why the page was removed.[1644] In this regard, Mr. Radley considered the two ESDA runs performed by Mr. LaPorte under the same conditions "*far from exhaustive testing*." He also noted that from the photographs presented by Mr. LaPorte of the impressions he found on page 14, he, Mr. Radley, was not able to decipher any significant details of the impressions, which Mr. LaPorte had not described in his report.[1645]

1260. As for the use of two different inks on page 12 and the use of the same ink for both questioned entries on page 12 and page 14, respectively, Mr. Radley noted that he had "*no way of assessing the truth of the matter*," but considered that the use of the same ink "*for a series of entries with different dates, including all of the questioned entries which appear on two different pages could also suggest that those entries were created at a later point in time and therefore not on the purported date*."[1646]

1261. According to Claimant, the missing page 13 "*suggests a series of fabrication hypotheses*" and the use of two different inks on pages 12 and 14 "*is consistent with the possibility that the Dad entry and all of the entries that follow it were not written on their purported dates.*" In Claimant's view, Mr. LaPorte's evidence thus "*actually impeaches the relevant pages of the Aziz Diaries and would support a decision that they be disregarded as evidence*."[1647]

1262. At this point, the Tribunal again recalls that it does not need to make a positive finding of fabrication and that the Tribunal cannot draw an inference from the absence of evidence of forgery that the relevant entries must be authentic. In the Tribunal's view, the peculiarities detected by Mr. LaPorte are remarkable, in particular that: (i) page 13 was removed between the two pages 12 and 14 containing the relevant entries and some of the entries that now also appear on page 14 to have been initially written on page 13; and (ii) two different inks were used on page 12, with the relevant entry recording the alleged payment by Mr. Dad being the first entry for which a different ink was used, and the second ink was also used for the entries on page 14, including the second relevant entry, even though a page was removed in between and some of the entries bear a different date.

1263. While the Tribunal is aware that Mr. Radley has raised various other criticisms of Mr. LaPorte's report, the Tribunal considers the above sufficient to conclude that the evidentiary value of the Aziz Journal is again very limited. This conclusion is reinforced by the fact that, as discussed above, the entries into the Aziz Journal were made with a

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[1644] Radley Report, ¶¶ 39-41.
[1645] Radley Report, ¶¶ 74, 79.
[1646] Radley Report, ¶¶ 45-47.
[1647] Claimant's LaPorte Response, ¶¶ 32-33, 36.

type of ink on which an ink-dating analysis could have been performed but was ultimately prevented by the NAB even though: (i) Mr. LaPorte was originally retained by Respondent for this precise purpose; (i) an ink-dating analysis could have yielded a positive result of fabrication, *i.e.*, that the entries were created in 2015 rather than in 2008.

1264. The Tribunal does not wish to go as far as making a finding that the the entry on page 12 of the Aziz Journal of an alleged cash payment of PAK Rs. 600,000 made by Mr. Dad to Mr. Farooq on 14 April 2008 was fabricated. However, in the circumstances, the entry also cannot serve to establish Respondent's allegation that this payment was actually made. Taking into account both the inconsistencies identified in the witness evidence and the peculiarities detected in connection with the relevant entry in the Aziz Journal, the Tribunal concludes that Respondent has failed to establish that the alleged act of corruption occurred.

(c) The Alleged Payment of PAK Rs. 200,000 by Mr. Aziz to Mr. Asmatullah

1265. Respondent's third allegation concerns an alleged payment of PAK Rs. 200,000 by Mr. Aziz on behalf of Mr. Farooq to Mr. Asmatullah on 14 April 2008 in return for his assistance with obtaining the surface rights for Claimant and for not objecting to Farooq's disregard for the Balochistan mining regime. This payment was allegedly made out of the amount received by Mr. Farooq from Mr. Dad on the same day. The Tribunal concluded in the previous section that Respondent has failed to establish that this payment by Mr. Dad was actually made. While this may indicate a similar finding with regard to the alleged passing on of part of the paid amount to Mr. Asmatullah, the Tribunal will nevertheless consider the evidence presented by Respondent in this regard, *i.e.*, the witness evidence of Mr. Farooq, Col. Khan, Mr. Asmatullah and Mr. Aziz as well as the entry recording the alleged payment in the diary kept by Mr. Aziz. As for the latter, the Tribunal will again take into account the findings it has made regarding the evidentiary value of the Aziz Journal above.

1266. Mr. Farooq testified in his first witness statement that he "*specifically recall*[ed] *paying money on behalf of TCC to Mr Mandokhail and Sheikh Asmatullah at the Board of Revenue to secure approval of TCC's surface rights lease*."[1648] In his second witness statement, Mr. Farooq added that he contacted Mr. Asmatullah after Col. Khan had told him that TCC needed surface rights over the entire area rather than the 147 square kilometers approved by the Chief Minister on 11 March 2008 and that he discussed with Mr. Asmatullah the plan to secure a first order granting the approved 147 square kilometers and the correct acreage figure and later get an amendment for the full 585

[1648] Farooq I, ¶ 18, *confirmed in* Farooq II, ¶ 43.

square kilometers once payment for the full area had been made. Mr. Farooq specified that "[f]*or his efforts, Mr Asmatullah was paid Rs. 200,000*."[1649] He did not specifically mention any involvement of Mr. Aziz.

1267. Col. Khan confirmed in his first witness statement that he "*was aware that Mr Farooq made payments to Sheikh Asmatullah for his assistance with the project, including in relation to the airstrip and aurface rights*."[1650] During the hearing, he confirmed that Mr. Farooq had told him about paying money to Mr. Asmatullah and that such money had come from him, Col. Khan.[1651] When confronted with the fact that, while referring to this payment in his witness statement of 30 September 2015, he had not told the NAB about it in his statement of 21 September 2015, Col. Khan stated that "[m]*ost probably it slipped … out of my mind, but definitely Farooq had told me that he had made some money.*"[1652]

1268. Mr. Asmatullah testified in his witness statement that he refrained from raising any objection to the Summary for the Chief Minister issued by Mr. Farooq or to the first order, despite being aware of the discrepancy between the square kilometers and acreage figures and Mr. Farooq's plan to use this discrepancy "*in TCC's favour further down the line*."[1653] Mr. Asmatullah further stated:

> "*For this, I was paid PAK Rs 200,000. I was given the money directly by Mr Abdul Aziz who was the personal assistant to Mr Farooq. He told me that the money was from Col. Sher Khan (TCC), via Mr Farooq*."[1654]

1269. During the hearing, Mr. Asmatullah stated that he was aware of a record of payments being kept by Mr. Aziz but maintained that he had not been shown such record by the Group of Experts. He added that he had decided to confess about taking the payment before finding out that Mr. Aziz "*had already told everything.*"[1655] Mr. Asmatullah further confirmed that while Mr. Farooq "*prepared the summary and got approval for it*" with what Mr. Asmatullah considered "*speed* [that] *needs to be noted*," he, Mr. Asmatullah, "*got the money for the Order*" that Mr. Kasi had kept on hold "*for up to two months*."[1656] In response to the question whether he was paid around the time the order was issued, Mr. Asmatullah stated: "*No. I asked him for the money in April. I said that it was my son's birthday; I said I need some money. He said he'd ask Sher Khan for money. His PS brought the money, and he said Sher Khan has sent it*."[1657]

[1649] Farooq II, ¶ 47.
[1650] Khan I, ¶ 33.
[1651] Transcript (Day 3), p. 850 line 9 to p. 852 line 12.
[1652] Transcript (Day 3), p. 853 line 8 to p. 854 line 4.
[1653] Asmatullah, ¶ 12.
[1654] Asmatullah, ¶ 13.
[1655] Transcript (Day 5), p. 1331 line 17 to p. 1333 line 1.
[1656] Transcript (Day 5), p. 1360 line 10 to p. 1362 line 12.
[1657] Transcript (Day 5), p. 1372 line 18 to p. 1373 line 2.

1270. Mr. Aziz testified in his witness statement that he made the payment to Mr. Asmatullah out of the amount received from Mr. Dad on 14 April 2008. He stated:

> "*When Mr Daad left, Mr Farooq asked me to give PAK Rs 200,000 of that money just received from TCC to Sheikh Asmatullah. He told me that this payment was in return for Sheikh Asmatullah's help in getting land allotted to TCC. I went to Sheikh Asmatullah's house the same day to give him this money, and told him that it was from Mr Farooq on behalf of TCC.*"[1658]

1271. In the very last entry of his bound diary, Mr. Aziz recorded a payment of PAK Rs. 200,000 to Sheikh Asmatullah BoR on 15 April 2008.[1659] During the hearing, Mr. Aziz stated that he made the payment on the evening of the days on which it was given to Mr. Farooq but entered it into his diary on the next day.[1660]

1272. Mr. Aziz further stated that while he did not have his diary with him when he first met with the Group of Experts, he told them about the payment he made to Mr. Asmatullah because he "*still remember*[ed] *whatever payment* [he] *had made approximately*." Mr. Aziz confirmed that he kept track of a lot of payments to and from Mr. Farooq but maintained that he remembered this specific payment made to Mr. Asmatullah seven years earlier.[1661] He further stated that he provided the diary, including the page recording the alleged payment to Mr. Asmatullah, to the Group of Experts, but could not explain why it was not included in the annexures to his statement before the Group of Experts.[1662]

1273. Based on the witness evidence presented by Respondent, the Tribunal does not consider it established that a payment was made by Mr. Farooq (via Mr. Aziz) on behalf of TCC to Mr. Asmatullah in connection with the Surface Rights Lease. As noted above, Mr. Aziz testified that the payment was made out of the amount that Mr. Farooq received from Mr. Dad – a payment that has not been proven. The Tribunal also does not consider it plausible that Mr. Farooq, while not mentioning any specific amount in his first witness statement, recalled in his second witness statement that he had paid the precise amount of PAK Rs. 200,000. Col. Khan also could not explain how he came to remember a payment to Mr. Asmatullah in his first witness statement despite not having made any reference to any such payment in his statement before the NAB, which he had signed only nine days earlier. In addition, the alleged purpose of the payment remained unclear. According to Mr. Aziz, it was made on 14 April 2008, *i.e.*, a month after the Summary had been approved by the Chief Minister and more than a month before the first order was issued. While Mr. Asmatullah initially stated in his written testimony that he was paid so that he would refrain from raising any objections to the Summary and the discrepancy in the first

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[1658] Aziz, ¶ 18.
[1659] **Exhibit AA-1**, p. 13.
[1660] Transcript (Day 7), p. 1665 lines 6-12 and p. 1674 lines 1-19.
[1661] Transcript (Day 7), p. 1616 line 14 to p. 1617 line 14.
[1662] Transcript (Day 7), p. 1636 line 16 to p. 1639 line 12.

order, he stated during the hearing that he "*got the money for the Order*" and did not confirm any involvement in the preparation or approval of the Summary.

1274. As for the entry in the Aziz Journal recording the alleged payment, the Tribunal refers to its summary and evaluation of the evidence presented by the Parties and their forensic experts set out above in connection with the alleged payment from Mr. Dad. For the same reasons, the relevant entry recording the payment to Mr. Asmatullah cannot serve to establish that the payment was actually made.

1275. In any event, the Tribunal considers that even if it were established that a payment was made by Mr. Aziz on behalf of Mr. Farooq and that the money originated from funds provided by Mr. Dad on behalf of Col. Khan, it would still be doubtful whether such payment could be attributed to Claimant. In this regard, the Tribunal refers to its considerations above that, on his own testimony, Col. Khan made payments out of his own pocket and did not tell Ms. Boggs, who allegedly reimbursed him for his expenses in connection with the Surface Rights Lease via a bonus in December 2008, about the alleged plan and improper payments.

(d) The Alleged Payment of PAK Rs. 400,000 by Col. Khan to Mr. Mandokhail

1276. Respondent's fourth allegation concerns a payment of PAK Rs. 400,000 by Col. Khan Khan to Mr. Mandokhail in late September 2008 and the payment for an Umrah trip for Mr. Mandokhail and his family by Mr. Farooq "*on behalf of TCC*" in 2009 in return for signing the second order. In support of this allegation, Respondent relies on the testimony of Col. Khan, Mr. Farooq and Mr. Mandokhail.

1277. Col. Khan testified in his first witness statement that he paid Mr. Farooq "*to get things done*" and was told by Mr. Farooq that he was passing on the money particularly to the Board of Revenue from whom Claimant was seeking various leases and concessions "*in contradiction to Balochistan rules and legislation*." Col. Khan further stated that while he did not like to personally hand over bribes, he "*did have to deal directly with Mr Mandokhail (senior Member of the Board of Revenue) since he was a senior Bureaucrat and an ex-Chairman of the BDA*" and confirmed that he "*personally made cash payments to Mr Mandohail for securing for TCC an airstrip and later for the grant of surface rights*." He added that "[t]*he payments to Mr Mandokhail and others allowed us to achieve many things which would otherwise have been difficult or impossible for the Reko Diq project*," including "*acquiring surface rights over approximately 600 square kilometres*."[1663]

[1663] Khan I, ¶¶ 14-15, 33.

1278. In his second witness statement, Col. Khan confirmed that he made "*cash payments to Mr Mandokhail for his assistance in obtaining surface rights for TCC*" and added that these were made "*on the advice of Mr Farooq*." Col. Khan stated that he "*remember*[ed] *paying Mr Mandokhail PAK Rs. 4 lakh (PAK Rs. 400,000).*"[1664]

1279. During the hearing, Col. Khan was pointed to his Section 161 statement before the NAB dated 21 September 2015 and his Section 164 statement before the magistrate dated 4 February 2016.[1665] In these statements, Col. Khan also stated that he had had to "*deal directly*" with Mr. Mandokhail because of his status and that the practice of making payments to him had continued from 2007 until 2009 or 2010. In his Section 161 statement, Col. Khan further stated: "*While I don't remember exact amounts and occasions and no record is held with me, I can confirm that somewhere around Rs. 2 Millions were paid by me to him as bribe through cash*."[1666] In his Section 164 statement, Col. Khan similarly stated: "*There is no record of such events in my possession. I cannot recall accurate estimate of the money. I may have spent 2 million rupees in such matters*."[1667]

1280. As described above in the context of the alleged payment to Mr. Farooq, Col. Khan was asked at what point the had remembered that he had also paid PAK Rs. 400,000 to Mr. Mandokhail. Col. Khan answered that he "*deliberately started looking for things*" and that "*slowly, slowly, slowly, it came to* [him]" and he "*checked up as to how much* [he] *had paid*." He confirmed that he did not have any records of the payments to Mr. Farooq and Mr. Mandokhail but was referring to a search of his own memory and "*small chits*" that he had. Col. Khan further stated that he also reviewed his own bank statements and "*from all the information* [he] *gathered … made a rough estimate as to how much money* [he] *had spent*."[1668]

1281. Mr. Farooq testified in his first witness statement that he helped Claimant to obtain "*numerous improper advantages that it should not have otherwise obtained*," including the grant of surface rights by "*making payment and providing gifts to Mr Mandokhail in return for assisting TCC to secure surface rights to 585 square kilometres*." Mr. Farooq added that he "*specifically recall*[ed] *paying money on behalf of TCC to Mr Mandokhail and Sheikh Asmatullah at the Board of Revenue to secure approval of TCC's surface rights lease*" and "*providing Mr Mandokhail with Rolex watches and sending him on Umrah to Saudi Arabia in return for his assistance to TCC*."[1669]

[1664] Khan II, ¶ 42.
[1665] **Exhibits RE-456** and **RE-468**.
[1666] **Exhibit RE-456**, p. 3.
[1667] **Exhibit CE-468**, ¶ 7.
[1668] Transcript (Day 3), p. 887 line 16 to p. 889 line 21.
[1669] Farooq I, ¶¶ 16, 18.

1282. In his second witness statement, Mr. Farooq confirmed that he had paid Mr. Mandokhail in connection with the approval of the surface Rights Lease. He specified that after Mr. Mandokhail had agreed to issue the revised order on 27 September 2008, he, Mr. Farooq, "*discussed Mr Mandokhail's payment of Rs. 400,000 with Col. Sher Khan, who made the payment to Mr Mandokhail*."[1670]

1283. During the hearing, Mr. Farooq was pointed to his Section 161 statement before the NAB dated 28 September 2015 in which he had also testified about making payments on behalf of Claimant to Mr. Mandokhail and about providing Rolex watches to him as a gift. He further stated: "*I also remember financing Hajj/Umrah trip to Saudia Arabia of Mr. Mandokhel. This was part of my yearly package in which I used to send number of persons every year on Hajj/Umrah at my own expenses.*"[1671] When asked whether this final statement was true, Mr. Farooq stated: "*I didn't have any package as such. I would send them on my own expense, from kickback. Sometimes four. Sometimes five—there were different people there, politicians, Ministers, officials as well*."[1672] Mr. Farooq confirmed that he paid for these trips out of the funds he had earned through kickback arrangements at the BDA.[1673]

1284. Mr. Mandokhail testified in his witness statement that when Mr. Farooq told him in September 2008 that he would be asked to issue a revised order, Mr. Farooq also threatened him that he would lose his job and be transferred out of Quetta and lose his residence, whch was "*extremely important*" to Mr. Mandokhail. He stated that he "*therefore signed an order dated 27 September 2008*." Mr. Mandokhail added:

> "*A few days after this, Col. Sher Khan came to my office and thanked me personally for issuing the Order. In return for my efforts for TCC, he gave me PAK Rs. 400,000 in cash. The money was in a brown envelope. He told me that TCC, through the CM, would look after me. And they did. In 2009, I was sent with my family on Umrah, paid for by TCC through Mr Farooq*."[1674]

1285. Mr. Mandokhail further testified that he "*received a sum of PAK Rs 200,000 on two occasions at Eid through Mr Farooq*" and "*two Rolex watches (on two separate occasions),*" both in return for his "*services to TCC*."[1675]

1286. During the hearing, Mr. Mandokhail acknowledged that he had never seen Col. Khan giving any money to Mr. Farooq but relied on statements from Col. Khan that he would

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[1670] Farooq II, ¶¶ 43, 50.
[1671] **Exhibit RE-457**, p. 7.
[1672] Transcript (Day 3), p. 613 lines 13-22.
[1673] Transcript (Day 3), p. 615 line 18 to p. 616 line 2.
[1674] Mandokhail, ¶¶ 22-23.
[1675] Mandokhail, ¶ 24.

look after Mr. Farooq and accommodate him in the same way as Mr. Mandokhail.[1676] He maintained that the money and gifts he received from Mr. Farooq came from Claimant rather than from the BDA contractors or Mr. Farooq himself, stating that Mr. Farooq "*very clearly*" told him that "[t]*his money is from TCC, and you get this money on behalf of TCC for the jobs, the work you do for them*."[1677]

1287. Mr. Aziz confirmed in his witness statement that Mr. Farooq arranged for an Umrah trip for Mr. Mandokhail and his family "*in return for his assistance in allotting land to TCC*" and stated more generally that Mr. Farooq "*used the money he received from TCC and others to arrange Hajj and Umrah trips for politicians, bureaucrats and government officials*."[1678]

1288. On the basis of the witness evidence presented by Respondent, the Tribunal does not consider it established that a payment was made by Col. Khan to Mr. Mandokhail or that Mr. Mandokhail was provided with gifts or an Umrah trip with his family out of funds provided by Claimant.

1289. As to the alleged payment of PAK Rs. 400,000 by Col. Khan, the Tribunal notes that Col. Khan did not mention any specific amount paid to Mr. Mandokhail in relation to the Surface Rights Lease in his first witness statement. As with the alleged payment made to Mr. Farooq, the Tribunal is further not convinced by Col. Khan's explanation as to how he came to remember such specific amount in his second witness statement. Similarly, Mr. Farooq did not make reference to a direct payment from Col. Khan to Mr. Mandokail in his first witness statement but then testified in his second witness statement that he specifically recalled having discussed such a direct payment, including the specific amount, with Col. Khan.

1290. As regards the witness testimony of Mr. Mandokhail, the Tribunal recalls the inconsistencies already discussed above with regard to both the timing of his re-appointment as Senior Member of the Board of Revenue in 2008 as well as to the amount he claimed to have received in connection with the airstrip lease in 2007. In addition, the Tribunal notes that while acknowledging during the hearing that he had no records of the payments allegedly made to him and testifying that "[m]*oney is a thing, which you don't forget about*," Mr. Mandokhail did not mention a specific amount paid to him by Col. Khan in respect of the Surface Rights Lease in his statement before the Group of Experts, which he provided shortly before his witness statement in this arbitration.[1679]

[1676] Transcript (Day 5), p. 1412 lines 4-20.
[1677] Transcript (Day 5), p. 1413 line 5 to p. 1415 line 2 and p. 1420 line 2 to p. 1423 line 17.
[1678] Aziz, ¶ 25.
[1679] *Cf.* **Exhibit RE-440**, ¶ 8.

1291. As for the Umrah trip that Mr. Mandokhail took with his family in 2009, it may be true that this trip was financed by Mr. Farooq. Mr. Farooq testified in his first witness statement that he had arranged the trip for Mr. Mandokhail "*in return for his assistance to TCC*"; he did not, however, state that the money he used had come from Claimant. During the hearing, he confirmed Mr. Aziz's testimony that he had paid for Hajj/Umrah trips of several officials and politicians per year and further stated that he had funded these trips out of the kickback arrangements he had made with BDA contractors. While Mr. Mandokhail maintained during the hearing that the money for this trip had come from TCC, he acknowledged that he had never seen Col. Khan giving any money to Mr. Farooq but only concluded this from statements made by Col. Khan and Mr. Farooq. Consequently, the Tribunal does not accept Respondent's allegation that the Umrah trip for Mr. Mandokhail and his family was paid for by Claimant. In addition, the Tribunal notes that neither Mr. Farooq nor Mr. Mandokhail specifically stated that the trip, which occurred in 2009, was financed in return for the surface rights order he had issued in September 2008 but rather more vaguely for "*services to TCC*."

1292. The same applies to the alleged gifts and further money allegedly given to Mr. Mandokhail by Mr. Farooq. Again, Respondent has failed to establish that any of these benefits, even if they were given, were provided out of funds received from Claimant or that they were granted in return for issuing the second order regarding the Surface Rights Lease.

(e) The Alleged Payments of PAK Rs. 4,000 to 5,000 by Mr. Farooq to Mr. Asmatullah

1293. Respondent's fifth and final allegation concerns allegedly monthly payments of PAK Rs. 4,000-5,000 by Mr. Farooq to Mr. Asmatullah starting in December 2007 in return for not objecting to Mr. Farooq's plan regarding the Surface Rights Lease. In support of this allegation, Respondent relies on the witness testimony of Mr. Asmatullah.

1294. In his witness statement, Mr. Asmatullah testified that he was promoted to the position of Secretary of the Board of Revenue at Mr. Farooq's request in December 2007. According to Mr. Asmatullah, Mr. Farooq told him that Col. Khan would "l*ook after* [Mr. Asmatullah]" if he helped him "*in relation to all of TCC's dealings with the Government of Balochistan*."[1680] Mr. Asmatullah added:

> "*In addition to my salary, therefore, I received PAK Rs 4,000 to 5,000 per month in cash for a period of 6-7 months from December 2007. This was delivered to me by Mr Farooq. I always understood that this money came*

[1680] Asmatullah, ¶¶ 5-6.

> *from Col. Sher Khan (TCC). This was in return for me endorsing all decisions relating to TCC and refraining from raising any objections.*"[1681]

1295. Mr. Asmatullah referred to "*two specific examples*," *i.e.*, the land for the airstrip and the Surface Rights Lease in the context of which he refrained from raising objections to the Summary for the Chief Minister initiated by Mr. Farooq in March 2008 and the first order issued in May 2008 despite his awareness of the discrepancy between the square kilometers and acreage figures.[1682]

1296. Mr. Farooq did not mention any monthly payments to Mr. Asmatullah in his written testimony. During the hearing, Mr. Farooq first stated that "*Asmatullah was only paid once for 2 lakh rupees*"; he then clarified that he "*did not pay any big amounts*" except for the PAK Rs. 200,000 discussed above but that he had been "*paying 5,000 and 10,000 rupees for small jobs.*" He also stated that "[h]*e wasn't a regular recipient—whatever the job for TCC, we would pay him and we would have our jobs done*."[1683]

1297. Mr. Asmatullah confirmed during the hearing that he received regular payments starting in January 2008 and specified that he did not receive them directly from Mr. Farooq but rather "*through his men*" who said that it came from Mr. Farooq. He confirmed that "*nobody from TCC would directly come and pay* [him]."[1684] When confronted with Mr. Farooq's testimony that he had been paid on a per-job basis but not on a monthly basis, Mr. Asmatullah maintained that "[f]*ive, six, seven months, he had been sending me money. It's not like wages that I would get it on that same day every time. Sometimes it would come after 15 days; sometimes it would come after 45 days*."[1685] Mr. Asmatullah added that Mr. Farooq "*would not remember when he paid 4,000 or 5,000*" but he, Mr. Asmatuallah, "*would remember how every 2 rupees and other small amount came into* [his] *budget*."[1686] Mr. Asmatullah further stated that "*this was TCC's work*" because the payments finished "*when TCC's business finished*" even though he remained in the same position for three years.[1687] At the same time, Mr. Asmatullah confirmed in response to the question whether these payments had anything to do with the Surface Rights Application that this was not the case.[1688]

1298. In light of the testimony given by Respondent's witnesses, the Tribunal considers that, even though small payments may have been made by Mr. Farooq through subordinates he sent to Mr. Asmatullah, it has not been established that the money for these payments

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[1681] Asmatullah, ¶ 7.
[1682] Asmatullah, ¶¶ 7, 11-12.
[1683] Transcript (Day 2), p. 578 lne 13 to p. 580 line 4.
[1684] Transcript (Day 5), p. 1343 line 9 to p. 1344 line 20.
[1685] Transcript (Day 5), p. 1348 line 16 to p. 1350 line 18.
[1686] Transcript (Day 5), p. 1351 lines 16-19.
[1687] Transcript (Day 5), p. 1351 line 21 to p. 1352 line 2.
[1688] Transcript (Day 5), p. 1353 lines 13-16.

came from or was paid with the knowledge of TCC. While Mr. Asmatullah stated in his witness statement that he understood the payments to come from Col. Khan, he did not confirm this testimony during the hearing but clarified that the payments had come from subordinates of Mr. Farooq who told him that it came from Mr. Farooq. In addition, Mr. Farooq, who had not mentioned these payments at all in his witness statement, made reference to "*small jobs*" for TCC but did not state that he made the payments out of funds received from TCC or that anyone from TCC was aware of such payments.

1299. Consequently, the Tribunal concludes that even if payments of PAK Rs. 4,000 to 5,000 were by or on behalf of Mr. Farooq to Mr. Asmatullah, there would be no basis for attributing them to Claimant. In addition, Mr. Asmatullah clarified during the hearing that these payments were not related to the Surface Rights Lease.

(f) Conclusion

1300. In conclusion, the Tribunal finds that none of the alleged payments of benefits that Respondent claims to have been given by or on behalf of representatives from TCC in relation to the Surface Rights Lease has been established by Respondent. The Tribunal also does not accept Respondent's submission that Mr. Farooq orchestrated a plan to first obtain an ambiguous order providing for a discrepancy between the square kilometers and acreage figures and later have this order corrected by Mr. Mandokhail following the death of Mr. Kasi.

1301. In light of its findings above, the Tribunal does not need to express an opinion on whether any acts of corruption committed by or on behalf of Col. Khan would be attributable to Claimant on the basis of either of the theories advanced by the Parties. In any event, the Tribunal concludes that Respondent has failed to establish that any act of corruption attributable to Claimant contributed to Claimant's obtaining the Surface Rights Lease over an area of 585 square kilometers.

f. Allegations Relating to the Visa Applications

1302. A further allegation raised by Respondent concerns certain irregularities in the visa application process for Claimant's expatriate employees that were discovered in 2009.

i. Summary of Respondent's Position

1303. Respondent submits that the following actions further undermine Claimant's purported corporate compliance culture;

a) the submission of fraudulent visa applications for expatriate employees;
b) the payment of bribes by TCC's staff for expatriate work visas; and

c) the failure to hold senior management accountable for such actions.[1689]

1304. Respondent contends that the documentary record shows that every expatriate work visa application submitted prior to September 2009 was fraudulent, with applications containing fictitious employment contracts (presumably substituting for the salary, overseas allowance and fringe benefits information required) and forged signatures.[1690] Respondent refers to Col. Khan's testimony that each CEO from Mr. Hargreaves onwards was aware of the falsity of this process.[1691]

1305. Respondent further submits that the documentary evidence shows three instances where Claimant resorted to corruption in order to obtain the necessary approvals for its employees.[1692] Firstly, Respondent relies on e-mail records and Col. Khan's testimony to submit that Claimant's Chief Financial Officer (Ms. Sharp) approved payment of USD 700 to a contact at the passport office in Karachi to issue a visa in less than a day (a process which normally took 1-3 months) for Trevor Whisken (TCC's Logistics and Support Manager).[1693] Secondly, Respondent submits that Mr. Flew approved the payment of PAK Rs. 50,000 in order to expedite the approval process and obtain a visa in September 2008.[1694] Lastly, Respondent submits that Mr. Stone obtained a visa in May 2008 through a payment of PAK Rs. 30,000 (again approved by Mr. Flew) to the local passport and visa office.[1695] Respondent considers that Mr. Flew has been unable to provide adequate answers as to why he provided such approvals and is thus directly implicated in corrupt and fraudulent conduct.[1696]

1306. Respondent further suggests that TCC's response to these incidents was prompted by fear that the illegally obtained visas were easily discoverable and could negatively affect its project, rather than a desire to uphold the company's corporate compliance regime.[1697] Respondent highlights that senior staff including Mr. Hargreaves, Ms. Boggs, Mr. Flew and Ms. Sharp, whom it considers to have been aware and/or complicit in this wrongdoing, were not held to account.[1698] Respondent specifically questions Ms. Boggs' justification as to why Mr. Flew and Mr. Stone both retained their positions in contrast to Mr. Whisken, submitting that contrary to her suggestion that Mr. Flew took steps to

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[1689] Respondent's Post-Hearing Brief, ¶ 320.
[1690] Respondent's Reply, ¶ 84 *referring to* **Exhibit RE-367**.
[1691] Respondent's Reply, ¶ 86 *referring to* Khan II, ¶ 47.
[1692] Respondent's Reply, ¶ 87.
[1693] Respondent's Reply, ¶¶ 88-90 *referring to* **Exhibits RE-344**, pp. 4-6, **RE-343**, p. 2, **RE-357**, p. 2 *and* Khan II, ¶ 45, 49.
[1694] Respondent's Reply, ¶¶ 91-92 *referring to* **Exhibits RE-357**, p. 2, **RE-349**, pp. 3-4 *and* **RE-347**.
[1695] Respondent's Reply, ¶¶ 93-94.
[1696] Respondent's Reply, ¶ 97.
[1697] Respondent's Reply, ¶ 83.
[1698] Respondent's Reply, ¶ 83, 102.

ensure the legality of his actions, he actually showed total disregard for the proper legal process.[1699]

ii. Summary of Claimant's Position

1307. Claimant submits that its self-reported deficiencies in its procedures for applying for expatriate work visas provide no basis to dismiss its Treaty claims, but confirm its commitment to ethical business practice.[1700]

1308. Firstly, Claimant considers it uncontested that TCC acted appropriately to respond to the visa issues and that Respondent, thus unable to refute the steps which Claimant took, instead contends that Claimant should have gone further in finding more employees responsible.[1701] Claimant notes that following Col. Khan's reporting of the irregular process, an internal investigation was conducted from which Ms. Boggs determined that certain individuals were complicit of wrongdoing and thus lost their jobs, while Mr. Stone and Mr. Flew had been misled as to the legality of the proposed steps and therefore maintained their positions.[1702]

1309. Secondly, Claimant maintains that Dr. Jezek's identification, investigation (with the help of local counsel) and subsequent reform of the application process further reflects the realty of Claimant's anti-corruption policies. Claimant refutes Respondent's suggestion that this was done out of fear that the irregular process would be discovered and maintains that the documentary record clearly shows that it was done to ensure maintenance with TCC's ethical standards and that the corporate compliance culture was sufficiently robust that even minor irregularities were taken seriously.[1703]

1310. Claimant further argues that following its voluntary reporting of the matter to the relevant authorities, the matter was deemed unworthy of further inquiry which demonstrates that this issue is not serious enough to affect Claimant's Treaty rights.[1704]

1311. Moreover, Claimant submits that Col. Khan's assistance in reporting the irregularities contradicts his claims that he facilitated a system of bribery over the years with the knowledge and support of Claimant's CEOs, something which Respondent has been unable to explain.[1705] Claimant argues that certain 'versions' of Col. Khan occasionally

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[1699] Respondent's Reply, ¶ 101 *referring to* **Exhibit RE-352** *and* **Ex RE-348**.
[1700] Claimant's Rejoinder, ¶ 260; Claimant's Post-Hearing Brief, ¶ 264.
[1701] Claimant's Post-Hearing Brief, ¶¶ 265-266 *referring to* **Exhibits RE-357** *and* **RE-347**.
[1702] Claimant's Rejoinder, ¶ 263 *referring to* Boggs IV, ¶¶ 21-22, Flew, ¶¶ 39–40, **Exhibits RE-347**, **RE-349, RE-352, RE-344**, **RE-350**, **RE-353**, **RE-354**, **RE-355**, **RE-356** *and* Livesey VII, ¶ 16.
[1703] Claimant's Rejoinder, ¶¶ 265-268 *referring to* Respondent's Reply, ¶ 83.
[1704] Claimant's Rejoinder, ¶¶ 263-264 *referring to* Boggs IV, ¶ 23 *and* **Exhibit RE-357**.
[1705] Claimant's Rejoinder, ¶ 264 *referring to* Khan I, ¶ 17 *and* Khan II, ¶¶ 6-12; Claimant's Post-Hearing Brief, ¶ 268.

slipped through in his testimony where he made clear that Claimant did not engage in corruption, which cannot be squared with his other allegations.[1706]

iii. Tribunal's Analysis

1312. The Tribunal notes that with regard to the visa applications concerning Claimant's expatriate employees, Respondent's allegations relate to two separate issues: (i) the making of improper payments to procure work visas for three TCC employees as discovered by Ms. Boggs and Col. Khan in early 2009; and (ii) irregularities in all work visa applications for TCC's expatriate employees as discovered by Dr. Jezek in late 2009. The Tribunal will address these allegations in turn.

(a) Improper Payments Made to Procure Work Visas for Three Employees in 2008 and Early 2009

1313. Respondent submits that Claimant resorted to corruption to obtain work visas for at least three of its employees, making reference to the following payments:[1707]

i. USD 700 paid by or on behalf of Mr. Trevor Whisken, Claimant's Logistics and Support Manager at the time, and approved by Ms. Madeline Sharp, Claimant's CFO at the time, to a contact of Mr. Rahil Khan, an administrative officer in TCC's Karachi office, at the passport office in Karachi in January 2009 in return for immediately processing and issuing an authentic visa for Mr. Whisken;

ii. PAK Rs. 50,000 paid by Mr. Rahil Khan, and approved by Mr. Barry Flew, to the passport office in September 2008 in return for issuing a letter from the Ministry of Interior, which would normally authorize the passport office to stamp a visa, and securing itself a work visa for Mr. Flew;

iii. PAK Rs. 30,000 paid by Mr. Rahil Khan, and approved by Mr. Flew, to the local passport and visa office in May 2008 in return for obtaining a work visa for Mr. Clive Stone, an IT specialist at TCC.

1314. Claimant does not dispute that these payments were made or that they were improper. It emphasizes, however, that once these "*irregularities*" were identified pursuant to an investigation conducted by Ms. Boggs with the assistance of Col. Khan, Claimant self-reported them to the Board of Investment and terminated the employees responsible for this wrongdoing, *i.e.*, Mr. Whisken and Mr. Rahil Khan, while concluding that Mr. Stone, Mr. Flew and Ms. Sharp had not been complicit in the improper process.[1708] According

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[1706] Claimant's Rejoinder, ¶¶ 268-270 *referring to* Transcript (Day 4), p. 951 lines 15–20, p. 948 lines 9–10 *and* p. 947 lines 21–22.
[1707] Respondent's Reply, ¶¶ 87-94.
[1708] Claimant's Rejoinder, ¶¶ 261-264.

to Respondent, on the other hand, the evidence shows that in particular Mr. Flew was guilty of wrongdoing as well and the fact that he remained at TCC "*suggests that they were concerned with this issue being discovered by people outside of TCC, rather than a broader desire to uphold the company's corporate compliance regime*."[1709]

1315. The Tribunal notes that it is undisputed between the Parties that Claimant reported two of the incidents referred to above, *i.e*., those involving Mr. Whisken and Mr. Flew, to the Board of Investment.[1710] Pursuant to the revised draft letter sent by Ms. Boggs to Col. Khan on 22 April 2009, Claimant intended to report the two incidents as follows:

> "*Application for work visa for Mr. Trevor John Whisken was submitted to your office on 5 Dec 2008. At the same time an application for Security Clearance for the individual was submitted to Director General Mineral (DGM), MP&NR.*
>
> *We subsequently discovered that Mr. Trevor John Whisken managed to get his passport stamped on 15 Jan from Regional Passport Office Karachi (copy attached), after paying 700US$ to Passport authorities without waiting for his security clearance from DGM and without approval of your office. The individual then proceeded on leave and left the country on 19 Jan 2009 and returned two weeks later. When we discovered that Mr. Whisken did not have a proper visa, we had him leave the country immediately on February [ ] 2009. We subsequently determined that Mr. Whisken's visa was invalid and not properly issued. The activities with the Passport Office were conducted by a Tethyan employee, Rahil Khan, who claimed that he used the services of an agent to pay the fees to the Passport authorities.*
>
> *In investigating the circumstances surrounding Mr. Whisken's visa, we also discovered that Mr. Khan had also facilitated an improper visa for Mr. Barry Flew in [September 2008]. Mr. Khan advised Mr. Flew that by paying [ ] he could obtain a work visa on an expedited basis. Mr. Khan never made application through your office or otherwise and simply paid the Passport authorities who issued fraudulent paperwork and a fraudulent visa. Mr. Flew had no knowledge of these activities and was not aware that the visa issued to him was invalid.*
>
> *After a thorough investigation of these matters, TCC concluded that Mr. Khan and Mr. Whisken had acted not in accordance with the Company's policies and procedures and they were immediately terminated. Mr. Whisken was not allowed to return to the country. Mr. Flew is entitled to remain ni* [sic] *Pakistan as the holder of POC, and application has been made for a work permit for him. The application is currently pending.*"[1711]

[1709] Respondent's Reply, ¶¶ 95-98.
[1710] *Cf.* Respondent's Reply, ¶ 100; Claimant's Rejoinder, ¶ 263, *both referring to* **Exhibit RE-357**.
[1711] **Exhibits CE-559** and **RE-357**, pp. 2-3.

1316. The final version of this letter as it was sent to the Board of Investment is not in the record. There is no indication that the third incident involving Mr. Stone was made part of the self-report.

1317. As regards the investigation conducted by Ms. Boggs, the record shows the following. On 18 February 2009, Mr. Khurram Shahzad, an employee of TCC based in Islamabad, informed Ms. Boggs about the process and status of Mr. Whisken's work visa. He stated that an application for renewal of Mr. Whisken's work visa, which expired on 9 January 2009, had been filed with the Board of Investment on 6 December 2008. While the application process should usually be completed within four weeks, it was delayed in that case because of a pending security clearance; requests from him and Col. Khan for urgent processing were not successful. Mr. Shahzad further reported that on the day of the expiry, he was visiting some of his personal contacts but still "*failed to process legally on an urgent basis*." He added that "[a]*t that time, Mr. Rahil advised that he has his contact in Passport Office – Karachi, from whom he can process that immediately and that will authentic visa but we have to pay $ 700 to them. Trevor was in tension so Mrs. Madeline, after confirmation from my side regarding the delay of process from here in Islamabad, approved that payment and Trevor got the visa*."[1712]

1318. An e-mail exchange that Ms. Sharp forwarded to Ms. Boggs on 19 February 2009 shows that on 9 and 10 January 2009, when it became clear that Mr. Shahzad would not be able to obtain the work visa from the Board of Investment in time, Col. Khan informed Mr. Whisken that he would receive an acknowledgment letter that would allow him to stay in the country. This did not, however, solve Mr. Whisken's concerns about being able to leave and re-enter the country on the occasion of his next leave scheduled for 19 January 2009, as a result of which Mr. Whisken asked Mr. Rahil Khan to take his passport to the passport office in Karachi to "*get it done same day*." On 10 January 2009, Mr. Whisken also informed Ms. Sharp about the ongoing issue and they exchanged various e-mails about whether Mr. Shahzad or Mr. Rahil Khan, who were acting in parallel at the same time, should proceed. Finally, Ms. Sharp stated that "*Khurram is looking after the new visa; what a Rahil would be getting is an extension*."[1713]

1319. On 4 March 2009, Col. Khan informed Ms. Boggs that he had spoken with an official at the Federal Investigation Agency who advised him that Claimant should report the case as soon as possible. He added that they would at least be "*saved from embarrassment, later if found out and reported by the ministry of Interior*" and attached a first draft of the

[1712] **Exhibit RE-343**.
[1713] **Exhibit RE-344**.

reporting letter, which at that time referred only to the incident involving Mr. Whisken.[1714]

1320. An e-mail exchange between Mr. Livesey and Ms. Boggs of the same days confirms that they had asked Mr. Whisken to fly out of the country as soon as possible, which he did on the same day. Ms. Boggs emphasized that "*it is important that we demonstrate that we have taken this seriously, both at the TCC and the Barrick level*" and added that she had spoken to Col. Khan "*for a very long time about this issue*." Ms. Boggs also indicated that concerns had been raised regarding Mr. Flew's visa but that they did not yet have the paperwork to determine whether he also had to leave the country until they could regularize his status.[1715]

1321. On 5 March 2009, Col. Khan informed Ms. Boggs that, having reviewed the documentary evidence and spoken with the people responsible for obtaining work visas, both Mr. Flew's and Mr. Whisken's visas were "*bogus*." He added that in the case of Mr. Flew, not even an application had been filed. Col Khan further reported that he had spoken with Mr. Rahil Khan who "*was not sure what he was talking about. He has produced a letter of Ministry of Interior that authorizes passport office to stamp a visa, is fake. I have the evidence from the ministry today*." Col. Khan concluded that they now had to report these incidents to the authorities.[1716]

1322. On the same day, Ms. Sharp wrote to Ms. Boggs, informing her that contrary to Mr. Whisken, Mr. Flew had permission to stay in the country due to a POC card he possessed but that it was still unclear whether this card also allowed him to work while applications for new work permits were still pending. Ms. Sharpe further stated that "[i]*t appears that sometimes Khurram processed visas, sometimes Rahil and Barry said that he had evidence that he asked Rahil whether this was on the up and up. He is personally very offended that he might be considered knowingly part of a fraud*."[1717]

1323. Still on the same day, Ms. Boggs wrote to Mr. Livesey and Col. Khan that she would like to "*discuss the issues relating to Trevor's and Barry's visas*," confirming the facts as known to them and agreeing on an action plan and possible disciplinary actions.[1718]

1324. On 6 March 2009, Mr. Flew forwarded to Ms. Boggs two e-mail exchanges, one concerning his own visa and one concerning the visa of Mr. Stone. As for his own visa, Mr. Flew added that "*Rahil confirmed to Khurram the option to expedite was legal. I now recall delay was caused by Rahil being sick. Though re-reading this I should have been*

[1714] **Exhibits CE-555** and **RE-345**.
[1715] **Exhibit RE-346**.
[1716] **Exhibits CE-557** and **RE-347**.
[1717] **Exhibit RE-348**.
[1718] **Exhibit CE-556**.

more suspicious about issue a without documentation but was probably thinking about the process with Clive above."[1719]

1325. The first e-mail exchange forwarded by Mr. Flew shows that on 26 August 2008, Mr. Shahzad apologized for a delay in processing Mr. Flew's visa application, which had not been forwarded to him by Mr. Rahil Khan because the latter had been sick, and informed Mr. Flew that there were two ways in which they could proceed: (i) follow normal procedures, pay a penalty on the official processing fee and have the visa extended within one month; or (ii) "*process it immediately*" through a source of Mr. Rahil Khan who would "*get VISA stamped on passport without documentation and penalty charge Rs. 50,000 to be paid additionally with Official Fee Rs 8,058*." Mr. Flew responded on the same day, noting that he had started the process a month ago and considered this delay unacceptable. He added that, as he was leaving on 19 September and his visa would expire on 2 September, he could not wait for a month for his visa and therefore stated: "*Please expedite on an urgent basis*."[1720]

1326. The second e-mail exchange forwarded by Mr. Flew shows that Mr. Stone inquired about the issuance of a new visa for the first time on 24 April 2008, with his current visa expiring on 20 May 2008. Following various e-mails exchanged with Mr. Flew and Mr. Rahil Khan, the latter informed Mr. Flew on 8 May 2008 that there were two options for issuing a multi entry business visa for Mr. Stone: (i) file an application with the local passport & visa office who would send it to the Ministry of Interior for security clearances and approval, which "*would take at least 45 days and no guarantee for approval by Ministry*"; or (ii) pay "*Rs. 5,400 fee against receipt and Rs. 30,000 … over and above legal fee … to wave* [sic] *all legal obligation and passport will be return* [sic] *back after 2 days with one year multiple entry business visa*." Mr. Rahil Khan further stated that Mr. Shahzad had advised him that the charges for a multiple entry business visa filed through Islamabad would be higher than those of the passport & visa office in Karachi. Mr. Flew responded on the same day that he "*now underst*[ood] *the Rs 30,000 is a facilitation payment to expedite the visa process which is ok if this is the only alternative, and we are not get* [sic] *the visa illegally*." Mr. Rahil Khan answered still on the same days that "[v]*isa will not be illegal; the passport & visa office have their relation with ministries and wave* [sic] *all the time space required for security clearance against facilitation payment*." Still on the same day, Mr. Flew wrote: "*Additional visa amounts approved as requested*."[1721]

[1719] **Exhibits CE-558** and **RE-349**, p. 1.
[1720] **Exhibit RE-349**, pp. 3-4.
[1721] **Exhibit RE-349**, pp. 6-11.

1327. On 10 March 2009, Ms. Boggs wrote to Col. Khan, informing him that she had spoken to Mr. Livesey "*about the issue regarding Rahil and Trevor*" and suggested that the three of them "*go through the paperwork and investigation,* [redacted] *and agree the plan.*"[1722]

1328. An e-mail exchange of 18 March 2009 between Ms. Boggs, Mr. Livesey and Mr. Maurice Harapiak from Toronto confirms that by that time, it had been decided that Mr. Whisken would be terminated but he had not yet been informed of this decision because they intended to terminate Mr. Rahil Khan at the same time, expecting that the latter might "*cause more internal damage*" than Mr. Whisken.[1723]

1329. On 24 March 2009, Mr. Harapiak followed up on Mr. Whisken, who had also mentioned to him that "*Barry Flew had obtained his work visa by the same means*." Ms. Boogs responded on the same day that she was planning to speak with Mr. Whisken on the following day, adding that "*as we have discussed, we determined that we cannot terminate Rahil, but then not terminate the expatriate for whom he worked. That sends a very bad message.*" As regards Mr. Flew, she stated that "[w]*e are aware of the incident with Barry and have investigated the same. The facts are different and although they confirm Rahil's complicity in both events, Barry did take steps to try and ensure what was being proposed was legal. Trevor took none of those actions*. [redacted]"[1724]

1330. On 26 March 2009, Ms. Boggs informed Mr. Livesey that she had spoken with Mr. Rahil Khan to whom she had explained that it would not be possible for him to get a different job at TCC as such jobs did not exist and "*it isn't fair to people who are doing their job correctly*." She added towards Mr. Rahil Khan that they would be "*as generous as* [they] *could in determining his entitlement benefits*" and that they "*could stretch a little here.*"[1725]

1331. A further e-mail exchange between Ms. Boggs, Mr. Livesey and Mr. Harapiak of 27 March 2009 shows that it was indicated to both Mr. Whisken and Mr. Rahil Khan on the previous days that they would be terminated "*as a result of the events surrounding Trevor's work visa*." Ms. Boggs reported that while Mr. Whisken had acknowledged the facts and apologized at that point, he now stated that his actions had been "*approved*" by Col. Khan and Ms. Sharp. Ms. Boggs added: "*I told him that this was not the conclusion reached by any of us who have investigated the matter*." Later on the same day, she informed Mr. Harapiak that both Mr. Whisken and Mr. Rahil Khan had agreed to resign.[1726]

[1722] **Exhibit RE-350**.
[1723] **Exhibit RE-351**.
[1724] **Exhibit RE-352**.
[1725] **Exhibit RE-353**.
[1726] **Exhibit RE-354**.

1332. On the same day, Ms. Boggs indicated to Mr. Livesey and Col. Khan that she would send a message to all employees of TCC informing them that the two employees had resigned, without saying anything about the circumstances.[1727] On 29 March 2009, Ms. Boggs announced to Claimant's employees that Mr. Rahil Khan and Mr. Whisken had resigned effective as of 27 March 2009 and thanked them for their services. She then informed about the resulting shift of responsibilities for administrative and visa-related issues.[1728]

1333. As noted above, at some point after 22 April 2009, Claimant self-reported the incidents regarding the work visas of Mr. Whisken and Mr. Flew to the Board of Investment. It is undisputed between the Parties that no further inquiry was made and no further action was taken by the Board of Investment or any other Government authority in this regard.[1729]

1334. Col. Khan testified in his second witness statement that when he spoke to Mr. Rahil Khan about Mr. Whisken's visa, Mr. Rahil Khan "*admitted that he had bribed the Passport Office to issue and stamp a visa despite one not having been approved by the relevant government departments. He said that Mr Whisken knew he was doing so*." Col. Khan added that he understood that Ms. Sharp "*also instructed Rahil to do so*." As for Mr. Flew's visa, Col. Khan stated that Mr. Rahil Khan admitted having "*forged a letter from the MOI authorizing the Passport Office to issue a visa stamp for Mr Flew*." According to Col. Khan, Mr. Flew confirmed that "*money has been paid for this visa and that he knew that it was a bribe since he had not even applied with proper visa papers through the BOI.*"[1730] Col. Khan further stated that Mr. Rahil Khan admitted to him that "*he was operating in a racket in which TCC was paying him to bribe passport officials in Karachi to get illegal work visas issued*" and that he done that "*for dozens of expats in Karachi over the course of many years*" with the "*money for the bribes* [being] *paid by TCC with the approval of the CFO, Ms Sharp*." Col. Khan noted that while Mr. Rahil Khan and Mr. Whisken were fired following an investigation of this wrongdoing "[f]*or reasons unknown to* [him], *Mr Flew was not fired despite being involved in the same conduct. Nor was any action taken against Ms Sharp*."[1731] As for the letter sent to the Board of Investment, Col. Khan stated that he first "*gauge*[d] *whether it was in TCC's best interests to self-report and show we were being proactive about changing (and, importantly, that it would not lead to any sanction against TCC).*" He testified that when he informed his contact about the incident and that two employees had alrady been terminated, he was told "*not to worry*," and informed Ms. Boggs accordingly.[1732]

[1727] **Exhibit RE-355**.
[1728] **Exhibit RE-356**.
[1729] *Cf.* Respondent's Reply, ¶ 100; Claimant's Rejoinder, ¶ 264.
[1730] Khan II, ¶¶ 48-49.
[1731] Khan II, ¶¶ 49, 51.
[1732] Khan II, ¶ 51.

1335. Mr. Flew testified in witness statement that when an expatriate employee sought to renew his work visa in 2008, Mr. Rahil Khan advised him, Mr. Flew, that there were two options, either the standard process, which would take at least 45 days, or "*the applicant could pay a fee of Rs. 35,400 for a two day expedited process*." Mr. Flew emphasized that he asked Mr. Rahil Khan whether the second option was legitimate and, after receiving this confirmation, authorized the payment of "*the small expediting fee*." Mr. Flew added: "*While I was responsible for approving visa payments, I was not well versed in all of the procedures and steps involved in the visa process and I trusted Rahil's explanation.*"[1733] As regards his own visa, Mr. Flew stated when it was discovered that it was based on a non-authentic government authorization document and an investigation was prompted, he sent his correspondence with Mr. Rahil Khan to Ms. Boggs and Ms. Sharp and "*acknowledged that, in hindsight,* [he] *should have been more skeptical of Rahil's explanation, but explained that* [he] *had understood that the expedited visa process had a valid legal basis.*" Mr. Flew added that he was able to stay in Pakistan lawfully because he had a resident card and subsequently applied for and obtained "*a new and completely authentic work visa*."[1734]

1336. During the hearing, Mr. Flew confirmed that his understanding of a facilitation payment was "*that it's a payment to acquire something that is nondiscretionary, i.e., something that one would be entitled to, but all you're paying for is it to be quicker than you would otherwise get it.*" He further confirmed that this was how he understood the second option suggested by Mr. Rahil Khan regarding the visa of Mr. Stone, *i.e.*, that it he did not understand it to be about guaranteeing the process but "*more about speeding up the process*" and to "*facilitate the paperwork.*"[1735] As regards his own visa, Mr. Flew stated that he "*understood it to be the similar process that we talked about before, Mr. Stone's visa issued*" and that the "*facilitation payment, or extra payment … would entitle you to get a legal visa.*" Mr. Flew did not recall whether he had asked Mr. Rahil Khan to confirm the legality of his own visa but stated that on the basis of the information received from Mr. Rahil Khan, he had been "*comfortable that … the second option to expedite the process was a legal process … to get the legal visa.*"[1736]

1337. Ms. Boggs testified in her fourth witness statement that the investigation she conducted with the help of Col. Khan revealed that "[a]*t the time, Mr. Flew had questioned whether the process was legitimate, and Rahil Khan confirmed that the visa would be legal and that payment would expedite the process. We also learned that TCC's Chief Financial Officer, Madeline Sharp, understood that this payment was a legitimate fee to extend Mr.*

[1733] Flew, ¶ 39.
[1734] Flew, ¶¶ 40-41.
[1735] Transcript (Day 11), p. 2967 line 2 to p. 2968 line 13.
[1736] Transcript (Day 11), p. 2975 line 3 to p. 2979 line 3.

Whisken's visa."[1737] Ms. Boggs stated that as a result of this investigation, they immediately terminated the employment of Mr. Whisken and Mr. Rahil Khan, "*who were responsible for the payments in question*." She explained that she did not fire Mr. Flew at the time because "the evidence from Col. Khan's investigation did not support that Mr. Flew knew that the payments from Rahil Khan were improper." She added: "*Nevertheless, since Mr. Flew was generally familiar with the visa process and did not exercise the care and diligence that I believed he should have exercised given his position, I determined that some disciplinary action was required. We issued him a formal reprimand, and he was counseled on the proper process going forward*." As for Ms. Sharp, Ms. Boggs stated that they "*determined that Ms. Sharp, who was not familiar with the visa process, understood that the payment was for a legitimate fee and was not at fault*."[1738] Finally, as to the report to the Board of Investment, Ms. Boggs testified that she understood at the time that "*affirmatively reporting was an unusual step to take in Pakistan, but we believed that it would reaffirm TCC's commitment to anti-corruption specifically and an ethical approach more generally*."[1739]

1338. The Tribunal recalls that Respondent takes the position that Claimant's response to the wrongdoing in connection with the work visas that was identified in early 2009 was not driven by a desire to uphold its corporate compliance regime but rather by the concern that the issue could be discovered by people outside of TCC.[1740] Respondent further claims that "*the proven bribes paid by members of TCC's staff for expatriate work visas and submission of fraudulent visa applications for expatriate employees is symptomatic of an investor displaying little or no diligence*."[1741]

1339. In the Tribunal's view, the documentary record does not support Respondent's argument. In particular with regard to the incident involving Mr. Whisken, the evidence shows that Ms. Boggs conducted a thorough investigation into the matter, which resulted in serious consequences for Mr. Whisken and Mr. Rahil Khan as they were both terminated as a result of this incident. The Tribunal is aware that, neither Mr. Flew nor Mr. Stone faced comparable consequences for the incidents relating to their work visas. As for Mr. Stone, the Tribunal understands that he was not directly involved in the visa application process, including the decision to proceed on an expedited basis by paying an extra fee of PAK Rs. 30,000. As far as Mr. Flew is concerned, Ms. Boggs' contemporaneous e-mails indicate and her witness evidence confirms that she took a different view on his conduct because of his e-mail exchange with Mr. Rahil Khan in which the latter confirmed the

[1737] Boggs IV, ¶ 21.
[1738] Boggs IV, ¶ 22.
[1739] Boggs IV, ¶ 23.
[1740] Respondent's Reply, ¶ 98.
[1741] Respondent's Post-Hearing Brief, ¶ 320.

legality of the visa and indicated that the fee had to be paid for the expedited process. Even if one might have taken a different view on Mr. Flew's conduct at the time, in particular regarding his acceptance of having to make a facilitation payment for Mr. Stone's visa, a process which he apparently considered to be repeated in relation to his own visa,[1742] the Tribunal does not believe it to be its task to now re-consider Ms. Boggs' decisions regarding the appropriate disciplinary actions to be taken in the case of each individual employee involved. In addition, as Ms. Boggs testified, she did believe that the incident required some disciplinary action towards Mr. Flew. While Mr. Flew could not recall during the hearing whether he received a formal reprimand, he confirmed that he was "*advised that this was not an appropriate process and to be more diligent*" and recalled that his bonus that year had been lower than in other years.[1743] Finally, Col. Khan confirmed in his second witness statement that the visa application process was reformed after the incident had been reported to the Board of Investment.[1744]

1340. In the Tribunal's view, an incident of improper payments being made, which, once it became known to Claimant's CEO, was investigated, followed by disciplinary actions against the employees responsible for the wrongdoing and a self-reporting letter to the competent authority as well as a reform of the relevant procedures, cannot be a ground for impugning the validity of Claimant's investment and its claims under the Treaty. This conclusion is reinforced by the absence of any evidence that these payments contributed to Claimant obtaining a right or benefit relating to his investment, given that Claimant made Mr. Whisken leave the country as soon as the issue surfaced and immediate action was taken within TCC to file the necessary applications to regularize the work status of Mr. Flew, who was permitted to stay within the country due to his resident card, by applying for a new authentic work visa soon thereafter.

(b) Irregularities in All Work Visa Applications Made for Expatriate Employees Until Late 2009

1341. Respondent further alleges that the applications for all work visas for Claimant's expatriate employees filed until September 2009 were "*fraudulent*," relying on a memorandum of Dr. Jezek dated 8 September 2009 in which he reported to Claimant's Board of Directors about "*irregularities*" in the visa application process, which he was told had been "*put in place many years ago and may not have been reviewed by management.*"[1745] Specifically, Dr. Jezek reported the following "[s]*pecific problems:*

[1742] *Cf.* Transcript (Day 11), pp. 2975-2978.
[1743] Transcript (Day 11), p. 2979 line 18 to p. 2980 line 3.
[1744] Khan II, ¶ 51.
[1745] Respondent's reply, ¶ 84, *referring to* **Exhibit RE-367**. *See also* Respondent's Post-Hearing Brief, ¶ 321.

- *Fictitious employment contracts are attached to the applications, presumably to substitute for the salary, overseas allowance and fringe benefits required in the application*
- *The fictitious employment contracts contain forged signatures in the purported CEO and employee signature areas*
- *Applications have been signed by the Corporate Security and Public Affairs Manager (now Director) in the area requiring TCC CEO to sign.*"[1746]

1342. Dr. Jezek further stated that while he had been informed by the employees responsible for the visa application process that the contents of the application was not important, "*because no one read them*," he considered this process "*incompatible with business ethics of TCC and the JV partners*" and added that it created risks and could give rise to "*far reaching consequences*" for the project, in particular when it reached the implementation stage. Dr. Jezek concluded that "[t]*he process has now been stopped and we are working with our legal counsel to develop a new process and underlying procedure to assure that this problem does not reoccur*." [1747]

1343. Respondent further relies on the witness evidence of Col. Khan who stated in his second witness statement that "[o]*ne example of TCC's culture of toleration of corruption is that, at least between 2005* [when Col. Khan became responsible for supervising the visa application process] *and 2009, TCC obtained all of its work visas for non-Pakistani staff through fraud.*" Col. Khan testified that from the outset and on instructions from the then-CEO Mr. Hargreaves he signed the applications on behalf of the CEO.[1748]

1344. Col. Khan further stated that while the application process would usually take between one and three months and there was no formal expedited process available in Islamabad or Karachi, his subordinate Mr. Shahzad "*used sources*" at the Passport Office in Islamabad, the MPNR and the MOI to expedite the process, including for obtaining security clearances, which "*might have saved a couple of weeks*." Col. Khan testified that Mr. Shahzad "*paid a few thousand rupees in bribes per visa which he was reimbursed for by way of petty cash*."[1749]

1345. As for the "*specific problems*" identified by Dr. Jezek in his memorandum, Col. Khan testified that he realized in 2005 that the applications were "*fraudulent, in the sense that they attached fake or dummy contracts (they were not the actual contracts of employment between the employee and TCC)*" and "*immediately pointed this out to Mr. Hargreaves*." According to Col. Khan, Mr. Hargreaves told him that "*this is how it would be done as*

[1746] **Exhibit RE-367**.
[1747] **Exhibit RE-367**.
[1748] Khan II, ¶¶ 44-45.
[1749] Khan II, ¶¶ 45-46.

the company was not prepared to disclose actual financial data and other details to the government." Col. Khan added that "[e]*ach CEO after Mr. Hargreaves also knew that all work visa details and attached documentation was false*."[1750]

1346. Mr. Hargreaves testified in his second witness statement that he did not personally handle visa applications but delegated this "*routine and administrative*" task to someone on the ground in Pakistan. Mr. Hargreaves confirmed that Col. Khan was responsible for supervising the process and added that to his knowledge, they did provide the information required by the application. He further explained that "[d]*ue to security concerns about the risk of kidnapping and ransom, we tended to be cautious in disclosing only the minimally required personal financial information of employees on applications but this does not mean that I ever approved attaching* 'fake or dummy contracts.'"[1751]

1347. Mr. Flores also responded to Col. Khan's testimony in his second witness statement, stating that while not being directly involved in overseeing the application process, he had "*no reason to believe that the bribes Col. Khan alleges were ever paid*" and had no knowledge and "*no reason to suspect*" that Col. Khan would falsify documents for work visa applications.[1752]

1348. Mr. James "*categorically reject*[ed]" in his second witness statement Col. Khan's allegation that he had been aware of false documentation to visa applications and added that during his tenure as CEO, he was "*not aware of any irregularities concerning visas, and never heard any suggestion that the documentation included with these applications contained any false information about employees*."[1753]

1349. Ms. Boggs noted in her fourth witness statement that while Col. Khan now claimed that regular payments were made to Government officials to obtain visas, he reported "*potentially suspicious payments involving TCC employees*" while she was CEO. She referred to the payments discovered in early 2009, which were discussed in detail above, and emphasized that it was Col. Khan who brought the incident involving Mr. Whisken to her attention and helped her to conduct the factual investigation that revealed the additional incident involving Mr. Flew.[1754]

1350. When Col. Khan was asked about this incident during the hearing, he responded with regard to the "*fake visas*" he had discovered: "*Can you imagine, sir? We are talking about Tethyan Copper Company, one of the biggest mining companies, coming into Pakistan, and these stupid people could bring out such a bad name to us for taking unnecessary*

[1750] Khan II, ¶ 47.
[1751] Hargreaves II, ¶¶ 51-53.
[1752] Flores II, ¶ 45.
[1753] James II. ¶ 33.
[1754] Boggs IV, ¶¶ 20-21.

risk, a total unnecessary risk. That is why I reported the matter to Madam Cassie Boggs."[1755] Col. Khan also confirmed that Ms. Boggs "*took the matter seriously*" and fully supported his efforts to investigate and voluntarily and transparently report the matter to the authorities.[1756]

1351. Dr. Jezek confirmed in his second witness statement that shortly after he started as CEO in the summer of 2009, he reviewed his own work visa application that had been submitted on his behalf prior to his arrival and discovered that Col. Khan had signed in the space provided for the signature of Claimant's CEO and that the application was accompanied by a fictitious employment contract bearing wrong signatures in the employee and CEO signature areas. Dr. Jezek further stated that upon further investigation with local counsel, they discovered that these "*flaws*" existed in the visa applications for all ten of Claimant's expatriate employees. Dr. Jezek added: "*I felt that this issue was sufficiently important to raise with the Board, but I did not consider it to be a corruption issue because, to the best of my recollection, I did not find evidence of bribery in the visa application process.*"[1757]

1352. According to Dr. Jezek, Col. Khan told him that this practice was necessary to obtain the work visas in a timely manner and that "*the irregularities were not important because nobody actually reads the applications. He also indicated that the fictitious employment contracts were designed to conceal expatriates' true salary information.*" Dr. Jezek testified that he understood this concern but considered that it did not justify these "*irregularities*" and therefore instructed Col. Khan to cease these practices immediately. Dr. Jezek added that he remembered Col. Khan being upset during that conversation and seeming to resent his authority, which contributed to his "*strained relationship*" with Col. Khan.[1758]

1353. Dr. Jezek testified that he determined at the time that Col. Khan was responsible for these practices and "*did not find any evidence that TCC's senior management or owners ever sanctioned the procedures*." He added that he decided against taking disciplinary actions at the time, considering that in the absence of any evidence of corruption in the visa application process, the employees responsible deserved "*a second chance*." Dr. Jezek stated that with the assistance of local counsel, he reformed the procedure and made it "*clear that the old practices would not be tolerated going forward*." According to Dr.

[1755] Transcript (Day 4), p. 951 lines 13-21.
[1756] Transcript (Day 4), p. 953 line 19 to p. 955 line 10.
[1757] Jezek II, ¶¶ 11-12.
[1758] Jezek II, ¶¶ 13-14.

Jezek, this was unanimously endorsed by the Board, which he had informed of this issue by the memorandum discussed above.[1759]

1354. As for Col. Khan's allegation that bribes were paid in order to expedite the process, Dr. Jezek stated that he considered this to be "*highly dubious*" given that once the matter came to his attention, he looked into it "*thoroughly*" and did not find any evidence of payments being made.[1760]

1355. The Tribunal notes that there are two distinct issues in this regard: (i) the allegation that bribes were being paid on a regular basis to the authorities in Islamabad to expedite the visa application process; and (ii) the discovery made by Dr. Jezek in September 2009 with regard to the applications and attached employment contracts.

1356. The first allegation is supported only by Col. Khan's written witness testimony where he stated that for every visa, "*a few thousand rupees*" were paid by Mr. Shahzad for which he was reimbursed via petty cash. Apart from the fact that there is no documentary evidence supporting this allegation, the Tribunal does not consider Col. Khan's testimony plausible. As Ms. Boggs testified, when he discovered in early 2009 that payments had been made in connection with the visas of Mr. Whisken and Mr. Flew, he reported them to Ms. Boggs and assisted her in investigating who was responsible for this wrongdoing. In addition, his own reaction during the hearing regarding his discovery of payments being made in Karachi does not accord with his written testimony that he was at the same time aware of payments being made to expedite the process in Islamabad. Finally, Dr. Jezek testified that he did not find any evidence of bribes being paid even though he thoroughly investigated the matter after having found out about irregularities in the documentation of visa applications. Consequently, the Tribunal concludes that the allegation that Mr. Shahzad regularly paid bribes in connection with obtaining work visas has not been established.

1357. As to the second issue that was identified by Dr. Jezek and reported to Claimant's Board of Directors in September 2009, Respondent argues that the submission of "*fraudulent*" visa applications contributes to "*undermin*[ing] *TCC's vaunted corporate compliance structure*."[1761] According to Claimant, on the other hand, Dr. Jezek's dealing with the issue he had identified serves to confirm that "*TCC's anti-corruption policies were real*."[1762] In the Tribunal's view, it is not necessary to express a general view on Claimant's "*corporate compliance culture*." The evidence in the record shows that up to 2009, the applications were signed by Col. Khan instead of the respective CEO and the attached employment contracts did not reflect the actual employment relationship

[1759] Jezek II, ¶¶ 15-19.
[1760] Jezek II, ¶ 21.
[1761] Respondent's Reply, ¶ 103.
[1762] Claimant's Rejoinder, ¶ 265.

between the employee and the company but were rather fictitious documents used for all applications. Regardless of whether there were plausible concerns to disclose financial information concerning the employees, this process was, as Dr. Jezek reported to the Board, not in line with the company's business ethics and could give rise to "*far reaching consequences*."

1358. Col. Khan testified that since he became responsible for supervising the visa application process in 2005, Mr. Hargreaves and each of his successors knew about these practices. In response to this testimony, each of them denied having had any knowledge about the practices. Dr. Jezek further confirmed that his investigation did not reveal any indication that they did but he rather determined at the time that Col. Khan had been responsible for these practices. While Respondent notes that the issue was easily identified by Dr. Jezek when he became CEO "*simply by reviewing his own work visa application*," Dr. Jezek also noted that his application had already been filed on his behalf before his arrival in Pakistan. Assuming that the same would have applied to Claimant's previous CEOs, it cannot be presumed that each of them did the same review after arriving in Pakistan.

1359. On that basis, it cannot be considered established that Claimant's CEOs were aware of and endorsed the practices identified by Dr. Jezek. In the Tribunal's view, it therefore again has to be taken into account how the issue was addressed once it came to the attention of Claimant's CEO Dr. Jezek in September 2009. It is undisputed that Dr. Jezek investigated the matter, reported it to Claimant's Board of Directors and, most importantly, implemented a reform of the procedure, as demonstrated by the document entitled "*Work Visa: Applicating Procedure*" dating from 5 March 2010 in which expatriate employees were informed about the steps involved and the requirements to be met *vis-à-vis* the various authorities involved.[1763]

1360. In any event, the Tribunal notes that it remains unclear whether these practices, even if they were to be qualified as "*fraudulent*" as claimed by Respondent, had a relevant impact on Claimant's investment. In particular, there is no indication and it has not even been alleged that any of the visas that were granted on the basis of fictitious employment contracts would have been denied if the correct information had been attached and thus that any of Claimant's expatriate employees would not have been permitted to work in Pakistan.

1361. In conclusion, the Tribunal finds that Respondent has failed to establish that the irregularities in the visa application process for Claimant's expatriate employees that came to light in the course of 2009 reflected a general lack of diligence or respect for Pakistani laws on the part of Claimant's representatives. Consequently, the Tribunal does

[1763] **Exhibit RE-406**.

not have to decide whether and, if so, to what extent such a finding would be relevant to Claimant's claims under the Treaty.

g. Allegations Relating to the Mineral Agreement and/or the Mining Lease

1362. Finally, the Tribunal will address Respondent's allegation that between 2006 and 2010, Claimant "*paid and offered numerous bribes to key Government decision-makers … in return for their assistance procuring a Mineral Agreement and Mining Lease*."[1764]

i. Summary of Respondent's Position

1363. Respondent alleges that Claimant made and offered four bribes to key Government officials between 2006 and 2010 in the aim to obtain the Mineral Agreement, which, as acknowledged by Claimant's witnesses, was necessary to secure financing for the project and the Mining Lease -

a) According to Mr. Farooq, the first of these payments was of USD 20,000 made by Mr. Flores to CS Rind in 2007 in return for his cooperation with the Mineral Agreement.[1765] Respondent argues that although Mr. Flores denies having made this payment, inconsistencies between his evidence and Ms. Boggs' evidence as to his contact with Chief Secretary Rind suggest that Mr. Farooq's evidence is to be preferred.[1766]
b) Secondly, USD 100,000 was allegedly offered by Mr. James to Mr. Farooq in 2008 for his assistance in obtaining a Mineral Agreement.[1767] Despite Mr. James denying this offer, Respondent argues that his tendency to misremember and fabricate evidence supports Mr. Farooq and Col. Khan's turn of events.[1768] Although Claimant criticized Col. Khan for not including this in his NAB section 161 statement or his section 164 statement, Col. Khan explained that this was because he only witnessed the offer and was unsure whether the money was paid to Mr. Farooq or not.[1769]
c) Thirdly, according to Mr. Mustikhan, an offer of "*millions*," of project contracts and of jobs was made by Dr. Jezek in September 2009 to two ministers in Chief Minister Raisani's Cabinet in return for them forming a pressure group in the provincial government aiming to secure the Mineral Agreement for Claimant.[1770] Respondent maintains that Claimant has foregone two opportunities to defend itself against this allegation (Dr. Jezek did not mention

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[1764] Respondent's Post-Hearing Brief, ¶ 207.
[1765] Respondent's Post-Hearing Brief, ¶ 208 *referring to* Farooq II, ¶ 16.
[1766] Respondent's Post-Hearing Brief, ¶¶ 208-210 *referring to* Flores II, ¶ 39, Transcript (Day 10), p. 2573 line 17, Boggs I, ¶ 25, Transcript (Day 10), p. 2576 lines 5-10 *and* p. 2508 lines 4-12.
[1767] Respondent's Post-Hearing Brief, ¶ 211 *referring to* **Demonstrative RD-1**, item 19, *citing* Khan II, ¶ 9 and Farooq II, ¶ 17 *and* Transcript (Day 4), p. 1017 lines 10-18 and p. 1019 lines 1-5.
[1768] Respondent's Post-Hearing Brief, ¶ 211.
[1769] Respondent's Post-Hearing Brief, ¶ 211 *referring to* Transcript (Day 4), p. 1019 lines 6-12 *and* p. 1024 lines 12-20.
[1770] Respondent's Post-Hearing Brief, ¶¶ 212-213 *referring to* **Demonstrative RD-1**, item 26 *and* Mustikhan, ¶¶ 11-12.

this allegation in his witness statements, and Mr. Mustikhan was not challenged on this in cross-examination) and thus there is no reason not to accept Mr. Mustikhan's evidence at face value.[1771]

d) Furthermore, Respondent alleges that a range of evidence before the Tribunal, spanning many years and witnesses, is remarkably consistent in demonstrating that Claimant also attempted to bribe Chief Minister Raisani with USD 1 million in or around 2009 in order to obtain his approval of the Mineral Agreement and Mining Lease.[1772]

1364. In relation to the bribe allegedly offered to Chief Minister Raisani, Respondent submits that following Mr. Farooq's assertion that "*TCC needed to have CM Raisani in its pocket*," Col. Khan allegedly calculated that for less than USD 1 million, Claimant could purchase a house and car which would be a "*reasonable price for obtaining the loyalty of the CM*" with which Mr. Flores was allegedly in favor.[1773] Although Mr. Flores denies agreeing to present this option to Claimant's Board of Directors, Respondent argues that Col. Khan's evidence is to be preferred for multiple reasons. Firstly, at the time Mr. Flores was still involved with Claimant as a Board Member and he admitted that Chief Minister Raisani was an important decision-maker with regard to the Mineral Agreement.[1774] Secondly, Mr. Flew confirmed that key aspects of Col. Khan's evidence (such as the price of the plot of land and house in Islamabad) had been known to other TCC employees for years.[1775] Thirdly, Col. Khan has shown consistency in his recollection of events, giving the same account to Mr. Flew and Claimant's counsel in mid-2015, then to the NAB and to this Tribunal.[1776]

1365. Respondent claims that this USD 1 million bribe was then offered to Chief Minister Raisani in 2009, as alleged by the Chief Minister in a January 2010 meeting as well as publicly in the Pakistani press.[1777] Respondent submits that the timing of the documentary and witness evidence regarding this attempted bribe strongly supports the truth of it, raising concerns as to Claimant's failure to mention this to the Tribunal at an earlier stage of the proceedings.[1778] Respondent argues that if Claimant truly believed that Chief Minister Raisani had wrongly accused TCC of corruption in order to extort it (as it now

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[1771] Respondent's Post-Hearing Brief, ¶ 213.
[1772] Respondent's Reply, ¶¶ 71-74; Respondent's Post-Hearing Brief, ¶ 214 *referring to* **Demonstrative RD-1**, item 27 *and* Claimant's Rejoinder, ¶ 246.
[1773] Respondent's Post-Hearing Brief, ¶ 215 *referring to* Khan II, ¶¶ 24-25, Flores II, ¶ 40 *and* Transcript (Day 10), p. 2617 lines 11-13.
[1774] Respondent's Post-Hearing Brief, ¶ 216 *referring to* Transcript (Day 10), p. 2616 lines 9-17.
[1775] Respondent's Post-Hearing Brief, ¶ 217 *referring to* Khan II, ¶¶ 24-25.
[1776] Respondent's Post-Hearing Brief, ¶ 219 *referring to* **Exhibit RE-459**, p.6, Khan I, ¶¶ 19-20 *and* Khan II, ¶¶ 24-26.
[1777] Respondent's Post-Hearing Brief, ¶¶ 222-228 *referring to* Jezek I, ¶ 65, Boggs IV, ¶ 38, **Exhibits RE-430 / AM-7A** and **RE-431 / AM-7B**.
[1778] Respondent's Reply, ¶¶ 71-74.

claims), this would presumably have been asserted in support of Claimant's argument that Respondent breached the fair and equitable treatment standard of protection.[1779]

1366. Respondent relies on the testimony of Dr. Jezek regarding the rumor of a USD 1 million bribe he had learned of in late 2009 and Mr. Mustikhan's admission of approaching Chief Minister Raisani in late November/early December on Dr. Jezek's instruction with Claimant's offer of a bribe and argues that Claimant misrepresents a number of contemporaneous documents in an attempt to counter such allegations.[1780] Moreover, Respondent rejects the criticism of its reliance on statements made by Chief Minister Raisani to the press on the basis that if he were available, Respondent certainly would have spoken to him directly about the allegation. Respondent reiterates that Mr. Raisani left Pakistan years ago and is believed to be residing in Malta at present.[1781]

1367. Respondent considers it higly relevant that Claimant was interested at the time in whether Chief Minister Raisani was amenable to taking bribes and that there was a focus on initiatives to increase the chances of successfully accessing the Chief Minister around the time of the meeting in which Chief Minister Raisani was offered the USD 1 million bribe.[1782] Respondent maintains that this initiative included Claimant's donation of USD 100,000 to Chief Minister Raisani's relief fund for the earthquake in Ziarat given Col. Khan and Ms. Boggs belief that "*there was a good chance the money would end up in CM Raisani's personal bank account.*"[1783]

1368. Respondent maintains that the actions of Mr. Mustikhan and Dr. Jezek are attributable to Claimant. Not only was Dr. Jezek CEO of Claimant at the time, but witnesses have testified that he actively encouraged Mr. Mustikhan's attempts to bribe Chief Minister Raisani (and that he himself offered financial rewards to senior members of the Balochistan cabinet to support TCC in respect of the project).[1784] Respondent thus maintains that Claimant is responsible for his actions carried out in its interests. Moreover, given that he explicitly endorsed Mr. Mustikhan's bribery efforts (who was also acting for and on behalf of TCC), Respondent maintains that Mr. Mustikhan's conduct is also legally attributable to Claimant.[1785]

1369. Respondent argues that despite Claimant not securing the Mineral Agreement or Mining Lease, the bribes were still improper under Pakistani law, the FCPA and the anti-bribery

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[1779] Respondent's Reply, ¶ 73.
[1780] Respondent's Post-Hearing Brief, ¶¶ 223-227; Respondent's Reply, ¶ 72.
[1781] Respondent's Post-Hearing Brief, ¶ 228 *referring to* Claimant's Rejoinder, ¶ 256.
[1782] Respondent's Reply, ¶ 364.
[1783] Respondent's Reply, ¶ 364 *referring to* Khan II, ¶ 26.
[1784] Respondent's Application, ¶ 60 *referring to* Mustikhan, ¶ 11, 12, 18, Dad I, ¶¶ 15-16.
[1785] Respondent's Application, ¶ 60.

and corruption policies of TCC, Barrick Gold and Antofagasta.[1786] Respondent also asks the Tribunal to draw the appropriate inferences from Claimant's reluctance to provide evidence and investigation documents in relation to Barrick Gold's investigation into Chief Minister Raisani's allegation of bribery in early 2010 under the pretext of privilege.[1787]

ii. Summary of Claimant's Position

1370. As an initial matter, Claimant asserts that Respondent's allegations regarding the Mineral Agreement are irrelevant given the undeniable fact that the agreement was never achieved.[1788] Nonetheless, Claimant submits that Respondent has failed to prove its allegations since they are based on the testimony of Mr. Mustikhan and Mr. Dad who are discredited witnesses (the former for reasons elaborated on below and the latter in relation to Pakistan's other "*scattershot allegations*," particularly his vague, unsubstantiated claims that Claimant paid journalists to report in its favor).[1789]

1371. Claimant argues that Respondent's claims are also allegedly contrary to the record and common sense.[1790] Claimant firstly submits that Mr. Flores: (i) denied having a conversation with Mr. Farooq as to promised rewards and personal benefits; and (ii) explained that Mr. Farooq's allegation makes little sense given his lack of influence in the Mineral Agreement negotiations and lack of authority to grant a mining lease. Claimant argues that conflicting dates in his recollection of events also cast doubt on the credibility of his testimony.[1791] Claimant secondly submits that Dr. Jezek has likewise denied offering any jobs, contracts or other improper benefits to Government officials. In addition, his efforts towards the strategy to increase local engagement in the project, undermine any suggestion that he was trying to achieve those goals through corruption.[1792]

1372. Furthermore, Claimant perceives Respondent's attempts to resurrect Chief Minister Raisani's accusations that TCC tried to bribe him to be fatally deficient.[1793] Firstly, Claimant argues that Respondent has never explained why Chief Minister Raisani has not appeared in these proceedings to make the accusations himself, rather than relying on "*implausible testimony, uncorroborated and inconsistent rumours, and* [his] *unhinged*

[1786] Respondent's Post-Hearing Brief, ¶ 229; Respondent's Application, ¶¶ 80-87.
[1787] Respondent's Post-Hearing Brief, ¶¶ 229-232.
[1788] Claimant's Post-Hearing Brief, ¶ 170.
[1789] Claimant's Post-Hearing Brief, ¶ 170, ¶¶ 234-238, 278-281.
[1790] Claimant's Post-Hearing Brief, ¶¶ 169-175.
[1791] Claimant's Post-Hearing Brief, ¶¶ 171-173 *referring to* Flores I, ¶¶ 32-33, Farooq I, ¶ 15 *and* Flores II, ¶ 25.
[1792] Claimant's Post-Hearing Brief, ¶ 175.
[1793] Claimant's Post-Hearing Brief, ¶ 232 *referring to* Respondent's Reply, ¶¶ 71-73.

rants in the local Pakistani press."[1794] Secondly, Claimant perceives these allegations to make no sense given that Chief Minister Raisani was looking to oust TCC so that Balochistan could take control of the project.[1795] Claimant submits that the alleged offer, if it had indeed occurred, would have been sufficient reason to kick TCC out of the project, making it inconceivable that it was not used as a justification for taking over the project and denying the Mining Lease Application.[1796] Claimant further criticizes Respondent's citation of only three documents as supposed proof of the bribe attempt, including Chief Minister Raisani's public statement in 2013, which it considers to prove nothing but his reputation for making exaggerated claims for political reasons.[1797]

1373. Claimant further asks the Tribunal to reject Respondent's contentions in respect of Chief Minister Raisani based on the argument that the witness testimony at the hearings confirmed their falsity.[1798]

1374. Claimant rejects the first version of Respondent's allegation that in December 2009, Mr. Mustikhan offered Chief Minister Raisani the opportunity to name his price in exchange for the Mineral Agreement, after having received instructions from Dr. Jezek on 26 September 2009. Claimant argues that this claim is vague and unsubstantiated and deems it to be "*highly implausible*" that Mr. Mustikhan would have waited three months to act on Dr. Jezek's instructions.[1799]

1375. Claimant further rejects Respondent's allegation that a USD 1 million bribe was offered as alleged by Chief Minister Raisani during the January 2010 meeting, relying on the testimony of both Ms. Boggs and Dr. Jezek.[1800] Claimant maintains that despite its repeated attempts, Respondent cannot impugn Claimant for its failure to investigate the allegation given Dr. Jezek and Ms. Boggs' agreement that the lack of details in this allegation made it incapable of investigation.[1801] In any event, Claimant submits that as soon as the allegation was communicated to TCC, it inquired into the matter and could find no evidence in support of the claim.[1802]

[1794] Claimant's Post-Hearing Brief, ¶ 233.
[1795] Claimant's Post-Hearing Brief, ¶ 234 *referring to* Transcript (Day 6), p. 1558 lines 3–7 *and* Claimant's Rejoinder, ¶ 248.
[1796] Claimant's Post-Hearing Brief, ¶ 234 *referring to* Transcript (Day 6), p. 1559 line 19 to p. 1560 line 1.
[1797] Claimant's Rejoinder, ¶ 248 *referring to* Respondent's Reply, ¶¶ 71-73 *and* **Exhibit AM-7**.
[1798] Claimant's Post-Hearing Brief, ¶ 235.
[1799] Claimant's Post-Hearing Brief, ¶¶ 236-238.
[1800] Claimant's Post-Hearing Brief, ¶¶ 239-241 *referring to* Transcript (Day 12), p. 3127 line 15 to p. 3128 line 1 *and* Transcript (Day 11), p. 2895 lines 3–4 and 15–18.
[1801] Claimant's Rejoinder, ¶ 254 *referring to* Respondent's Reply, ¶ 73(d), Jezek I, ¶¶ 61-62, Jezek II, ¶¶ 62-64 and Boggs IV, ¶ 41.
[1802] Claimant's Rejoinder, ¶ 254 *referring to* Jezek II, ¶¶ 62-64.

1376. Finally, Claimant submits that Respondent's claim that TCC offered a car and a house to Chief Minister Raisani was disproven at the hearing by Mr. Flores, Mr. Flew and Ms. Boggs.[1803]

1377. Additionally, on any of these versions, Claimant submits that Respondent has failed to explain how the acts of an independent consultant like Mr. Mustikhan would even be attributable to Claimant.[1804] Claimant argues that Mr. Mustikhan was not even an agent of TCC but a mere consultant who signed a consulting contract that contained clear anti-bribery policies and explicit restrictions on the scope of this authority to bind the company in violation of this agreement, which he admitted to understanding.[1805]

1378. Claimant also asks the Tribunal to dismiss Respondent's separate allegation attacking TCC's efforts to support the local community by making a disaster relief donation in the wake of a 2008 earthquake. Claimant maintains that the public nature of the donation, contemporaneous e-mails and the testimony of Ms. Boggs all confirm that the fund was legitimate and not an attempt to divert the money into Chief Minister Raisani's personal bank account.[1806]

iii. Tribunal's Analysis

1379. At the outset of its analysis, the Tribunal notes that it is undisputed between the Parties that the rights or benefits to which these final allegations relate were ultimately never obtained, given that a Mineral Agreement that was being negotiated between the Parties starting in 2007 was never concluded and the Mining Lease that TCCP applied for in February 2011 was denied by the Licensing Authority on 15 November 2011. Nevertheless, the Tribunal also notes that Respondent raises serious allegations in this regard that would directly implicate Claimant's CEOs if they were proven. In addition, Respondent argues that the offer of a payment of a bribe is, in and of itself, illegal under Pakistani and US law and is thus "*clearly relevant to the issue of whether TCC was a fit and proper person to hold a Mining Licence and the state of mind of the CM, a key decision-maker in the context of that Mining Licence decision process.*"[1807] In Respondent's view, the Tribunal has not yet made a finding on the effect of the corruption

[1803] Claimant's Post-Hearing Brief, ¶ 242 *referring to* Khan II, ¶¶ 24–25, Farooq II, ¶ 60, Respondent's Reply, ¶¶ 71–74, Transcript (Day 10), p. 2619, lines 1–14, p. 2623 line 16 p. 2626 line 2, Transcript (Day 11), p. 3018 line 15 to p. 3019 line 2 *and* Boggs IV, ¶ 9.
[1804] Claimant's Post-Hearing Brief, ¶ 243.
[1805] Claimant's Post-Hearing Brief, ¶ 243 *referring to* **Exhibit RE-379**; Transcript (Day 6), pp. 1496–1504.
[1806] Claimant's Rejoinder, ¶ 258; Claimant's Post-Hearing Brief, ¶¶ 244-246.
[1807] Respondent's Post-Hearing Brief, ¶ 229.

evidence on Claimant's ability to meet the test of "*fit and proper person*" and thus whether the alleged corrupt acts justified a denial of the Mining Lease Application.[1808]

1380. Without expressing any opinion on the merits of Respondent's argument at the present stage, the Tribunal will carefully assess the evidence supporting each of these allegations. Should any of these allegations be proven, the Tribunal will turn to their relevance to Claimant's claims under the Treaty.

1381. Specifically, Respondent raises four allegations of actual or attempted corruption in this regard:[1809]

i. Payment of USD 20,000 by Mr. Flores to Chief Secretary Rind in the presence of Mr. Farooq in 2007 "*in return for his cooperation with the Mineral Agreement*";

ii. Offer of a payment of USD 100,000 by Mr. James to Mr. Farooq in 2008 "*to continue*[] *to support the Reko Diq project and help*[] *TCC to obtain the Mineral Agreement*";

iii. Offer of "*millions*," project contracts and jobs by Dr. Jezek to Mr. Marri and Mr. Buledi, two ministers in Chief Minister Raisani's cabinet, in September 2009 "*to form a pressure group within the provincial government and Cabinet with the aim of securing the Mineral Agreement for TCC*";

iv. Offer of a payment of USD 1 million by Mr. Mustikhan, on Dr. Jezek's instructions, to Chief Minister Raisani in late November / early December 2009 "*to obtain a mineral agreement and mining lease*."

1382. In support of these allegations, Respondent relies on the witness testimony of Mr. Farooq, Col. Khan and Mr. Mustikhan, which will be addressed in detail below. In the context of the attempted bribe of Chief Minister Raisani, Respondent also refers to contemporaneous documentary evidence pursuant to which Chief Minister Raisani raised the allegation of having received such an offer in early 2010.

(a) Payment of USD 20,000 by Mr. Flores to Chief Secretary Rind

1383. Respondent claims that "*to put the loyalty of CS Rind beyond doubt*," after he had already attended the trip to Toronto in March 2007, which was discussed in detail above, "*TCC paid him a further bribe of US$ 20,000 soon after his return from Canada in 2007*."[1810] In addition, Respondent alleges that Chief Secretary Rind received "*expensive and imported wine and liquor*" from TCC, which Respondent decribes as a "*prize gift in*

[1808] Respondent's Post-Hearing Brief, ¶ 433.
[1809] Respondent's Post-Hearing Brief, ¶¶ 208-228; Respondent's Reply, ¶¶ 71-74.
[1810] Respondent's Reply, ¶ 340.

Pakistan" because it is illegal for Muslims to buy.[1811] In support of its allegations, Respondent relies on the witness testimony from Mr. Farooq and Col. Khan.

1384. In his second witness statement, Mr. Farooq stated that having read Mr. Flores' testimony that he had had "*only limited interactions with Mr. Farooq, and most of them were in connection with Operating Committee meetings*,"[1812] he, Mr. Farooq, had "*remembered one particular incident involving* [Mr. Flores]." Mr. Farooq then testified as follows:

> "*There was a meeting between Mr K.B. Rind (the Provincial CS) and Mr Flores in CS Rind's house in Quetta in 2007. Mr Flores and CS Rind had a good relationship and Mr Flores used to supply liquor to him. I arranged the meeting and also attended, arriving before Mr Flores. The meeting was shortly after the trip to Toronto, Canada … and we discussed the trip and the Mineral Agreement. Mr Flores arrived at the meeting with a briefcase. At the end of the meeting, he told CS Rind that he had a gift for him and he handed over the briefcase to CS Rind, which he said contained US$ 20,000. CS Rind partly opened the briefcase and I saw that it contained US currency. CS Rind seemed to be expecting the money. CS Rind told Mr Flores that he should not worry,* 'the company will get my full co-operation'."[1813]

1385. During the hearing, Mr. Farooq was pointed to the fact that he had not mentioned this incident in his first witness statement or his statement before the NAB in September 2015 but only raised it in response to the witness statements filed by Claimant together with its Opposition. Mr. Farooq responded:

> "*Yes. There was two or three reasons for that. One is that I--whatever bribery case took place, which was directly linked with me, I explained--the money I took or gave I explained.*
>
> *And the other thing was Rind was a very influential person, tribal person. I could not talk against him, so I was worried that he might destroy me or take an action against me. So, I could not complain against the Chief Secretary about his secret, about his weaknesses. I could not open them. I did not have that courage.*
>
> *When they started refusing; the opposition then I said I will see and then I could explain. And then whatever points I had, I explained. And then there was a case about this Flores, and then I explained that as well*."[1814]

1386. In response to the question when he had remembered this incident, Mr. Farooq stated:

> "*I had already remembered. I remembered this earlier as well. I am telling you the reasons why did I not explain it beforehand; because I am a family person with children, and I was worried that they will harass me. And because*

[1811] Respondent's Reply, ¶ 339 (note 1190).
[1812] Flores I, ¶ 28.
[1813] Farooq II, ¶ 16.
[1814] Transcript (Day 3), p. 801 line 20 to p. 802 line 13.

> *he belonged to a big tribe and he was a very influential person and he would create problems for me if he knew about it, and I was worried about these things that's why I did not want to give statement against these higher-up people.*
>
> *And when the opposition increased, I thought I should also come out and tell the Government; so I told these things*."[1815]

1387. Mr. Farooq confirmed that he had deliberately concealed the information from the NAB "[b]*ecause I am not directly involved, so I don't need to tell about it. And because he was a higher-up officer at that time*." When asked why, despite the consequences he had described, he decided to make the allegation in the present arbitration, Mr. Farooq answered that he became upset when reading the denial of any bribery by Claimant's representatives and so "*decided that whatever points I have, I would bring it up in the interest of the nation and tell that these are the incidents which took place, and these are the corruptions that happened*."[1816]

1388. Col. Khan did not testify about the alleged payment of USD 20,000 but confirmed in his second witness statement that "*Mr Flores used to provide expensive and imported wine and liquor to the Chief Secretary of Balochistan, Mr K.B. Rind*" and added that he, Col. Khan, "*also delivered liquor on behalf of Mr Flores to CS Rind on many occasions*." Col. Khan stated that he "*spent hundreds of thousands of rupees on liquor for CS Rind on behalf of TCC*" and that "[i]*n addition to the expense, being illegal, these gifts created influence for TCC with CS Rind. When Mr Flores would visit CS Rind at his office in Quetta, CS Rind would call all of his key secretaries (e.g. Secretary of Finance, Secretary of Mines) and hold a* darbar *(court) where all secretaries were made answerable to Mr Flores on projet-related issues*." Col. Khan further testified that he and Mr. Flores also went to see the Chief Secretary "*to seek a favourable verdict in the TCC case pending in the Balochistan High Court*" and were told by the Chief Secretary that he had met with the Chief Justice and that "*a favourable verdict would be delivered*" as it indeed was later that year.[1817]

1389. In response to this testimony, Mr. Flores testified in his second witness statement that besides "*a single bottle of Chilean wine*" that he gave to Chief Secretary Rind "*as a business gift*" during the trip to Toronto, he did "*not recall giving Chief Secretary Rind wine or liquor on any other occasion*" and never authorized Col. Khan to do so nor was he aware that Col. Khan ever did so. Mr. Flores also denied Col. Khan's allegation that the Chief Secretary would make his secretaries answerable to him at the meetings they had or that he received the Chief Secretary's assurance of a favorable ruling in the case

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[1815] Transcript (Day 3), p. 803 line 16 to p. 804 line 5.
[1816] Transcript (Day 3), p. 805 line 5 to p. 806 line 20. *See also* p. 809 line 14 to p. 810 line 4.
[1817] Khan II, ¶ 20.

pending before the Balochistan High Court.[1818] Mr. Flores further strongly rejected Mr. Farooq's allegation that he had given a briefcase containing USD 20,000 to Chief Secretary at his house, stating:

> "*I never made any such payment, at any time, to Chief Secretary Rind or any other other government officials, and am deeply disturbed to have these slanderous and fictitious allegations of such a serious nature made against me. The other facts in Mr. Farooq's allegation are also false. While I do recall having at least one meeting with Chief Secretary Rind in a guest house owned by the Government of Balochistan, I do not remember ever attending any meetings at Chief Secretary Rind's home. Nor do I recall any meeting attended by only Chief Secretary Rind, Mr. Farooq, and myself. As a general matter, in order to minimize the risk or appearance of impropriety, I would not attend meetings with government officials alone*."[1819]

1390. During the hearing, Mr. Flores again denied both Col. Khan's testimony that he supplied exensive, imported liquor to Chrief Secretary Rind and Mr. Farooq's testimony that he gave him a briefcase containing USD 20,000. Mr. Flores confirmed that during the months from late 2006 until the time Mr. Rind left as Chief Secretary, he met with him "*10 times, maybe less"* but denied that he met him "*off-line from formal meetings*" with one exception at the hotel in Toronto.[1820] When pointed to Ms. Boggs' testimony in the previous phase of this arbitration that he "*forged a good relationship with the Chief Secretary of Balochistan, K.B. Rind, and ensured that Mr. Rind was constantly informed of developments*,"[1821] Mr. Flores confirmed that he "*did have a good relationship with him*" and "*remembered to have had several meetings with him at his office at Quetta*" but did not recall to have had "*informal meetings with him*." Mr. Flores maintained that he did not remember "*to have had any single meeting by* [him]*self with a government authority*," adding that this was not his way of conducting business or meetings with government officers.[1822]

1391. As for the allegation raised by Mr. Farooq, Mr. Flores testified that "[t]*hat is absolutely false and makes no sense*," explaining that "*that was the very beginning of the conversation on the Mineral Agreement. There was nothing to agree at that time. We're talking about the first half of 2007, the discussion was not even started. And further, the discussion went for another year, maybe another year. So, there was … nothing to agree to discuss at that point*."[1823]

[1818] Flores II, ¶¶ 37-38.
[1819] Flores II, ¶ 39.
[1820] Transcript (Day 10), p. 2570 line 21 to p. 2572 line 19.
[1821] Boggs I, ¶ 25.
[1822] Transcript (Day 10), p. 2573 line 5 to p. 2575 line 19.
[1823] Transcript (Day 10), p. 2576 lines 4-15.

1392. Based on the witness evidence presented by the Parties, it cannot be considered established that Mr. Flores made a payment of USD 20,000 to Chief Secretary Rind. In support of this allegation, Respondent relies exclusively on the witness testimony of Mr. Farooq, who described this alleged payment for the first time in his second witness statement. In the Tribunal's view, Mr. Farooq's explanation during the hearing as to why he did not mention the alleged payment either in his first witness statement or in his statement before the NAB is not convincing. While he stated in his second witness statement that he remembered this incident after having read Mr. Flores' first witness statement, he testified during the hearing that he always remembered the incident but that he did not mention it before the NAB because he was testifying only about acts of bribery in which he was directly involved and because he was concerned about the consequences of accusing Mr. Rind whom he described as "*a very influential person … that would create problems for* [him]." While the Tribunal would not exclude that raising an accusation of corruption against a high-ranking Government officer could indeed give rise to consequences for the accusing individual, the Tribunal does not consider it plausible that Mr. Farooq simply changed his mind and decided to raise the allegation after Claimant's representatives had denied the allegations of corruption in their witness statements submitted together with Claimant's Opposition.

1393. In addition, the Tribunal takes note of Mr. Flores' firm denial of this allegation in both his written and oral testimony as well as of his testimony that he did not recall to have ever had an informal meeting with Chief Secretary Rind. While Respondent placed much emphasis during the hearing on Ms. Boggs' previous testimony that Mr. Flores "*forged a good relationship*" with the Chief Secretary and kept him "*constantly informed of developments*," the Tribunal does not agree with Respondent that this testimony indicates that Mr. Flores met with him informally or without any other people being present. Finally, the Tribunal also notes Mr. Flores' testimony that it would not have made any sense to make a payment in early 2007, which was before the negotiations on the Mineral Agreement had started and the first draft had been exchanged.

1394. Consequently, in the absence of any further evidence supporting Mr. Farooq's testimony, the Tribunal does not accept Respondent's allegation that Mr. Flores made a payment of US 20,000 to Chief Secretary Rind "*in return for his cooperation with the Mineral Agreement.*"

1395. As for the additional allegation raised by Col. Khan, *i.e.*, that he and Mr. Flores gave gifts in the form of expensive, imported liquor to Chief Secretary Rind on several occasions, the Tribunal again notes that this allegation is based exclusively on the witness testimony of Col. Khan and Mr. Farooq. Apart from the absence of any documentary evidence that Col. Khan indeed spent "*hundreds of thousands of rupees*" on liquor for the Chief Secretary, Col. Khan did not identify any specific incident on which Mr. Flores and he himself actually provided such a gift to the Chief Secretary. In addition, there is no

evidence supporting Col. Khan's testimony that in return for this supply with liquor, the Chief Secretary always summoned his secretaries and made them answerable to Mr. Farooq whenever they had a meeting. In any event, the Tribunal notes that this alleged conduct would not qualify as a sufficiently concrete right or benefit that Claimant obtained in relation to its investment. Finally, there is no evidence supporting the allegation that Chief Secretary exercised influence on the Chief Justice in respect of the pending case in the Balochistan High Court to obtain a ruling favorable to Claimant.

1396. In conclusion, the Tribunal finds that Respondent's allegations regarding a payment of USD 20,000 and expensive gifts made to Chief Secretary Rind in 2007 have not been established.

(b) Offer by Mr. James to Pay USD 100,000 to Mr. Farooq

1397. Respondent further claims that Mr. James promised Mr. Farooq in 2008 to pay him USD 100,000 if he "*continued to favour TCC and ensured that the agreements TCC was requesting got through*."[1824] In support of this allegation, Respondent again relies on the witness testimony of Mr. Farooq and Col. Khan.

1398. Mr. Farooq testified in his second witness statement that having read Mr James' first witness statement that he "*never saw or heard anything about bribes or illicit payments involving TCC,*"[1825] he recalled "*one incident that shows otherwise*." Mr. Farooq then stated:

> "*I once met* [Mr. James] *in Balochistan House with Col. Sher Khan to discuss the Mineral Agreement. It was in early 2008. Mr James promised that he would give me US$ 100,000 if I continued to favour TCC and ensured that the agreements TCC was requesting got through. I never actually received this money.*"[1826]

1399. Col. Khan confirmed Mr. Farooq's testimony in his second witness statement, stating that he witnessed the offer being made by Mr. James to Mr. Farooq. He testified:

> "*In early 2008, Mr James and I attended a meeting with Mr Farooq at Balochistan House in Islamabad. The meeting took place shortly before TCC moved its application for surface rights. At the meeting, Mr Farooq told Mr James how important he was for TCC's project. Mr James acknowledged this and thanked Mr Farooq for his support. However Mr Farooq pressed on, saying that he should be adequately compensated for his assistance. Mr Farooq asked Mr James for US$ 100,000 to be paid into one of his bank accounts in Dubai. Mr James said that if Mr Farooq continued to support the project and helped to get the mining agreement, he would indeed be paid US$*

[1824] Respondent's Reply, ¶ 340, *quoting from* Farooq II, ¶ 17.
[1825] James I, ¶ 30.
[1826] Farooq II, ¶ 17.

> *100,000. He also told Mr Farooq that he would benefit through project contracts once the project development works began. Mr Farooq was very happy with Mr James' offer."*[1827]

1400. During the hearing, Col. Khan confirmed that this alleged offer was the largest bribe that he was aware of ever being offered by Claimant to a Government official but denied that this had been an "*occasion* [he] *took note of*" and described it as "*absolutely normal dealing*."[1828] When pointed to the fact that he had not included this incident in his statement before the NAB or in his Section 164 statement before the magistrate, Col. Khan testified that his interview with the NAB had been "*question and answers, a lot of questions, and then, finally, the Statement came up.*" He noted that this had been only a first statement and emphasized that "*there were lot many things I didn't remember, and then there were things that I recollect afterwards, but, basically, when you say not included, I want to make it very, very clear here that, it all was in a question-and-answer forms.*" Col. Khan confirmed that he had been asked by the NAB to confirm specific facts and added with regard to the USD 100,000 offer that "*this did not come up in our discussion in the NAB.*"[1829]

1401. Col. Khan was also pointed to the fact that he had not mentioned the alleged offer in his first witness statement in this arbitration. He answered that "*again, there's so many things that I spoke were not included*" and added: "*You see, actually, what happened is that I was keeping the grace of my CEOs; right? I kept their grace until the end, but then when I read their testimonies, when I saw their papers, what they were talking, they were giving a picture that they were saints, they knew nothing, they had done no illegal, and then I said okay.*"[1830] Col. Khan further stated that he had remembered the offer at the time of his first witness statement but had not mentioned it because he was not aware that any money had actually been paid. When pointed to the alleged offer to Chief Minister Raisani that he did mention in his first witness statement, Col. Khan answered that he had been "*very much involved in this case*" and "*saw what was happening*"; he then confirmed that he had also witnessed the alleged offer made by Mr. James to Mr. Farooq.[1831]

1402. Mr. James rejected the allegation that he promised to pay Mr. Farooq USD 100,000 in his second witness statement as "*completely false, and offensive to* [him] *both personally and professionally*." He added that while he remembered the meeting at Balochistan House after having read the witness statements of Mr. Farooq and Col. Khan, his recollection

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[1827] Khan II, ¶ 9.
[1828] Transcript (Day 4), p. 1017 line 10 to p. 1018 line 17.
[1829] Transcript (Day 4), p. 1019 line 6 to p. 1021 line 1.
[1830] Transcript (Day 4), p. 1021 line 3 to p. 1022 line 8.
[1831] Transcript (Day 4), p. 1023 line 22 to p. 1026 line 14.

was "*vastly different from the accounts Mr. Farooq and Col. Khan have presented*."[1832] Mr. James explained that at the time he had been trying to increase the frequency of, and set a more regular schedule for, Operating Committee meetings, which had been "*impossible*" so far "*despite several attempts, because* [Mr. Farooq] *claimed that he was too busy*."[1833] Mr. James then testified:

> "*The meeting at Balochistan House came about on Col. Khan's suggestion that I use the occasion of an internal meeting of Balochistan Government officials in Islamabad to meet with Mr. Farooq, and express the importance of coordination for moving the project forward, and therefore of regularly scheduled Operating Committee meetings. I proposed to meet Mr. Farooq at TCC's office, but he informed us that he could only fit us into his schedule if we went to him at Balochistan House. Because Mr. Farooq had no other time available, I agreed to his request.*
>
> *Col. Khan accompanied me to this meeting. The meeting did not last for more than 30 minutes, because Mr. Farooq arrived late and then left early to return to his meetings with officials. After a few minutes of pleasantries, I explained the need to establish a more formal operation of the Joint Venture given the project's scale and complexity. At no point during this meeting—or any other meeting with Mr. Farooq—did I make the alleged promise to pay him any sum of money or give him anything of value, and I flatly reject any suggestion to that effect by Mr. Farooq and Col. Khan*."[1834]

1403. Mr. James further stated that he did not recall whether Mr. Farooq's support for the project was discussed at that meeting but considered it doubtful "*because this meeting had a very specific objective of explaining the complexity of such a large project, and the importance of more formal operation of the Joint Venture*." He added that if there had been any discussion regarding support, it would have been "*general comments about the overall benefits that a successful project would bring for everyone, including the local community and all stakeholders, and in no way specific to any benefit Mr. Farooq might personally receive*."[1835]

1404. During the hearing, Mr. James was asked whether he was aware of the allegations raised by Mr. Farooq and Col. Khan and answered that he was "*highly offended by them*" because he had "*never made any type of payment or any type of offer like that, and* [he] *did not do it at the time*." Mr. James added: "*And Mr. Farooq in that came waltzing in, waving his hands, did not have enough time to even sit down as he walked around the room for a second and said,* 'I've really got to get back to this government meeting. I'm

[1832] James II, ¶¶ 3-4.
[1833] James II, ¶ 5.
[1834] James II, ¶¶ 5-6.
[1835] James II, ¶¶ 7-8.

sorry,' *and he was out the door*."[1836] Mr. James stated that he did not know whether Mr. Farooq would have been receptive to an offer of USD 100,000 but emphasized: "*Mr. Farooq was having a big fantasy that day if he thought I had made any kind of an offer to him because there is no way that I would make an offer like that*."[1837]

1405. Based on the evidence above, the Tribunal does not accept Respondent's allegation that Mr. James made an offer to Mr. Farooq to pay him USD 100,000 if he continued to support Claimant and the project and ensured that the Mineral Agreement would be concluded. In particular, the Tribunal considers it noteworthy that neither Mr. Farooq nor Col. Khan mentioned this alleged incident in their first witness statements or in any of their statements provided to the Pakistani authorities. In particular, the Tribunal is not convinced by Col. Khan's explanation that an offer of USD 100,000 made by CEO of Claimant "*did not come up*" during his interview with the NAB or that he did not refer to it in his first witness statement because it was not sufficiently specific or because he had not witnessed an actual payment being made. As for Col. Khan's testimony that he was "*keeping the grace*" of Claimant's CEOs and in particular Mr. James, Claimant pointed to various statements in his first witness statement in which he had stated that he "*was always open and transparent*" with various CEOs about payments he made to Mr. Farooq and others and that he gave them "*the full picture*."[1838]

1406. As for Mr. Farooq, the Tribunal notes that he did refer in both his statement before the NAB and his Section 164 statement before the magistrate to great benefits and handsome rewards he would receive if he helped Claimant to finalize the Mineral Agreement.[1839] If a specific offer of USD 100,000 had been made in that very same context, it is simply not credible that he would not have mentioned it or that it would not have been recorded in either of those statements.

1407. Finally, the Tribunal notes that Mr. James strongly rejected this allegation and gave a detailed account of how the meeting at Balochistan House came about and what the intention and focus was on his side.

1408. In conclusion, the Tribunal finds that the alleged payment offer cannot be considered established and that the allegation that Mr. James made an offer to Mr. Farooq to pay him USD 100,000 must therefore be rejected.

[1836] Transcript (Day 10), p. 2764 lines 6-22.
[1837] Transcript (Day 10), p. 2765 lines 9-16.
[1838] Transcript (Day 4), p. 1022 line 9 to p. 1023 line 19, *quoting from* Khan I, ¶ 17.
[1839] **Exhibit RE-457**, p. 6; **Exhibit RE-467**, ¶ 7.

(c) Offer by Dr. Jezek to Pay "*Millions*" and Provide Project Contracts and Jobs for Mr. Marri and Mr. Buledi

1409. Respondent's third allegation in this context is that Dr. Jezek, in the presence of Mr. Mustikhan, offered two ministers in Chief Minister Raisani's cabinet, Mr. Marri and Mr. Buledi, "'millions' *as well as projects contracts and jobs for themselves and other officials who assisted TCC*" if they agreed to form a pressure group within the Balochistan government with the aim to secure the Mineral Agreement.[1840] In support of this allegation, Respondent relies on the testimony of Mr. Mustikhan.

1410. Mr. Mustikhan testified in his witness statement that in late 2009, he and Dr. Jezek attended a meeting with Chief Minister Raisani in the context of Claimant's aim to conclude a Mineral Agreement and obtain a Mining Lease. Mr. Mustikhan described this meeting as "*inconclusive, with CM Raisani expressing his desire that TCCP should include an in-country smelter and do more to ensure local job creation*" and stated that a separate meeting with the Chief Secretary was equally "*inconclusive*."[1841] According to Mr. Mustikhan, he then discussed TCCP's further strategy in private with Dr. Jezek and they decided: "[I]*n light of the failre to win over CM Raisai in our meeting, we should look to pursue other* 'Influencers' *more vigorously to form and cultivate a* 'Pressure Group' *within the Balochistan Provincial Assembly. The aim of this bloc would be to work on CM Raisani to grant TCCP the Mineral Agreement and Mining Lease as per TCCP's proposals*."[1842] Mr. Mustikhan further testified:

> "*Following this discussion, I arranged a meeting between Mr Jezek and two provincial ministries in CM Raisani's cabinet: Shahnawaz Marri and Zahoor Buledi. The meeting took place over dinner in the Chinese Restaurant at the Serena Hotel Quetta. As we had discussed, Mr Jezek asked these two gentlemen to form a pressure group within the Provincial Parliament and Cabinet with the aim of securing for TCCP the Mineral Agreement and Mining Lease. They said they were happy to do so. In return for securing for these for TCCP, Mr Jezek said Mr Marri and Mr Buledi would be compensated with* 'millions', *and that other officials who assisted with the project would be rewarded with project contracts and jobs once the project was operational*."[1843]

1411. Dr. Jezek confirmed in his first witness statement that Mr. Mustikhan accompanied him to a meeting with Chief Minister Raisani on 26 September 2009. Dr. Jezek described the

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[1840] Respondent's Post-Hearing Brief, ¶ 212.
[1841] Mustikhan, ¶¶ 9-10.
[1842] Mustikhan, ¶ 11.
[1843] Mustikhan, ¶ 12.

meeting as having gone "*poorly*" with the Chief Minister being "*openly hostile and … ill-informed about the Reko Diq project*." Dr. Jezek testified that he took away from the meeting "*not that I had to resort to bribery, but rather that we had to learn more and redouble our efforts to better inform and educate political and business leaders across Balochistan and build more bottom-up support for the project in the province*."[1844] In this regard, Dr. Jezek referred to a meeting with Chief Minister's Personal Secretary shortly afterwards, which he did not personally attend but learned about through notes that he recalled to have been written by Mr. Dad. Dr. Jezek, *inter alia*, recalled what he described as "*an example of the infamous Pakistani rumour*" of which the Personal Secretary had informed Mr. Dad. The notes record that "*on Saturday 26 September to CM, one of the ministers verbally told to CM at CM House that TCC is demolishing the Raisani government by investing 10 millions dollars to get the favor of all minister by makig the favorable government to sign the project agreement*."[1845] Dr. Jezek considered this allegation "*ridiculous*" and maintained that "[c]*ontrary to Messrs. Mustikhan and Dad's allegations that I or others at TCC later made efforts to force CM Raisani from office, we never did anything of the kind*."[1846]

1412. Dr. Jezek did not specifically refer to Mr. Mustikhan's testimony that he made an offer to Mr. Marri and Mr. Buledi but stated more generally:

> "*It is certainly true that I and others at TCC often described how the project would create jobs for people in Balochistan and work for local contractors, suppliers, and construction companies through the daisy chain of projects. Indeed, one of our key messages to Baloch leaders was that we wanted to maximize the benefits derived from the project for Balochistan (although done in a manner that would not destroy the economic viability of the project for TCC and its owners, who supplied investment capital and technical knowledge and staff). We were trying to educate Baloch community and political leaders about the economic benefits the project would bring to the province. But we never offered anyone any kind of a bribe, including the ability to nominate people for jobs or to award or receive contracts outside normal competitive procedures. TCC hired employees and contractors solely on the basis of their qualifications and merit, and to the best of my knowledge we never hired anyone who was not qualified for his or her job*."[1847]

1413. The Tribunal notes that Dr. Jezek made this statement in the context of his testimony on the Umbrella Strategy, the legitimacy of which was subject to much debate between the Parties. The Tribunal considers it unnecessary to express an opinion on the Umbrella Strategy as such. It also does not have to decide whether the statement made by Dr. Jezek

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[1844] Jezek I, ¶¶ 54-55, 57.
[1845] **Exhibit CE-473**, ¶ 5.
[1846] Jezek I, ¶ 58.
[1847] Jezek I, ¶ 33.

that "[p]*romising jobs or contracts to win favors, or any other kind of corruption was not a part of the Umbrella Strategy and any such manifestations would have seriously undermined it*"[1848] is generally accurate. The Tribunal is rather assessing whether any specific allegation of corruption raised by Respondent has been established and, if so, whether it has had an impact on Claimant's investment and its claims under the Treaty.

1414. As for Respondent's allegation that, whether or not that was part of the Umbrella Strategy, Dr. Jezek offered "*millions*" as well as project contracts and jobs to two ministers and other Government officials, the Tribunal considers that Respondent has not sufficiently substantiated and certainly not established that this offer was actually made by Dr. Jezek. In any event, it would be doubtful whether a promise such as the one that Mr. Mustikhan testified about would be sufficiently specific to qualify as an offer of bribery made in relating to Claimant's investment. This allegation must therefore be rejected.

(d) Offer by Mr. Mustikhan, on Instructions of Dr. Jezek, to Pay USD 1 Million to Chief Minister Raisani

1415. Finally, Respondent claims that "*TCC attempted to bribe CM Raisani in or around 2009,*" alleging that a bribe in the amount of USD 1 million was first considered in 2008 by Mr. Flores and then actually offered to Chief Minister Raisani during the tenure of Dr. Jezek by Mr. Mustikhan in late November / early December 2009.[1849] In the same context, Respondent also notes that Col. Khan and Ms. Boggs decided in late 2008 to donate PAK Rs. 10 million to the Chief Minister's earthquake relief fund and alleges that they considered there to be a "*good chance that the money would end up in CM Raisani's personal bank account*."[1850] In support of these allegations, Respondent relies on the witness testimony of Col. Khan, Mr. Farooq and Mr. Mustikhan as well as on certain news articles reporting that Chief Minister Raisani raised an allegation that Claimant had attempted to bribe him in early 2010, which will be discussed in detail below.

(i) Evidence Concerning the Alleged Consideration of an Offer by Mr. Flores in 2008

1416. Col. Khan testified in his second witness statement that when Mr. Raisani was elected as Chief Minister in April 2008, Mr. Farooq considered it necessary for protecting Claimant's interests and the Reko Diq project that Claimant "*ha*[d] *CM Raisani in its pocket*" and therefore suggested to him, Col. Khan, that "*it may be possible to bribe the CM with a house in Islamabad and a car (a BMW)*" and that they should find out what that would cost and whether Claimant would be interested in making such an offer.[1851]

[1848] Jezek I, ¶ 34.
[1849] Respondent's Post-Hearing Brief, ¶¶ 214, 224.
[1850] Respondent's Reply, ¶ 364 (with note 1250), *quoting from* Khan II, ¶ 26.
[1851] Khan II, ¶ 24.

Col. Khan further stated that he calculated the price for a house and car to be less than USD 1 million, which he considered "*a reasonable price for obtaining the loyalty of the CM*." According to Col. Khan, he suggested this to Mr. Flores, who "*enthusiastically agreed that this was a very* 'workable' *and affordable solution, which he would present to Claimant's Board of Directors*." Col. Khan added that Mr. Flores' proposal was, however, rejected by the Board who told him that he needed to work on "*other options to appease CM Raisani and the government.*"[1852]

1417. According to Col. Khan, he and Ms. Boggs then decided in late 2008 to donate PAK Rs. 10 million to the Chief Minister's relief fund for an earthquake in Ziarat "*to appease CM Raisani*."[1853] As this is in fact a separate allegation of a bribery payment that was actually made, the Tribunal will address the evidence presented by the Parties in this regard in a separate section below.

1418. During the hearing, Col. Khan confirmed that he had spoken about the incident with Mr. Flores to Mr. Flew during a conversation in June 2015, which Mr. Flew had recorded without his knowledge.[1854] This part of the conversation is recorded as follows:

> "*SHER KHAN: So Farooq and Raisani were good pals, you see. And the corruption, all corruption was put together. So he said,* 'I know what this man wants. He'll not ask for big money. He'll ask for very small money. All he requires is at the moment now, he wants [PH 00:28:08] to settle in Islamabad, a plot and a house. You buy, you get a plot and a house.' *So, you know, I calculated a plot and a house, it was coming under one million dollar, under one million. And all he desired, right, of the house, the car, okay. It was all under one million dollars. So I took Eduardo into confidence and I said,* 'Sir, this is a feeling that has come to me.'
>
> *BARRY FLEW: That was when Eduardo was there?*
>
> *SHER KHAN: Eduardo.*
>
> *BARRY FLEW: I see, okay.*
>
> *SHER KHAN: That was when Eduardo was there. And I told Eduardo that Farooq has given me this message, saying that this guy is a very greedy guy and he'll create problems, and the best option is, you know, this is it. Eduardo said,* 'Okay, I'll have to talk to the Board.' *S* [sic] *Eduardo talked to the Board, and the Board said,* 'Nothing doing,' *they said* 'no way' *to me, and I told Farooq that* 'no way.' *He said,* 'But this is the only way.'"[1855]

1419. Col. Khan was further pointed to his repeated statement *vis-à-vis* Mr. Flew that he was not aware of any corrupt payments having been made by TCC and that they had "*never*

[1852] Khan II, ¶ 25.
[1853] Khan II, ¶ 26.
[1854] Transcript (Day 4), p. 961 line 21 to p. 966 line 8.
[1855] **Exhibit CE-480B**, pp. 19-20.

paid a penny."[1856] When asked whether it was now his testimony that he had lied to Mr. Flew in that regard, Col. Khan responded: "*Absolutely*."[1857] Col. Khan further testified: "*I would not give much emphasis to this Transcript. Number 1, this was totally recorded without my permission. And I came to Barry Flew with a specific reason, and … he was not coming out with that information* [on the investigation by the NAB of which he had been informed shortly before]."[1858]

1420. Mr. Flew was also pointed to the transcript of his conversation with Col. Khan during the hearing and confirmed that the story Col. Khan was telling him about a plot and a house in Islamabad was likely the same story he had been told a few years earlier.[1859] As for the reference to the amount of USD 1 million, Mr. Flew stated that "[i]*t was rumored before through Sher Khan about this house and a plot came up to one million*" and added that the rumor was "[t]*hat this was what Raisani was sort of offering or requesting*." Mr. Flew further stated that he had heard for the first time during his conversation with Col. Khan in 2015 that Col. Khan told Mr. Flores about this and was surprised "[t]*hat he would actually take it Eduardo and take it to the Board. I hadn't heard that before.*"[1860] Mr. Flew testified that he believed Col. Khan at the time that he was telling the truth: "*I didn't know that he did. But he was telling me this, so I believed him.*"[1861] During his re-direct examination, Mr. Flew was asked whether he he considered it likely that Mr. Flores had brought the proposal to Claimant's Board of Directors. He answered: "*I don't think Eduardo would bring a proposal. He may have—one, he would never believe that the Board would accept the proposal. He may have informed the Board that this was being offered or requested but I don't think he would bring it … as a proposal to pay that bribe*."[1862]

1421. Mr. Farooq confirmed in his second witness statement that "*in or around June or July 2008*," he had a discussion with Col. Khan regarding the payment of money to Chief Minister Raisani, who had removed him, Mr. Farooq, from his post as Chairman of the BDA shortly before. According to Mr. Farooq, a payment from Claimant would have directly benefitted him as the Chief Minister associated him with TCC. Mr. Farooq stated that he "*remember*[ed] *telling Col. Sher Khan that one good house in Islamabad and a good luxury car would be the minimum required to appease him.*"[1863]

[1856] **Exhibit RE-480B**, pp. 13, 14, 27.
[1857] Transcript (Day 4), p. 976 lines 5-8.
[1858] Transcript (Day 4), p. 992 line 21 to p. 993 line 4.
[1859] Transcript (Day 11), p. 3001 lines 5-9.
[1860] Transcript (Day 11), p. 3003 line 5 to p. 3004 line 8.
[1861] Transcript (Day 11), p. 3005 lines 3-8.
[1862] Transcript (Day 11), p. 3017 line 22 to p. 3018 line 8.
[1863] Farooq II, ¶ 60.

1422. Mr. Flores rejected Col. Khan's testimony that he approached Mr. Flores with a proposal to offer a bribe to Chief Minister Raisani and that he, Mr. Flores, "*enthusiastically agreed that this a very* 'workable' *and affordable solution*" and presented it to the Board. According to Mr. Flores, "[t]*his entire story is a fantasy*." He added:

> "*No such conversation ever occurred and if Col. Khan had ever brought such a proposition to me it would have led to his immediate termination. Similarly, I never presented any such idea to TCC's Board of Directors. If I had ever made such a proposition to the Board of TCC I know I would have been fired five minutes later, and my reputation in the industry would have been ruined. There is simply no way that I would ever have considered such a proposal, much less adopted it and brought it to the Board.*"[1864]

1423. During the hearing, Mr. Flores again rejected Col. Khan's testimony regarding the conversation they allegedly had about a house and car for Chief Minister Raisani and stated that they "*never had that conversation at all*."[1865] Mr. Flores further stated that he did not know why Mr. Flew had raised "*something about a house*" in his conversation with Col. Khan in June 2015 and maintained that "*that conversation never happened*" and that for him, Mr. Flores, to raise such a proposal with Claimant's Board of Directors "*makes absolutely no sense*."[1866] Similarly, when confronted with Col. Khan's account of the alleged conversation that he had given during two phone calls with Claimant's external counsel in this arbitration in late August and early September 2015, as recorded in a memorandum and notes prepared by counsel participating in the respective calls, Mr. Flores maintained his testimony that this was not true.[1867]

(ii) Evidence Concerning the Alleged Appeasement of Chief Minister Raisani Through an Earthquake Relief Donation

1424. Col. Khan testified in his second witness statement that after Claimant's Board of Directors had rejected Mr. Flores' proposal to buy a house and a car for Chief Minister Raisani, he and Ms. Boggs then decided in late 2008 to donate PAK Rs. 10 million to the Chief Minister's relief fund for an earthquake in Ziarat "*to appease CM Raisani*," having discussed that "*there was a good chance that this money would end up in CM Raisani's personal bank account*." Col. Khan added that this "*is a well-known method of corruption for officials to abuse these sorts of charitable structure in Pakistan.*"[1868]

[1864] Flores II, ¶ 40.
[1865] Transcript (Day 10), p. 2616 line 18 to p. 2617 line 13.
[1866] Transcript (Day 10), p. 2618 line 11 to p. 2620 line 7, *referring to* **Exhibit CE-480B**, p. 18 line 23 to p. 20 line 3.
[1867] Transcript (Day 10), p. 2620 line 8 to p. 2626 line 2, *referring to* **Exhibits CE-827** *and* **CE-832**.
[1868] Khan II, ¶ 26.

1425. Mr. Farooq confirmed in his second witness statement that he "*also advised Col. Sher Khan to pay money into the CM's relief fund related to the earthquake in Ziarat as he could spend that money at his discretion and there was a very good chance he would embezzle it*."[1869]

1426. Ms. Boggs confirmed in her fourth witness statement that in 2008, Claimant donated PAK Rs. 10 million in humanitarian aid for the victims of a severe earthquake that hit Balochistan in October 2008. She stated that as CEO of the TCC, she considered that the company had a responsibility towards the local community "*as a good corporate citizen*" and added that Col. Khan had recommended to donate the amount for humanitarian relief to a government controlled fund for which she requested approval from Claimant's Board of Directors. She noted that "*TCC made donations to similar relief aids for flood and earthquake victims in subsequent years*."[1870]

1427. Ms. Boggs added that by making the donation to that fund, she wanted to "*ensure four factors: that the payment was by a traceable instrument; the payment went to a confirmed government account; the donation was made in an open and transparent fashion; and there was an accountability mechanism to provide assurances that the funds were used for the intended purpose*." According to Ms. Boggs, Col. Khan confirmed that the Chief Minister of Balochistan's Relief and Rehabilitation Fund was "*a legitimate official government fund set up for the proper purposes*" and Ms. Sharp was also asked to confirm the same.[1871] Ms. Boggs further stated that the donation was made by Col. Khan, who presented Chief Minister Raisani with "*a giant ceremonial check*" addressed to the Chief Minister's Fund and was photographed and publicized by TCC. Ms. Boggs also noted that other donors to the same fund included "*the federal government, provincial governments, other private companies, non-governmental organizations, and individuals*," who donated over PAK Rs. 2 billion in total.[1872]

1428. In a contemporaneous e-mail exchange dating from 31 October and 1 November 2008, Ms. Boggs informed Col. Khan that there was agreement to make a donation in the amount of PAK Rs. 10 million to the GOB as Col. Khan had suggested and asked him to "*figure out the best way to do so—do we give a cheque to a specific agency or aid group or just directly to the GOB? Is it better to send cheque or fly in supplies*." Col. Khan responded that "*the best way to donate is to present a cheque to the CM in Quetta. I suggest you write a letter to the CM right away expressing your deep concern for the people of Balochistan, also announcing the donation*." Ms. Boggs agreed with this

[1869] Farooq II, ¶ 60.
[1870] Boggs IV, ¶¶ 32-34.
[1871] Boggs IV, ¶ 35.
[1872] Boggs IV, ¶¶ 36-37.

proposal and asked for a draft, which Col. Khan sent for her approval later on the same day. He also confirmed that he would be available to deliver the cheque on her behalf, as she was outside Pakistan at the time.[1873]

1429. On the next day, Ms. Boggs noted that Mr. Flores considered it "*better to give supplies rather than cash like* [they] *did for the flood relief*" and added that she "[did]*n't really have a view which is better in this case other than cash is obviously easier to misuse or use for other purposes than quake aid. If you think cash is ok to give and there is a specific agency within the government where we know it will go that we have convidence* [sic] *will be used correctly, then let's go ahead and send the letter and perhaps you can follow with a visit*." In response, Col. Khan informed her that he spoken with Additional Chief Secretary Lehri who "*was of the view that a donation was needed*" and advised him to present a cheque to the Chief Minister as "*donation in kind was coming from the government and now money was required for reheblition* [sic] *of the people*." Ms. Boggs responded that "*based on this information* [they] *should go ahead with delivery of the cheque*."[1874]

1430. In a further e-mail exchange dating from 3 November 2008, Ms. Boggs informed Col. Khan that she had confirmed to Ms. Sharp that they were making a donation to the GOB for earthquake relief and asked him: "*But is there any way we can confirm that this is a legitimate fund and set up for proper purposes?*" In response, Col. Khan stated that "[w]*e see every day in the news paper that a special account has been opened and all donations are to be sent to CM Balochistan, Relief and Rehabilitation Fund. I have spoken to the staff of the CM, they received our letter and arranged the presentation at 1200 hrs on 5 Nov*." Ms. Boggs responded by thanking Col. Khan and stating: "*I just wanted to make sure that we had checked out where the money was going.*"[1875]

1431. In an e-mail of the same day, Ms. Sharp confirmed "*a cheque to be made out to:* 'Chief Minister Balochistan's Relief Fund' *in the amount of 10 million Pak rupee*." In response, Ms. Boggs confirmed that they were making a donation to the GOB for earthquake relief and asked Ms. Sharp: "*Is there anyway to check this out to confirm it is established for this purpose?*"[1876] There appears to be no response from Ms. Sharp to this question in the record.

1432. On 6 November 2008, Ms. Boggs circulated pictures of the ceremony in which Col. Khan had handed over the cheque to the GOB among Claimant's Board of Directors as well as

[1873] **Exhibit CE-546**, pp. 2-4.
[1874] **Exhibit CE-546**, pp. 1-2.
[1875] **Exhibit CE-548**.
[1876] **Exhibit CE-549**.

Antofagasta and Barrick.[1877] According to a news article published by *Dawn* on 23 November 2008, "[i]*ndividuals and public and private organisations entities have so far donated more than Rs. 2.35 billion in the Chief Minister's Relief and Rehabilitation Fund for people affected by the recent earthquake in Balochistan*." Claimant was mentioned as one of the international donors.[1878]

1433. During the hearing, Ms. Boggs again denied Col. Khan's testimony that they had both known that the money donated by Claimant would ultimately go into the pocket of the Chief Minister. She confirmed that they "*undertook some steps, some diligence to ensure that it was a legitimate fund, and it was a legitimate contribution*."[1879] Ms. Boggs agreed that "[t]*here is potential for those kind of funds to be misappropriated*" and further agreed that a cash payment could be misappropriated more easily than supplies, as she had "*noted* [] *in an e-mail*." Ms. Boggs maintained, however, that they "*didn't simply hand over a large sum of cash without due diligence*."[1880] She stated that she had initially raised the possibility of making a charitable contribution with Col. Khan and asked him how to do it and to confirm the legitimacy of the fund. When asked whether she was relying on the e-mail exchange of 3 November 2008, she confirmed and added that her "*experience … with Sher Khan, was that he had a number of sources that he would have contacted to ask about this fund, and then he would have had this independent newspaper account of the fund. So, I was not in Pakistan at the time, so he would have sent me this e-mail, and I would have, based on my knowledge of how he went about his job, thought that he had done diligence around the fund*."[1881] Ms. Boggs denied that this e-mail chain had been meant to serve as a "*paper trail to suggest anything*" and noted that "*Sher Khan was not somebody who would write lengthy e-mails, so* [she] *would not have expected him to detail it.*"[1882]

1434. Ms. Boggs further confirmed that upon her inquiry Col. Khan informed her that the donations were commingled, thus making it impossible to follow up on how the money was spent, and that she did not make any further inquiries in that regard. She added: "*Sher Khan assured me—and you could read about it in the papers—that these contributions were being used for relief efforts. So, I had no reason to believe they were being used for*

[1877] **Exhibit CE-551**.
[1878] **Exhibit CE-553**. According to the news article: "*Donors include the federal government, provincial governments, the Azad Jammu and Kashmir government, private companies, NGOs, philanthropists and the common man. Donations were also received from PIA, Wapda, PAF, Tethyan Copper Company, Qesco, MMC Duddar Mineral Development Corporation, Nepra and the Senate*."
[1879] Transcript (Day 11), p. 2841 lines 1-17.
[1880] Transcript (Day 11), p. 2842 line 8 to p. 2844 line 18.
[1881] Transcript (Day 11), p. 2845 line 8 to p. 2848 line 7.
[1882] Transcript (Day 11), p. 2849 line 20 to p. 2850 line 12.

anything else. There was no need to follow up because [Col. Khan] *had confirmed that they were being used for relief efforts.*"[1883]

1435. Col. Khan confirmed during the hearing that he had spoken to Government officials about how to make a contribution and stated that Mr. Farooq considered this "*a God-given opportunity*" at the time and advised him to tell Mr. Boggs that they should "[d]*onate handsomely so that, again, to have* [the Chief Minister] *on* [their] *side*." Col. Khan further stated that when Ms. Boggs asked him how the donation shoule be made, "*everybody advised* [him] *it has to be cash, give cash. It is only if you give cash to this man that he will be little happy because, ultimately, this cash will go into his pocket*."[1884] In response to the suggestion that this was the opposite of what he had told Ms. Boggs at the time, Col. Khan stated: "*Well, this is what I told her*." Col. Khan acknowledged that in his contemporaneous e-mail correspondence with Ms. Boggs, which he described as a "*paper trail*," he had not mentioned having taken advice from Mr. Farooq but stated that "*Cassie Boggs knew very well that all—these governmental affairs and decisions are all taken by Mr. Farooq*" and added that he had separately told Ms. Boggs about Mr. Farooq's advice.[1885]

1436. When pointed to another e-mail exchange with Ms. Boggs in which she had specifically asked him to check whether the money was going, Col. Khan testified that "*this is all set up. This is how it is done. This is how Balochistan works. Bank accounts are opened. Everybody is donating into the bank's account, and ultimately it's going into the pockets of the bureaucrats or the Cabinet of Balochistan*." Col. Khan added that he did not tell Ms. Boogs that "*on paper*," but maintained that he "*spoke to her very … confidentially on the phone*." In response to a question from the President of the Tribunal, Col. Khan stated that he spoke to her on the very day that Mr. Farooq had contacted him:

> "*Exactly in these same words I spoke to her, and I spoke to her on the phone. She was not here in Pakistan, she was in Toronto. And I told her that this is what Farooq says. We have already missed one opportunity. And let's not miss this opportunity again, and please donate handsomely big money so that we can again start talking to him. This transpired between Cassie Boggs and myself on the first day.*"[1886]

1437. Col. Khan further testified that "[v]*ery few donations came in from multi-national companies*" and "*nobody paid cash. Basically all cash had come from Pakistani companies*." When pointed to the list of donors recorded in a newspaper article and the fact that the fund ultimately raised over PAK RS. 2.3 billion, Col. Khan was confronted

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[1883] Transcript (Day 11), p. 2851 line 17 to p. 2855 line 10.
[1884] Transcript (Day 4), p. 1037 line 7 to p. 1039 line 5.
[1885] Transcript (Day 4), p. 1039 line 6 to p. 1044 line 5.
[1886] Transcript (Day 4), p. 1045 line 3 to p. 1049 line 10.

with the suggestion that "*at least as Madeline Sharp and Cassie Boggs were concerned … this was a legitimate relief effort done for humanitarian purposes; correct?*" Col. Khan answered: "*Right. Absolutely. Yes*."[1887]

(iii) Evidence Concerning the Alleged Offer Made to Chief Minister Raisani by Mr. Mutikhan in Late 2009

1438. Finally, as to Respondent's allegation that an offer of bribery was ultimately made by Claimant to Chief Minister Raisani in late 2009, Mr. Mustikhan testified in his witness statement that after the unsuccessful meeting that he and Dr. Jezek had with the Chief Minister "*in late 2009*," he told Dr. Jezek during a private discussion that, in his opinion, "*nothing was going to get done without monetary payments to the important decision-makers*." According to Mr. Mustikhan, Dr. Jezek responded that "*provided* [Mr. Mustikhan] *didn't implicate TCCP directly in the process,* [he] *was free to inquire as to CM Raisan's personal demands*" and they both agreed that "*it was worth approaching CM Raisani in private to see whether TCCP could buy his agreement to the Mineral Agreement and Mining Lease*."[1888]

1439. Mr. Mustikhan then stated:

> "*Accordingly, as per Mr Jezek's instructions I met CM Raisani in his office in Quetta in a one-to-one meeting in December 2009. During that meeting I said that if he approved the Mineral Agreement and Mining Lease, he would be rewarded with a huge array of financial benefits and that he could effectively name the price that he wanted in return*."[1889]

1440. According to Mr. Mustikhan, his offer angered the Chief Minister, who stated that "*he had nothing personal against TCCP or the project, but that he was looking at it with the best interests of the people of Balochistan, at heart,*" referring in particularly to the need for a smelter "*to ensure greater economic benefits for the community*."[1890]

1441. During the hearing, Mr. Mustikhan confirmed his testimony that during a private discussion following the meeting with the Chief Minister, which he now confirmed took place on 26 September 2009, Dr. Jezek had authorized him to inquire into the Chief Minister's personal demands. Mr. Mustikhan was then pointed to his statement before the NAB in which it is recorded that he "*was asked by Mr. Peter Jezek to approach CM Raisani in* [his] *private capacity and inquire about his personal terms and conditions including any financial requirements*"[1891] but no further detail was given of the private

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[1887] Transcript (Day 4), p. 1051 line 2 to p. 1052 line 12.
[1888] Mustikhan, ¶¶ 10-11, 18.
[1889] Mustikhan, ¶ 18.
[1890] Mustikhan, ¶ 19.
[1891] **Exhibit RE-452**, p. 4.

conversation he now testified about. Mr. Mustikhan stated that he had "*no idea*" why this conversation was not included in his statement "*because that's a Statement developed by NAB themselves*."[1892]

1442. As to the meeting at which he alleged made the offer to Chief Minister Raisani, Mr. Mustikhan testified that it took place at the official office in the Chief Minister's house. In response to the question when the meeting took place, he stated that he could not recall the exact date but that it was "*probably early December*" and "*probably a business day because* [he] *met him in his office*." Mr. Mustikhan confirmed that one needed to have an appointment to meet with the Chief Minister and stated that his appointment had been made "*by* [his] *brother directly with the CM*" and that his name had been at the gate when he entered.[1893] He stated that he waited "[n]*ot very long … 10, 15 minutes*" before the Personal Secretary let him in but did not recall whether he had seen anyone else on his way in or out. According to Mr. Mustikhan, the meeting lasted "[n]*ot more than 30 minutes*" and he confirmed that nobody else participated in it.[1894]

1443. Mr. Mustikhan testified that he reported to Dr Jezek that the meeting had been unsuccessful "*on the same day of the meeting when* [he] *came out*" by calling Dr. Jezek on his mobile phone and stating: "*It didn't go successfully. I failed*." He stated that he did not know where Dr. Jezek was at the time but believed that he was in Pakistan. He further confirmed that he did not keep any record of his meetings or activities at the time but had been "*very lazy*" in recording where he had to be at a particular time.[1895]

1444. When asked when his brother had made the appointment, he answered that "[i]*t was in the end of November, early December, somewhere that time*" and confirmed that he had waited three months to move on Dr. Jezek's instruction of 26 September, providing the following explanation: "*So, there was a reason for that. Because I could see in the meeting that—how Raisani was really annoyed, and I thought that to give him some time before I go and see him in this particular context*."[1896] Mr. Mustikhan confirmed that between the authorization by Dr. Jezek and his meeting with Chief Minister Raisani, a considerable amount of work was going on in relation to the Umbrella Strategy, which would not have been necessary if the Chief Minister had accepted the offer. In response to the question whether he had had any conversation with Dr. Jezek on this matter in between, he said that they "*discussed the subject off and on*."[1897]

[1892] Transcript (Day 6), p. 1531 line 2 to p. 1534 line 20.
[1893] Transcript (Day 6), p. 1535 line 18 to p. 1539 line 17.
[1894] Transcript (Day 6), p. 1540 line 22 to p. 1542 line 4.
[1895] Transcript (Day 6), p. 1543 line 8 to p. 1544 line 22.
[1896] Transcript (Day 6), p. 1545 line 12 to p. 1546 line 5.
[1897] Transcript (Day 6), p. 1546 line 21 to p. 1549 line 13.

1445. During his re-direct examination, Mr. Mustikhan was again pointed to his statement before the NAB in which he had also stated that "*as per the instructions of Mr. Peter Jezek, I met CM Raisani in his office in Quetta in a one-to-one meeting in December 2009 during which I asked on behalf of Peter Jezek and TCCP about his personal requirements and desired financial benefits conveying him that TCCP was ready to address all such requirements*."[1898] In response to the question when Dr. Jezek had given him the instructions he had mentioned, Mr. Mustikhan stated that it was "*sometime in November or sometime when* [he] *talked to* [Dr. Jezek]." He added: "*I asked him that can I go now because the time has elapsed now, and it's about time that I should try or we should try to meet Raisani and go ahead with the offer that I had mentioned to him earlier*."[1899] When pointed to his earlier testimony that he had received instructions during the 26 September 2009 meeting in the coffee room, Mr. Mustikhan added that "[t]*here are two different aspects to it. One was that what was decided was in the coffee room, the meeting that did not go well with the Chief Minister and when we went to the coffee room and we principally agreed. Now, this was … something where when I decided that, yes, this was time to go and meet Mr. Raisani*."[1900]

1446. In his first witness statement, Dr. Jezek rejected Mr. Mustikhan's testimony that he had instructed or encourage him to offer a bribe to Chief Minister Raisani, stating that he "*never did anything of the sort*." Dr. Jezek testified that after the first meeting with the Chief Minister in September 2009 had gone "*poorly*," with the Chief Minister being "*openly hostile*" and "*ill-informed about the Reko Diq project*," he tried to schedule another meeting with him to "*fully explore and address the critical issues with him*." As direct requests for a meeting proved fruitless, Dr. Jezek stated, Claimant's staff and consultants "*began exploring all available channels to arrange such a meeting*."[1901] According to Dr. Jezek, Mr. Mustikhan was "*a key participant in this effort, but his mandate never included attempting to buy the Chief Minister's support or to find out whether he had personal demands*." He noted that this would have been contrary to the commitment Mr. Mustikhan had made in his consulting contract not to engage in corruption and added that he, Dr. Jezek, "*took those contractual obligations seriously and expected Mr. Mustikhan and all TCC consultants to follow them*."[1902]

1447. During the hearing, Dr. Jezek confirmed that Mr. Mustikhan had started to work for Claimant on 1 September 2008 but signed his consulting contract only in November. According to Dr. Jezek, this was "[b]*ecause the contractual document for consultants*

[1898] **Exhibit RE-452**, p. 4.
[1899] Transcript (Day 6), p. 1563 line 22 to p. 1565 line 12.
[1900] Transcript (Day 6), p. 1573 lines 2-12.
[1901] Jezek I, ¶¶ 55-56, 59.
[1902] Jezek I, ¶ 60.

was not in shape to include all of the—and particularly the anticorruption provisions that [he] *wanted to make sure were included*" for all of the consultants in a uniform contract. Dr. Jezek stated that "*Mr. Mustikhan was fully aware of what the requirements were*" and that he "*made a call because of timing and related issues to proceed with deploying Abid Mustikhan in the research capacity*." He also confirmed that Mr. Mustikhan attended the 26 September 2009 meeting before having signed his contract with TCC.[1903]

1448. In his second witness statement, Dr. Jezek testified that one of the reasons for the September 2009 meeting not going well was that Mr. Mustikhan had openly challenged the Chief Minister based on his experience with the Saindak project. Dr. Jezek stated that he therefore "*concluded that Mr. Mustikhan should not meet with the Chief Minister again*" and referred to an e-mail from Mr. John Sharp dating from 22 November 2009 in which the latter noted "*Abid's* [Mustikhan] *many connections*" but added "*I'm not so sure, however, that Abid meeting the CM directly would be a good idea*."[1904]

1449. During the hearing, Dr. Jezek did not agree with the suggestion that Mr. Mustikhan "*messed up*" or "*performed badly*" at the meeting but maintained that with regard to a reference made by the Chief Minister to the Saindak project, "*Mr. Mustikhan responded in a way that the Chief Minister did not appreciate*" and that Mr. Mustikhan's performance "*underscored* [Dr. Jezek's] *view, which* [he] *had heard from other people that Abid had the tendency to speak his mind, which rubbed people the wrong way.*"[1905] When pointed to his recommendation letter to Mr. Mustikhan after he had left TCC in which he had "*recommend*[ed] *Mr. Mustikhan for any challenging position or assignment he may be considered for*,"[1906] Dr. Jezek explained that he had not employed Mr. Mustikhan to assist him in winning favor with the Chief Minister but to "*educate* [Dr. Jezek] *and the company about Balochistan … and the people, the political structure, the tribal structure of Balochistan*." He did not consider the recommendation letter inconsistent with the performance of Mr. Mustikhan during the meeting, stating that he "*would find it difficult to describe Mr. Mustikhan's response to the Chief Minister as destroying a relationship*."[1907]

1450. With regard to the private conversation that he allegedly had with Mr. Mustikhan after the meeting on 26 September 2009, Dr. Jezek confirmed that "*the conversation took place, but not with this content*," adding that "[a]*fter every meeting* [they] *would have a review, to draw conclusions from what transpired*."[1908] When asked whether they had discussed of what Mr. Mustikhan's role could be, going forward, Dr. Jezek stated: "*We've*

[1903] Transcript (Day 12), p. 3111 line 7 to p. 3112 line 12.
[1904] Jezek II, ¶¶ 49-51, *referring to* **Exhibit RE-383**, p. 2.
[1905] Transcript (Day 12), p. 3114 line 3 to p. 3117 line 1.
[1906] **Exhibit RE-408**.
[1907] Transcript (Day 12), p. 3117 line 2 to p. 3118 line 18.
[1908] Transcript (Day 12), p. 3119 line 10 to p. 3120 line 3.

talked about issues, and again, I don't remember the details … But we've had a discussion about the outcome of the meeting and what should be done next." According to Dr. Jezek, the outcome they agreed on was "[t]*hat* [they] *have to redouble effort to actually have a chance for the Chief Minister to get a full understanding of the Project so that this issue of its simple truck-and-shovel project would not cloud his judgment, which in reality, since Government of Balochistan was the Joint Venture partner of Tethyan, should have been a relatively straightforward proposition to have this conversation and for both sides to raise issues and seek solutions to them.*"[1909] Dr. Jezek stated that he did not recall to have agreed on or discussed during that conversation any follow-up actions for Mr. Mustikhan to take.[1910]

1451. In his first witness statement, Dr. Jezek testified that he learned at some point after his September 2009 meeting with Chief Minister Raisani that he had publicly raised the allegation of having been offered a bribe of USD 1 million by TCC; in addition, during a meeting with the Chief Minister that they were finally able to arrange in January 2010, in which he participated together with Mr. Luksic, Ms. Boggs, Mr. William Hayes and Ms. Smia Alia Shah, the Chief Minister "[a]*t one point … also angrily raised the issue of a bribe having been offered to him. He provided no details, though, including who had made this alleged offer*." According to Dr. Jezek, Mr. Luksic told the Chief Minister "*very plainly that neither he nor TCC or its management had any knowledge of any such offer*" and that it would not have been approved or tolerated by TCC or its principals; the Chief Minister then "*said nothing further about this allegation and the discussion moved on.*"[1911]

1452. During the hearing, Dr. Jezek testified that he "*saw that as an opportunity for the Chief Minister, which is actually what* [they] *were seeking ever since the rumor first arose of the supposed bribe, to actually get specifics of what he has seen happen or what he believed has happened*" but that "*instead, he left it hanging, didn't take it any further.*"[1912] Dr. Jezek stated that he did not consider the allegation to be genuine "*based on everything* [they]*'ve looked at and all the inquiries* [they]*'ve made*." Dr. Jezek added:

> "*It was like chasing ghosts. We were not able to find anything specific that would add credence to it.*
>
> *In addition, I've been cautioned by a number of members of the Pakistani business community that … this was basically seeking political benefit and that it should not be taken seriously.*

[1909] Transcript (Day 12), p. 3120 line 22 to p. 3121 line 17.
[1910] Transcript (Day 12), p. 3121 line 18 to p. 3122 line 20.
[1911] Jezek I, ¶¶ 63, 65.
[1912] Transcript (Day 12), p. 3126 lines 5-15.

> *I've taken it seriously because of TCC, as well as Barrick and Antofagasta Code of Conduct, as well as my personal views of corruption*."[1913]

1453. Dr. Jezek confirmed that he did not ask the Chief Minister about the allegation, stating that the meeting was conducted by Mr. Luksic on their side, who "*made a very clear statement which allowed the Chief Minister to say* 'But this is what happened, and here are the specifics.'"[1914]

1454. As for the rumor he had heard about a bribe of USD 1 million being offered, Dr. Jezek stated that it surfaced "*probably November or December of 2009*" and confirmed that it related to the same allegation raised by the Chief Minister in January 2010 although he did not recall that the Chief Minister had mentioned an amount of USD 1 million. Dr. Jezek also did not recall how he had learned of the public allegation but confirmed that it "*had $1 million attached to it*."[1915]

1455. In her third witness statement, Ms. Boggs provided a similar description of the meeting with Chief Minister Raisani in January 2010 and added that she was "*confident that TCC never offered a bribe to Chief Minister Raisani and that his allegation was either a misunderstanding or an outright lie*."[1916] In her fourth witness statement, she clarified that by "*misunderstanding*" she was referring to the possibility that "*someone outside of TCC may have approached Chief Minister Raisani to try to broker a deal without consulting TCC*" but "*any such offer would have been made without approval because TCC did not condone bribery*."[1917]

1456. During the hearing, Ms. Boggs was pointed to a summary prepared by Mr. Manzoor Shaikh that he sent to Mr. Sharp on 13 January 2010 in which he reported, *inter alia*, about the meeting with the Chief Minister that had been held on the same day, including that:

> "*CM said:*
>
> …
>
> *b. is angry because someone from TCCP offered bribe to him. It was totally denied by Jean Paul. Jean Paul said that they done due diligence of Pakistan before making decision to invest here. They came to the*

[1913] Transcript (Day 12), p. 3126 line 18 to p. 3127 line 10.
[1914] Transcript (Day 12), p. 3127 line 13 to p. 3128 line 20.
[1915] Transcript (Day 12), p. 3129 line 17 to p. 3132 line 20.
[1916] Boggs III, ¶¶ 20-21. *See also* Boggs IV, ¶¶ 38, 40.
[1917] Boggs IV, ¶ 40.

> *conclusion that business can be done in Pakistan without using underhand methods*."[1918]

1457. Ms. Boggs confirmed that during the meeting on 13 January 2010, Chief Minister Raisani "*claimed that someone had offered a bribe to him*" and that "*he was angry about a number of things, including the fact that he claimed somebody had offered a bribe*."[1919]

1458. Ms. Boggs was further pointed to an e-mail in which Mr. William Hayes also reported on the meeting with the Chief Minister and stated:

> "*He raised the bribery issue which gave JPL the opportunity to clarify that we did not, nor would not ever, condone the practice. He made it clear that the only reason he received us was because Rodolfo, the Argentine Ambassador requested him to do so--they are close friends. He was sending a message that we were in the dog house but now had an opening*."[1920]

1459. In response to the suggestion that the reason for Mr. Hayes's characterization of their situation as being "*in the dog house*" was because of the Chief Minister's anger at having been offered a bribe, Ms. Boggs stated:

> "*I don't know that that was the only reason because he told us that someone had tried to bribe him; we said that that had not happened. And he didn't mention it ever again. He didn't tell us who supposedly tried to bribe him, what the amount was; as soon as we denied it, we moved on in the discussion*."[1921]

1460. When asked whether they asked for any details of the Chief Minister's allegation, Ms. Boggs responded that "*Mr. Luksic responded on behalf of all the Parties very forcefully that nobody at Barrick or Antofagasta or TCC had authorized any bribe, and the Chief Minister seemed to accept that and move on. He didn't offer any details and we didn't ask anymore*." Ms. Boggs confirmed that in light of the seriousness of the allegation, they "*would have expected, if it had been, in fact, truthful, he would have given* [them] *some detail around who supposedly had been involved in the bribe and how much it was for*"; she confirmed that they "*didn't ask him point-blank who did this*" but maintained that they "*gave him the opportunity to give* [them] *the details, and he didn't provide the necessary details and very quickly moved on*."[1922]

1461. In his first witness statement, Dr. Jezek testified that, nevertheless, both TCC and Barrick investigated the allegation raised by Chief Minister Raisani at the time and "*found no evidence to support it*."[1923] He stated that Barrick's investigation began after Chief

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[1918] **Exhibit RE-392**, p. 5.
[1919] Transcript (Day 11), p. 2892 line 12 to p. 2893 line 12.
[1920] **Exhibit RE-508**, p. 2.
[1921] Transcript (Day 11), p. 2894 line 18 to p. 2895 line 6.
[1922] Transcript (Day 11), p. 2896 line 5 to p. 2897 line 1.
[1923] Jezek I, ¶¶ 61-62.

Minister Raisani had for the first time raised his allegation directly *vis-à-vis* TCC in the 13 January 2010 meeting but noted that in the absence of any specific information of when, where, why and by whom the bribe had been offered, "*it was difficult what to make of the allegation, much less to investigate it.*"[1924]

1462. As to TCC's investigation, Dr. Jezek stated:

> "*While I believed the allegation to be false and even outlandish, I made inquiries with TCC staff, consultants, and numerous individuals outside of TCC as soon as I became aware of it. I wanted to see if I could identify the source of this rumor and try to determine if there was anything TCC might have done that could have been misinterpreted. I suspected that the allegation may have been generated by some enemy of the project that was trying to sabotage TCC and, if so, I wanted to get to the bottom of it. Unfortunately, I was unsuccessful in my efforts. Moreover, I never came across any credible evidence to support the Chief Minister's claim.*"[1925]

1463. During the hearing, Dr. Jezek confirmed that while he did not have any concerns that the allegation had something to do with Mr. Mustikhan, he spoke to him about the allegation after the January 2010 meeting and also when the rumor first surfaced: "*I spoke to all of our consultants as well as employees, particularly employees in Quetta, to try to get any possible information that would put substance beyond that allegation*."[1926]

1464. As for the investigation conducted by Barrick, Dr. Jezek stated:

> "*Barrick's investigation was overseen by Sybil Veenman. I was not directly involved in that investigation, but I am aware that over the course of it Ms. Veenman collected information from various people, including me*."[1927]

1465. Ms. Boggs confirmed in her fourth witness statement that Barrick's internal investigation was conducted by Ms. Veenman whose involvement was, according to Ms. Boggs, "*a sign that the company took any such allegation seriously*." Ms. Boggs added that while she was not directly involved, she understood that "*the results did not substantiate the Chief Minister's allegation.*"[1928]

1466. During the hearing, Ms. Boggs confirmed that the internal investigation was conducted by Ms. Veenman as someone who was independent from TCC. Ms. Boggs stated that she did not know any details of the investigation other than a discussion she had had with Ms. Veenman and specifically did not know who was contacted and interviewed in its course. As for her understanding that the results did not substantiate the allegation, Ms. Boggs

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[1924] Jezek II, ¶ 61.
[1925] Jezek II, ¶ 62. *See also* Jezek I, ¶ 62.
[1926] Transcript (Day 12), p. 3128 line 21 to p. 3129 line 16.
[1927] Jezek II, ¶ 62.
[1928] Boggs IV, ¶ 39.

stated she did not recall seeing an investigation report but that she had been told orally by Ms. Veenman. She also did not recall that a report was presented to Claimant's Board of Directors or that any e-mail, note or memorandum was sent to the members of the Board or Dr. Jezek. Ms. Boggs also confirmed in relation to how the investigation was conducted that she "*never say anything formally written*" but was advised by Ms. Veenman "*that the results of the investigation showed that they could find no one or no evidence that this bribe had been made*."[1929]

1467. Dr. Jezek rejected the suggestion that his departure from TCC in early April 2010 was connected to the outcome of the investigation, stating that this was "[a]*bsolutely not*" the case.[1930] This testimony was confirmed by Ms. Boggs who stated that the timing was coincidental.[1931]

1468. In his second witness statement, Dr. Jezek testified that he believed the Chief Minister's allegation to be "*completely unfounded*" and made to "*suit his political needs*" in light of the rising sentiments in Balochistan against the project that was viewed as a "*symbol of federal oppression*." Dr. Jezek considered his view confirmed by the comments on the then-Canadian High Commissioner to Pakistan, Mr. Randolph Plank, who had met with the Chief Minister a few days earlier.[1932] In his summary of that meeting, Mr. Plank reported that he had inquired whether the Chief Minister meant what he said in his public statements against the project or whether he was playing to audience to satisfy his constituents and that the answer had been:

> "• *CM affirmed that he was playing to audience*
>
> • *Such statements were necessary to position him as the promoter of Balochistan's interest* 'demanding major benefits' *for Balochistan*."[1933]

1469. Ms. Boggs stated that the Chief Minister's allegation was "*more likely … just a negotiating tactic*" given that he did not provide any further information as to when or by whom he had been offered a bribe or how he was contacted but rather continued with the meeting following Mr. Luksic's statement and asked TCC "*to make him a better offer with a new, but still legitimate, business proposal*."[1934]

1470. Respondent further relied on two news articles published in January 2013 after Chief Minister Raisani and his government had been dismissed. In a news article published on *thenews.com.pk* on 14 January 2013, Mr. Raisani was reported to have said that his government was "*ambushed as part of conspiracy which was at work for over three*

[1929] Transcript (Day 11), p. 2902 line 10 to p. 2907 line 6.
[1930] Transcript (Day 12), p. 3134 lines 10-12.
[1931] Transcript (Day 11), p. 2907 line 21 to p. 2908 line 4.
[1932] Jezek II, ¶¶ 63-64.
[1933] **Exhibit CE-578**, p. 2. *See also* p. 3.
[1934] Boggs IV, ¶ 41.

years," having started "*after he refused to be bribed over the issue of Reko Diq*." Mr. Raisani reportedly said: "*I was being pressurised to start negotiating with the global copper companies over Reko Diq. They offered me money and tried to bribe me but I refused to be bought, I refused to meet or entertain them*." Mr. Raisani also referred to an "*international conspiracy*" involving "*the Dutch, Germans, Chinese, Russians and Americans*" as all of their diplomats were asking about Reko Diq whenever he met with one of them.[1935]

1471. In a further news article published on *thenews.com.pk* on 19 January 2013, Mr. Raisani was again reported to have linked his dismissal to the Reko Diq project, arguing that his opponents attempted to "*pressurize* [him] *not to take a strong stance against the Tethyan Copper Company (TCC) and to hand it over the Chilean and Canadian consortium which is Antofagasta and Barrick Gold of Canada*" and then dismissed his government "*in the hopes of getting a hold on the resources of Balochistan*." Mr. Raisani reportedly remained "*adamant that he made enemies when he refused to be cornered into taking a decision in favour of TCC, Pakistan, and when he turned down offers of bribe by the TCC*."[1936]

(iv) The Tribunal's Consideration on of the Evidentiary Record

1472. Based on the evidence presented by the Parties, the Tribunal does not accept Respondent's allegation that Chief Minister Raisani was offered a bribe of USD 1 million by Mr. Mustikhan on instructions of Dr. Jezek in late 2009.

1473. First, as regards Respondent's submission that the offer was first considered by Mr. Flores after Mr. Raisani had become Chief Minister in April 2008, the Tribunal is not convinced by Col. Khan's testimony that Mr. Flores "*enthusiastically agreed that this was a very* 'workable' *and affordable solution, which he would present to Claimant's Board of Directors*." Mr. Flores strongly rejected this allegation and apart from Col. Khan's testimony, there is no indication that this conversation took place.

1474. The Tribunal is aware that Col. Khan gave a similar account of his alleged conversation with Mr. Flores during a meeting he had with Mr. Flew in June 2015. However, Col. Khan openly admitted that he had lied to Mr. Flew at various points during that meeting and did not want to place much emphasis on what was recorded in the transcript of this conversation that Claimant submitted into the record of this arbitration. In addition, Mr. Flew testified that, by contrast to the subsequently surfaced rumor that an offer had been made to Chief Minister Raisani, he had never heard before of the alleged involvement of Mr. Flores in this matter. Dr. Jezek, who conducted an investigation of the allegation

[1935] **Exhibit RE-430 / AM-7A**.
[1936] **Exhibit RE-431 / AM-7B**.

within TCC at the time, also stated that he did not recall having obtained such information before reading Col. Khan's witness statement in this arbitration.

1475. In any event, the Tribunal notes that even on Col. Khan's testimony, Claimant's Board of Directors rejected the proposal to offer a bribe to Chief Minister Raisani and thus did not sanction the alleged plan to improperly win favor with the Chief Minister by buying him a house in Islamabad and a BMW car. Consequently, the Tribunal concludes that this incident cannot support Respondent's allegation that an offer was later made on behalf of TCC.

1476. Second, in relation to the donation of PAK Rs. 10 million that Claimant made in late 2008 to the Chief Minister of Balochistan's Relief and Rehabilitation Fund after an earthquake had occurred in Balochistan, the Tribunal does not accept Respondent's allegation that Ms. Boggs agreed with Col. Khan at the time that "*there was a good chance that this money would end up in CM Raisani's personal bank account*." The Tribunal notes that contemporaneous e-mails exchanged between Ms. Boggs and Col. Khan in relation to the donation show that Ms. Boggs was inquiring about the nature that their charitable contribution should take and the legitimacy of the fund that Col. Khan had identified. According to these e-mails, Col. Khan told her that his recommendation to make a cash donation was based on the advice of Additional Chief Secretary Lehri and that the fund had been opened for the special purpose of collecting donations for earthquake relief as reported in daily newspapers.

1477. While Respondent claims that Col. Khan did not specifically confirm that the fund was legitimate, there is no indication in the documentary record that Ms. Boggs and Col. Khan were creating a "*paper trail*" to give the appearance of legitimacy but were in fact acting on the advice of Mr. Farooq pursuant to which a cash donation would likely end up in the pocket of the Chief Minister himself. The Tribunal considers its view reinforced by the fact that, as pointed out by Claimant, the donation was made in an open and ceremonial manner and various other donors, including international companies, contributed to the same fund, which raised a total of PAK Rs. 2.35 billion in the wake of the earthquake.

1478. On that basis, it cannot be considered established that Ms. Boggs and Col. Khan intended to, and much less did, provide personal benefits to the Chief Minister by making a donation to the relief fund opened in his name after the earthquake in Balochistan.

1479. Finally, the Tribunal will address the allegation that an offer was finally made to Chief Minister Raisani by Mr. Mustikhan on instructions of Dr. Jezek in late 2009. In this regard, it is undisputed and has been confirmed both by Ms. Boggs and Dr. Jezek as well as by contemporaneous notes that, during a meeting on 13 January 2010, Chief Minister Raisani raised the allegation that he been offered a bribe by someone at TCC *vis-à-vis* several representatives from Claimant and its parent companies. As reported in two news articles dating from January 2013, Mr. Raisani then still maintained the allegation that he

had been offered a bribe by TCC three years earlier and claimed that his resistance to this offer and the pressure he had faced gave rise to a conspiracy leading to his dismissal in January 2013.

1480. Dr. Jezek and Ms. Boggs testified that during the meeting on 13 January 2010, the Chief Minister did not provide any details regarding the alleged offer, in particular who had offered it and how much was offered on what occasion. While it became apparent during the hearing that neither of Claimant's representatives specifically asked for further details on the allegation, both witnesses maintained that their delegation gave the Chief Minister sufficient opportunity to provide them with further details but that he chose not to do so but to move on with the meeting.

1481. Dr. Jezek stated that he first learned of a rumor that someone from TCC had offered an amount of USD 1 million even before the meeting with the Chief Minister and that he made inquiries with "*TCC staff, consultants, and numerous individuals outside of TCC*" in order to identify the source of this rumor but was not successful. Moreover, both Dr. Jezek and Ms. Boggs testified about an internal investigation conducted after the 13 January 2010 meeting by Ms. Veenman of Barrick. The Tribunal takes note of the fact that neither of them could provide any further details about how this investigation was conducted or about a written report or formal information provided to Claimant's Board of Directors of its outcome. The Tribunal is also aware that Claimant refused to produce certain documents about the internal investigation on the basis that they are privileged.

1482. In the Tribunal's view, it is indeed remarkable that Ms. Boggs could not recall that any written report or formal document was produced by Ms. Veenman and that Ms. Boggs had to rely on information on the outcome of the investigation that she had been given by Ms. Veenman during an oral conversation. However, the circumstances surrounding the contemporaneous investigation conducted into the allegation raised by Chief Minister Raisani cannot be sufficient in and of themselves to establish that an offer of bribery was made. Respondent has to establish that a specific offer was made by or on instructions of a person whose conduct would be attributable to Claimant. This applies in particular given Mr. Luksic's undisputed statement during the 13 January 2010 meeting with the Chief Minister, which he made on behalf of representatives from Claimant and its parent companies, that the offer had not been made on behalf of TCC and that TCC did not tolerate or approve bribery.

1483. In this regard, Respondent relies on the witness testimony of Mr. Mustikhan who stated that he was instructed by Dr. Jezek following an unsuccessful meeting with Chief Minister Raisani on 26 September 2009 that he should feel free to inquire about the "*personal demands*" of the Chief Minister and that, following further instructions in November 2009, he arranged a meeting with the Chief Minister through his brother in early December 2009 and at that occasion offered the bribe. The Tribunal is not convinced

by Mr. Mustikhan's testimony in this regard. Apart from the fact that Dr. Jezek denied that he gave any instruction to Mr. Mustikhan regarding follow-up actions during the discussion they had following the meeting with the Chief Minister, the Tribunal does not consider it plausible that Mr. Mustikhan decided to wait for more than two months after receiving the alleged instructions before arranging for a second meeting with the Chief Minister. During the hearing, Mr. Mustikhan mentioned for the first time that he received additional instructions from Dr. Jezek "*sometime in November*" but could not provide any details as to the alleged additional instructions or the discussions he allegedly had with Dr. Jezek "*off and on*" about the subject. While the Tribunal is aware of Respondent's argument that Dr. Jezek decided to employ Mr. Mustikhan despite reports about Mr. Mustikhan having been engaged in corrupt activities and that he decided to let Mr. Mustikhan start his work before having signed his consultancy agreement with TCC, the Tribunal does not consider this sufficient to establish that he gave him instructions to make an improper offer to the Chief Minister.

1484. The Tribunal is further not convinced by Mr. Mustikhan's account of the meeting at which he allegedly offered a bribe to the Chief Minister. Mr. Mustikhan stated that he did not keep any records of meetings or other activities but claimed to recall that the meeting took place in early December, without being able to identify a specific date or any other indication as to how he remembered this timing. Mr. Mustikhan also remained very vague as to when and how his brother allegedly managed to arrange the meeting. This is particularly noteworthy when taking into account Claimant's parallel and documented efforts to have a further meeting with the Chief Minister, with the 13 January 2010 meeting having been made only upon the intervention of the Argentine Ambassador to Pakistan. Mr. Mustikhan also could not identify any person that he would have seen on his way in or out of the meeting with the Chief Minister and could not remember which one of the Chief Minister's personal secretaries had let him into the office.

1485. Finally, the Tribunal takes note of the fact that Mr. Mustikhan himself did not state that he offered an amount of USD 1 million to the Chief Minister but rather referred to an unquantified "*huge array of financial benefits*." His testimony thus does not accord with the amount attached to the rumor that surfaced in late 2009 and, more importantly, the amount that Respondent alleges to have been offered to the Chief Minister.

1486. In the Tribunal's view, it is not necessary to make a finding as to whether the Chief Minister's allegation was prompted by political considerations "*to play the audience*" and, in particular, a desire to harm Claimant's reputation in order to be able to pursue the GOB's own project instead of continuing to cooperate with Claimant. It suffices to note that, as the Tribunal has found in its Decision on Jurisdiction and Liability, the GOB decided around December 2009, *i.e.*, the same time that the rumor regarding an alleged bribery offer by TCC surfaced, that it wanted to "*take over*" the Reko Diq project from

Claimant.[1937] The exact motive for Chief Minister Raisani raising the allegation of having been offered a bribe can be left open. In any event, the Tribunal is not convinced that Mr. Mustikhan met with the Chief Minister in early December 2009 and offered him a bribe on the instruction of Claimant's CEO Dr. Jezek.

(e) Conclusion

1487. In conclusion, the Tribunal finds that Respondent has not established any of the allegations of corruption that it has raised in connection with obtaining the Mineral Agreement and/or Mining Lease. Consequently, the Tribunal does not have to make a finding as to whether any of the alleged acts of corruption contributed to obtaining a right or benefit for Claimant's investment despite the fact that neither the Mineral Agreement nor the Mining Lease were actually obtained. Similarly, the Tribunal does not have to address Respondent's argument that the alleged acts had an impact on whether Claimant was "*a fit and proper person*" to hold a mining lease and thus justified the denial of the Mining Lease Application in 2011 – given the Tribunal's findings that none of the alleged acts happened, none of them could have had an "*impact*" on whether Claimant was "*a fit and proper person.*"

1488. At this point, the Tribunal wishes to confirm that it still considers it established that the GOB intended at least by the end of 2009 to take over the Reko Diq project and thus decided to cease its collaboration with Claimant on the Joint Venture under the CHEJVA. The Tribunal is further still convinced that this decision was the motive for denying TCCP's Mining Lease Application in 2011. As it has found in the Decision on Jurisdiction and Liability, none of the reasons given by the Licensing Authority in the Notice of Intent to Reject dated 21 September 2011 justified the denial of the Mining Lease Application.[1938] For the reasons set out in the Decision on Jurisdiction and Liability, the Tribunal further found that Respondent should not be allowed to rely on reasons additional to those invoked in the Notice of Intent to Reject.[1939]

1489. In the Tribunal's view, this would also apply to the additional reason now invoked by Respondent that TCCP was not "*a fit and proper proper person*" to hold a mining lease as required by Rule 48(3)(a)(iv) of the 2002 BM Rules. Respondent now suggests that the alleged corruption was "*clearly relevant to … the state of mind of the CM, a key decision-maker in the context of that Mining Licence decision process.*"[1940] The Tribunal notes, however, that Respondent has previously placed much emphasis on the fact that the decision was taken by the Licensing Authority, *i.e.*, the Director General of the

[1937] *Cf.* Decision on Jurisdiction and Liability, ¶¶ 1144-1160.
[1938] Decision on Jurisdiction and Liability, ¶ 1226.
[1939] Decision on Jurisdiction and Liability, ¶ 1232.
[1940] Respondent's Post-Hearing Brief, ¶ 229.

MMDD. Respondent does not allege that allegations of corruption played any role in the decision-making process of the Licensing Authority at the time and there is certainly no indication in the Notice of Intent to Reject that this would have been the case.

3. Conclusion on Factual Allegations

1490. For the reasons set out in detail above and based on its review and evaluation of the evidentiary record, the Tribunal concludes that Respondent has not established any of its individual allegation of corruption that would be attributable to Claimant. The Tribunal has found no proven incident of Claimant exercising, or attempting to exercise, improper influence on Government officials aimed at obtaining rights or benefits relating to Claimant's investment in Pakistan.

1491. Specifically as regards the Tribunal's findings on the stopovers made by Government officials at the expense of Claimant or its parent companies on the way back from trips to Chile in December 2006 and Toronto in March 2007, the Tribunal found that Respondent has failed to establish any causal link between the stopovers and any right or benefit that Claimant obtained or at least attempted to obtain in respect of its investment and that, consequently, any improper conduct in connection with these stopovers cannot be deemed to have affected or "*tainted*" the investment. In the absence of such any causal link between improper conduct and Claimant's investment, the Tribunal also found that Claimant's conduct cannot be deemed to amount to contributory fault or have any further impact on the quantum of its claim for damages under the Treaty.

1492. The Tribunal has taken note of the context in which the testimony provided by Respondent's witnesses arose and was produced in this arbitration. By notification of 11 May 2015 but with effect from 23 April 2015, the GOB decided to form a "*Local Expert Group for the Reko-Diq cases pending adjudication before the International Centre for Settlement of Investment Disputes (ICSID) and International Chamber of Commerce (ICC)*" and instructed the Expert Group to, *inter alia*, "*investigate acts of mala fide and corruption in Reko-diq case and conduct of Broken Hill Properties Minerals (BHPM) and Tethyan Copper Company (TCC)*" and to "[i]*dentify new evidence including mala fide and corruption which can be helpful to legal firm engaged in ongoing arbitrations or out of court negotiations, which ever path is resorted to.*"[1941] It is remarkable that while, on Respondent's submission, "*Pakistan conducted investigations into corruption surrounding the Reko Diq project, albeit unsuccessfully, since at least 2011,*"[1942] the Local Expert Group then identified within a matter of weeks "*seven former and serving*

[1941] **Exhibit RE-188**.
[1942] Respondent's Post-Hearing Brief, ¶ 272.

Public servants/GoB officials/holders of public office [that] *are directly involved in widespread corrupt and fraudulent practices in respect of the Reko Diq project*."[1943]

1493. In addition, the the Tribunal notes that the Local Expert Group recommended in its Briefing Note of 4 June 2015 that the GOB should write to the NAB as the competent body "*to initiate an inquiry into corruption and corrupt practices in respect of Reko Diq. Responsible governmental officials and TCC personal should be brought to justice*."[1944] In line with this recommendation, the GOB requested the NAB to initiate an inquiry by letter of 22 June 2015, which the NAB did by authorization of its Chairman two days later.[1945] Taking into account that the NAB started to interview the seven individuals identified by the Local Group of Experts as well as further individuals in July 2015 and obtained in the course of August and September 2015 so-called Section 161 statements from the individuals that Respondent presented as witnesses in this arbitration in which each of them confessed to having been directly involved in corruption,[1946] it is indeed remarkable that as far as the Tribunal has been informed, the NAB has to date not initiated a prosecution against any of these individuals.[1947] The Tribunal also feels the need to record its concern as regards the timing and context in which the evidence was produced, which serves to reinforce the conclusions it has reached above.

1494. Finally, as for the diary kept by Mr. Aziz, which is the only piece of documentary evidence presented by Respondent that would directly support certain of its corruption allegations, the Tribunal has noted above that the NAB did not allow for an inspection of the diary outside Pakistan and then refused Respondent's own expert Mr. LaPorte to perform the very analysis for which he had been retained, *i.e.*, an ink-dating analysis, which could have positively proven that two of the relevant entries in the diary were made in 2015 rather than in 2008 and thus that the evidence would have been fabricated.

E. Legal Consequences Flowing from Proven Factual Allegations, If Any

1495. In light of the Tribunal's conclusion that Respondent has not proven any of its factual allegations of corruption, the Tribunal does not need to address the Parties' arguments

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[1943] **Exhibit RE-190**, *referring to* Messrs. Muhammad Farooq, Shehbaz Khan Mandokhel, Sheikh Asmatullah, Masood Malik, Muhammad Tahir, Abdul Aziz, Habibullah Baloch and Sher Khan (noting that the latter was not a public servant).
[1944] **Exhibit RE-443**, p. 57.
[1945] **Exhibits RE-190** and **CE-611**.
[1946] *See* **Exhibits RE-447** to **RE-453** and **RE-456** to **RE-457**. The only exception is Mr. Iqbal whose witness statement was submitted in this arbitration together with Respondent's Reply on 15 July 2016. His Section 161 statement dates from 11 March 2016. **Exhibit RE-491**.
[1947] *Cf.* Claimant's Rejoinder, ¶ 77; Claimant's Post-Hearing Brief, ¶ 294. Respondent has not corrected this statement in the further course of the proceedings.

regarding the legal consequences, if any, that would arise from such proven acts of corruption.

1496. The Tribunal therefore confirms, as it has found in its Decision on Jurisdiction and Liability for the reasons set out therein, that: (i) it has jurisdiction to hear Claimant's claims and that the claims are admissible;[1948] and (ii) by denying TCCP's Mining Lease Application in order to allow the GOB to implement its own project instead, Respondent has 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.[1949]

VIII. THE TRIBUNAL'S DECISION ON COSTS

1497. Further to the Tribunal's invitation of 20 March 2017, both Parties submitted their statements of costs on 20 April 2017, reflecting the costs, fees and expenses they incurred in the present phase of the proceedings concerning Respondent's Application to Dismiss the Claims.

1498. 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's Application is to be dismissed and its confirmation of the findings it has made in the Draft Decision on Jurisdiction and Liability, *i.e.*, 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 is currently 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 in line with its considerations in the Draft Decision, the Tribunal has again decided to reserve its decision on the costs of this phase of the arbitration for its Award.

[1948] Decision on Jurisdiction and Liability, ¶ 688.
[1949] Decision on Jurisdiction and Liability, ¶ 1373.

IX. DECISION BY THE TRIBUNAL

1499. The Tribunal therefore decides as follows:

I. The evidence submitted by Respondent as well as the counter-evidence submitted by Claimant in the present phase of the proceeding are admitted into the record.

II. Respondent's Application to Dismiss the Claims dated 2 September 2015 is dismissed in its entirety.

III. Respondent has not established any of its individual allegations of corruption that would be attributable to Claimant and that could have become relevant as potential contributory fault in the quantum phase that is now to follow.

IV. 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