

**IN THE SUPREME COURT OF PAKISTAN**  
(Advisory Jurisdiction)

**PRESENT:**

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

**Presidential Reference No.2 of 2022**

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

**IN ATTENDANCE**

For the Federation : Ch. Aamir Rehman,  
Addl. Attorney General  
Assisted by:  
Barrister M. Usama Rauf  
Mr. Zohair Waheed  
Miss Maryam Rashid &  
Miss Faryal Shah Afridi, Adv.

For PPL/OGDCL/ Govt. Holdings (Pvt.) Ltd. : Barrister Jahanzeb Awan, ASC  
Assisted by:  
Mr. Umar Shahzad Abbasi  
Mr. Abdullah Raza  
Mr. Shabbir Harianwala

For Govt. of Balochistan : Mr. Salahuddin Ahmed, ASC  
Mr. M. Asif Reki, AG, Balochistan  
Mr. M. Ayaz Khan Swati, Addl. AG,  
Balochistan

For PBC : Mr. Mansoor Usman Awan, ASC

For Balochistan Bar : Mr. Amanullah Kanrani, ASC

*Amici Curiae* : Mr. Salman Akram Raja, ASC  
Dr. M. Farogh Naseem, ASC  
Mr. Zahid F. Ibrahim, ASC

For Barrick Gold Corporation : Mr. M. Makhdoom Ali Khan, Sr. ASC  
Assisted by:  
S.M. Faisal Hussain Naqvi, ASC  
Mr. Iftikhar-ud-Din Riaz, ASC  
Mr. Saad M. Hashmi, Advocate  
Kh. Aziz Ahsan, Advocate  
Mr. Yawar Mukhtar, Advocate  
Kh. Azeem, Advocate

White & Case : Rebecca Campbell  
Mr. Kamran Ahmed  
(Via Video-Link)

Lazard : Spiro Youakim  
Pierre Cailletea  
Xovier de Regloix  
(Via Video-Link)

Dates of Hearing : 25 Oct 2022, 01-02 Nov 2022, 7-10 Nov 2022, 14-17 Nov 2022, 21-24 Nov 2022, 28-29 Nov 2022

### OPINION

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

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

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

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

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

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

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

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

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

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

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

- "i) Whether the earlier judgment of this Honourable

Court reported as [Maulana] Abdul Haque Baloch v. [Government of Balochistan], PLD 2013 SC 641 or the laws, public policy or Constitution of Pakistan prevent the GoB and the GoP from entering into the Implementation Agreement and the Definitive Agreements [**Agreements**] or affect their validity?

- ii) If enacted, would the proposed Foreign Investment (Protection and Promotion) Bill, 2022 [**FI Bill 2022**] be valid and constitutional?"

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

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

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

legislative competence of the Balochistan Assembly?

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

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

- i) It is settled law that while disposal of public assets through a competitive process is the ordinary rule, it is not an invariable rule. The Constitution does not forbid disposal of public assets other than through a competitive process so long as such disposal has the support of the law and is justified on rational grounds, as is the case here.
- ii) Ever since the enactment of the Constitution, legislative competence to deal with mines and mineral development (other than minerals used for nuclear energy) has rested exclusively with the Provincial Assemblies. Therefore, the Provincial Assemblies of Sindh and Khyber Pakhtunkhwa have already enacted comprehensive statutes dealing with mines and mineral development (other than minerals used for generation of nuclear energy). It follows from the legislative ambit of the Provincial Assemblies under the Constitution that they are competent to "alter, amend or repeal" any existing law to the extent that it deals with mines and mineral development. As far as the amendment incorporated in the Regulation of Mines and Oil fields and Mineral Development

(Government Control) Act, 1948 (**1948 Act**) is concerned, which has been introduced by way of the 2022 Act, to the extent that the said statute applies to the Province of Balochistan it is *intra vires* the Constitution and the rules framed by the GoB under Section 2 of the 1948 Act. The 2022 Act can therefore be treated as a standalone provision that operates alongside the 1948 Act and the aforesaid rules insofar as the subject of mines and minerals development (other than oil fields and mineral resources necessary for generation of nuclear energy) falls within the exclusive legislative competence of the provincial legislature.

- iii) The Balochistan Cabinet has approved the decision to enter into the Agreements on the basis of a detailed summary, a copy of which has been filed with this Court. The summary considers 'public interest' inherent in the negotiated agreement and since the Agreements pertain to an 'international obligation' in terms of the 2022 Act (i.e., Pakistan's obligation to make payment of approximately US\$ 6 billion under an ICSID award dated 12.07.2019), the formal obligations required under the 2022 Act for entering into a negotiated agreement stand fulfilled.
- iv) The Federal Government has placed on record documents to show that an Apex Committee headed by the Prime Minister of Pakistan and attended by all the relevant stakeholders (including the Chief Minister and Chief Secretary of Balochistan) had carefully negotiated the terms of the Agreements with the help of international financial advisors, international legal advisors, international mining experts and international tax advisors in addition to independent Pakistani advisors. As noted above, the international advisors also addressed the Court directly during proceedings in-person and through video link, and answered all the queries raised by the



Court. *Prima facie*, the Agreements cannot be faulted for lack of due diligence on the part of State authorities.

- v) The Agreements do not, *prima facie*, violate any of the findings recorded in the **Abdul Haque Baloch** case (PLD 2013 SC 641). Unlike CHEJVA, the decision to enter into the Agreements is backed by law and has been taken on the basis of careful negotiations during which authorized representatives of GoP/GoB were duly assisted by independent international consultants.

Further, the obligation to act in accordance with "Applicable Law" contained in the Agreements as well as the obligations of the Licensee to apply for consents in accordance with law and satisfy all conditions prescribed by the Applicable Law means that the statutory discretion of public functionaries is not being fettered by the Agreements.

- vi) We have also been informed that the Provincial Assembly of Balochistan was given a detailed in-camera briefing and was taken into confidence regarding the entire project and the terms and conditions of the proposed settlement between the parties were accepted without any objections being raised by the chosen representatives of the people of Balochistan.
- vii) On our specific query relating to environmental considerations, particularly in relation to the use of water, we have been informed that the Agreements contain no exemption from Pakistan's environmental laws. Rather, the Agreements require Barrick to act in accordance with both international environmental standards and domestic laws.

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

- i) Article 144 of the Constitution allows Provincial Assemblies to empower Parliament to pass a law dealing with issues within the legislative competence of the Provinces. Similarly, Article 147 of the Constitution allows the Provinces to entrust, either conditionally or unconditionally, to the Federal Government or to its officers, functions in relation to any matter to which the executive authority of the Province extends.
- ii) We have been provided the draft resolutions proposed to be passed by the Provincial Assemblies of Sindh and Balochistan to empower Parliament to enact the proposed FI Bill 2022. Provided that the draft resolutions are passed, Parliament will be competent to enact the FI Bill 2022, including the notified exemptions specified in the Bill and the protected benefits listed in the Third Schedule.
- iii) The provisions of Section 3 of the FI Bill 2022 do not in our opinion fetter the sovereignty of Parliament. It appears that the FI Bill 2022 represents a version of the Protection of Economic Reforms Act, 1992. It allows the Federal Government to notify certain benefits which may not be withdrawn to the prejudice of an investor. We have also been informed and there is consensus of all the learned counsel in this matter that Parliament remains at liberty to repeal the entire FI Bill 2022, if it so desires, of course subject to the corresponding legal consequences that may arise from such repeal.

On our query, we have also been informed that most of the exemptions proposed to be granted are already available under the regulatory regimes pertaining to Export Processing Zones and Special Technology Zones. Further, the exemptions being granted from

the operation of Labour Laws do not denude the labour force of their rightful entitlement to fair wages, allowances and guarantees/benefits provided by law. The learned counsel for Barrick has categorically assured us that the applicable minimum wage laws will be fully observed and the Agreements expressly provide that all operations will be carried out in accordance with International Mining Standards which are defined to include compliance with IFC Performance Standards, to the extent applicable. It has been pointed out to us that the IFC Performance Standards contain detailed provisions pertaining to labour rights. Barrick has also committed to act in accordance with the United Nations Guiding Principles on Business and Human Rights. We have also been assured that Barrick will contribute substantially towards Corporate Social Responsibility by dedicating a percentage of its returns towards provision of fresh drinking water, health facilities, schools and local infrastructure to the people of Balochistan. In addition, most of the labour force will be employed from amongst the local population of the Province. In addition, programs for development of skills will also be put in place.

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

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

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

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

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

The Reference is accordingly answered in the aforementioned terms.

Sd/-  
**Chief Justice**

Sd/-  
**Judge**

Sd/-  
**Judge**

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

Sd/-  
**Judge**

Sd/-  
**Judge**

Announced in Court  
on 09.12.2022

Sd/-  
**CJ.**

**APPROVED FOR REPORTING.**