

REKO DIQ CASE: AN INTEGRITY RISK TO THE MINING INDUSTRY OF PAKISTAN

Esha Farooq^φ

^φ Esha Farooq is currently pursuing B.A LL. B Hon(s) from Kinnaird College for Women, Lahore. She may be reached at edha.malik@gmail.com.

ABSTRACT

The Supreme Court of Pakistan created headlines in the international media by its verdict in the case titled as Maulana Abdul Haque v Government of Balochistan known as 'Reko Diq case'. It declared all the agreements and mining lease of a foreign mining company (TCC) null and void. Effected from the decision the company referred the case to ICSID (International Centre for Settlement of Investment Disputes) for arbitration. This paper analyses the verdicts given by the both courts and provides a critique on their decision. It also provides other alternatives the supreme court could have taken into account and states the impact of the case on the integrity and future foreign investments of Pakistan.

INTRODUCTION

Mining sector has turned out to be one of the most important sectors for Pakistan. It is considered as one of the largest producers of minerals and metals,¹ and can be one of the leading mining countries internationally. The Pakistan mining industry also contributes a great part to its national income.² Apart from that this sector all alone can affect the integrity of the whole of Pakistan such as the *Maulana Abdul Haque v Government of Balochistan* (PLD 2013 SC 641) or namely known as Reko Diq case in which Pakistan has suffered a loss in billions and undoubtedly also in its foreign investments. Now the question is who is responsible for making the country suffer such losses and how these lessons can be effective for a developing country like Pakistan.

One more reason is that these minerals are not fully exploited and Pakistan's mining sector is lagging behind. Several factors that contribute to it are, lack of mineable reserves,³ trained labor,⁴ flaws in the legal framework for the regulation of the mining sector, policies and agreements between the investors.

In contrast to that, many local mining corporations do not operate in Pakistan due to lack of technology, resources, infrastructure,

¹ CS Kuo., *The Mineral Industry of Pakistan. Minerals Yearbook 3* (2009) p.15.

² Malkani, M. Sadiq & Alyani, Muhammad & Khosa, Mureed & Tariq, Sonia & Saeed, Faisal & Khan, Gulawar & Faiz, Jalal, 'Mineral Resources of Pakistan-an update' (2016) V. 90-114.

³M Pervaiz (2003). Mining in Pakistan: private sector point of view (World Bank 2003)

⁴ Nikki R Keddie, 'Labor Problems of Pakistan' (1957) 16 *The Journal of Asian Studies* 575 www.jstor.org/stable/2941640 accessed 15 December 2020.

techniques and knowledge for effective mining. Due to this, mining rights are preferably given to foreign companies. This is done under the rules set by Pakistan's investment law⁵ and or bilateral investments treaties under international law⁶. However, several foreign mining companies have been operating in it for many years; it is in the last few decades that Pakistan has been subjected to controversies. Such as the case of *Maulana Abdul Haque v Government of Balochistan*,⁷ commonly known as "Reko Diq case".

Reko Diq is a district located in Balochistan, where foreign investment was made in order to explore the area. A Chagai Hill Exploration Joint Venture Agreement (CHEJVA) was signed between the Broken Hill Properties Minerals (BHPM) and Balochistan Development Authority (BDA).⁸ After that the Tethyan Copper Company (TCC), an Australian joint venture in 2006 entered into an agreement with the Balochistan government and TCC replaced BHPM as a new party in the previous agreements and all the rights of exploration and determination for the value of the reserves was given to TCC.⁹ These agreements have been a subject of controversies which lead to the involvement of the Balochistan High Court and the Supreme Court of Pakistan. The major drawback that Pakistan has to face was the consequences of Supreme Court

⁵ Foreign Private Investment (Promotion & Protection) Act 1976.

⁶ Bilateral investment treaties (BIT) For example Pakistan-Australia BIT.

⁷ *Maulana Abdul Haque v Government of Balochistan* PLD (2013) SC 641.

⁸Chagai Hills Exploration Joint Venture Agreement 1993. Balochistan Development Authority (BDA), a statutory corporation established under section 3(2) of the Balochistan Development Authority Act 1974.

⁹ Novation agreement dated 01.04.2006.

Judgement. On the other hand, the dispute was referred to the International Centre for Settlement of Investment Disputes (ICSID) for arbitration by the Tethyan Copper Company. ICSID held Pakistan is liable for the losses that the company incurred as a result of breaching treaties and agreements by Pakistan.¹⁰ According to the award given by ICSID on 12th July 2019, Pakistan will pay over \$4 billion, plus \$1.7 billion in damages pre-award interest to TCC.¹¹ For the enforcement of this arbitral award, TCC filed a petition in the United States district court for Columbia.¹² Pakistan in response filed for an annulment of the ICSID award and ICSID has approved the request for annulment of the Government of Pakistan.¹³ The final verdict of the matter is to be announced by ICSID.¹⁴

To examine that, this article proceeds in three steps. First, it deals with Pakistan's mining sector and its legal framework and also highlights the laws that are related to the mining sector and foreign investment regime in Pakistan, with specific reference to the Reko Diq case. Secondly, the emphasis has been drawn on the proceedings and judgement given by the Supreme court of Pakistan and award granted by International Centre for Settlement of Investment Disputes

¹⁰*Tethyan Copper Company v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1.

¹¹ *Ibid* at para 1858.

¹² Petition to Enforce Arbitral Award
<https://www.italaw.com/sites/default/files/case-documents/italaw10740.pdf>
accessed 8 November 2020.

¹³ *Tethyan Copper Company Pty Limited V Islamic Republic Of Pakistan* (ICSID Case No. Arb/12/1) Annulment Proceeding (Decision On Stay Of Enforcement Of The Award) <<https://www.italaw.com/sites/default/files/case-documents/italaw11880.pdf>> accessed 19 November 2020.

¹⁴ See <https://icsid.worldbank.org/cases/pending> accessed 15 December 2020.

(ICSID) in this case. Then the article highlights the flaws and impact of this case on the mining sector of Pakistan and future investments. It can be concluded that this case has the potential of changing the dynamics of the mining sector in Pakistan and the approach of Pakistani Courts in foreign investment disputes.

PAKISTAN'S MINING SECTOR AND INTERNATIONAL INVESTMENT LAW

Pakistan, a country endowed with abundant natural resources,¹⁵ is one of the mineral potential areas.¹⁶ There are numerous mining zones that include precious, industrial metals, minerals and stones. Some of those sites are developed and explored while others are still left unexplored.¹⁷ With respect to mineral resources, Balochistan is the richest province.¹⁸ There are almost more than twenty mining

¹⁵ There are valuable natural resources, including coal, gas, oil, hydropower potential, fertile land, copper, gold, salt, and others. Pakistan possesses a huge coal reserve, famously known as black gold (175 billion tons), which is equivalent to 618 billion barrels of crude oil. The value of Pakistan's coal reserves is far greater (more than double) than the value of the oil reserves possessed by the world's top four oil-rich countries. Moreover, Pakistan holds 885.3 billion cubic meters of natural gas reserves. Indeed, in a global comparison, Pakistan has the second largest coal reserves, the second largest rock salt reserves, the seventh largest copper mine, and the fifth largest gold reserves. For additional information *see* Pakistan Government. Pakistan Economic Survey; Ministry of Finance: Islamabad, Pakistan, 2016; pp. 19–40.

¹⁶ Syed Akhtar Hussain Shah, 'Strategy for Mineral Sector Development in Pakistan' (Ministry of Planning 2018) 10-11.

¹⁷ Recent Economic Survey of Pakistan indicated that the overall contribution of the mineral sector in GDP growth of Pakistan is about 2.51%.

¹⁸ Manufacturing And Mineral Sectors <https://www.pc.gov.pk/uploads/plans/Ch24-Manufacturing-minerals2.pdf> accessed 6 September 2020.

companies operating in Pakistan.¹⁹ In Balochistan four foreign mining companies are operating.²⁰ Among them the Tethyan Copper Company has recently been in the limelight because of its project in Reko Diq. Reko Diq is a mineral rich area located in Balochistan with copper and gold reserves estimated at more than five billion tonnes.

1. Legal Framework

Notwithstanding its abundance in minerals, Pakistan's mining sector is still lagging behind as compared to the Global market.²¹ One of the reasons is the legal policies related to the mining sector as these are not well structured.²² The available legal framework is based on two regimes the first is the law based regime²³ and the second is the contract based regime.²⁴ The former includes the regulations or

¹⁹ Some of these companies are Metallurgical Corporation of China Ltd operating in Saindak, Tethyan Copper Company Ltd, Swat Mining Corporation North Pvt and Mineral Grinding Mills Limited etc. List Available at: <https://www.zoominfo.com/companies-search/location-pakistan-industry-mining> accessed 15 September 2020.

²⁰ Ibid.

²¹ This lag is due to some interrelated issues in the mineral mining sector such as bottlenecks in mineral policies, law or order situation, insufficient infrastructure, outdated technology, low financial investment, marketing issues and geo-political conditions. Available at: Williams J Will, 'Untapped Mineral Resources And Economic Development Of Pakistan' (Global Mining Review, 2020), <https://www.globalminingreview.com/exploration-development/15072020/untapped-mineral-resources-and-economic-development-of-pakistan/> accessed 15 September 2020.

²² Ibid.

²³ A regime that is mainly based on laws and regulations. Such a legal regime is uniformly applied across mining companies within the country. For additional information see Uyanga Gankhuyag and Fabrice Gregoire, *Managing mining for sustainable development: A sourcebook* (Bangkok: United Nations Development Programme 2018) 41.

²⁴ Ibid, a regime that is mainly based on contracts between mining companies and the government. In this regime, most obligations of mining companies, such as

policies related to the mining sector that are applied uniformly within Pakistan and latter states about the agreements or contracts that are signed between mining companies and the government of Pakistan.²⁵ The domestic legal framework of the mining sector which provides the basic rights for mining in Pakistan includes the Mines Act 1923²⁶, Regulation of mines and Oilfields and Mineral Development(Government Control) Act, 1948,²⁷ Pakistan mining concession rule 1960²⁸ With respect to these rules the provincial governments have separately amended and substituted the rules according to their needs.²⁹ In addition to this, there is also National mineral policy to regulate the mining sector.³⁰

The power to regulate, legislate, mineral development, exploration of minerals, national and international coordination and formulation of agreements or national policies are vested with the Federal and Provincial Government with respect to the specific area.³¹

taxes, environmental requirements and social contributions are defined by contracts.

²⁵ Ibid, page 41-43.

²⁶Mines Act 1923, Act No. IV of 1923 Available at: <https://www.ilo.org/dyn/travail/docs/1007/mines> accessed 15 December 2020.

²⁷ The Regulation of Mines and Oil-Fields and Mineral Development (Government Control) Act 1948, Act XXIV Of 1948 which has been amended in 1955, 1964 and 1976.

²⁸ Pakistan Mining Concession Rules 1960 (Gaz. Pak, Ext 1960, pp.501-522).

²⁹ The Regulation of Mines and Oil-fields and Mineral Development (Government Control) Act 1948, Act XXIV of 1948 (on the basis of it provinces have formed their own rules such as Punjab concession rules 2002, Sindh concession rule 2002, Balochistan concession rules 2002 and Khyber Pakhtunkhwa concession rules 2005).

³⁰National Mineral Policy, 2013 at federal level and provinces has their own regulatory.policies,<https://mnm.punjab.gov.pk/system/files/National%20Mineral%20Policy%2C%202013.pdf> accessed 15 September 2020.

³¹ Constitution of Pakistan, 1973, art172, subsection (2) and (3).

Some other Acts and policies are also available at provincial level for the ease of mining industry within specific regions.³² However, according to the foreign companies there are inconsistencies in laws and policies from different regulatory authorities.³³

2. Foreign Investment Law:

Pakistan being a developing country requires foreign investments for the development of its any sector and for economic growth. For that purpose, it requires a foreign investment law in order to attract foreign companies. Moreover, most of the companies operating in Pakistan are foreign.

The basic purpose of international investment law is to govern the relation between the state and foreign investors.³⁴ With respect to the protection of foreign investors Pakistan has stated some of the laws to ensure the security of these investments. Some of the related Acts that apply to mining sector and its operation are the Protection of Economic Reforms Act 1992³⁵ and the Foreign Private Investment (Promotion and Protection) Act 1976³⁶. In addition to this, the Recognition and Enforcement (Arbitration Agreements and Foreign

³² These include Punjab mineral policies 2018, Khyber-Pakhtunkhwa Mineral policy 2014, Balochistan Mineral Policy 2019 and Sindh mineral policies, 2019.

³³ 2020 Investment Climate Statements - United States Department of State' <https://www.state.gov/reports/2020-investment-climate-statements/> accessed 16 September 2020.

³⁴ For more detail *see* International Investment Law: Understanding Concepts and Tracking Innovations. (2008). doi:10.1787/9789264042032-en.

³⁵ Protection of Economic Reforms Act 1992 Act NO XII of 1992.

³⁶ Foreign Private Investment (Promotion and Protection) Act 1976, ACT No. XLII of 1976.

Arbitral Awards) Act 2011³⁷ which also provides security to foreign investors. This act gives an effect to the New York Convention on the Recognition and Enforcement Foreign Arbitral Awards 1958³⁸ to which Pakistan was already signatory. It provides ease for the enforcement of foreign arbitral awards in Pakistan.³⁹ However, the Supreme court stated in the Reko Diq case if the award granted by ICSID is against the public policy it would not be enforced, provided as “... Under, the Act XVII of 2011 enforcement of an award can be refused on all of the grounds set out in Article V of 1958 New York Convention which includes grounds of public policy”.⁴⁰

It seems that after the Reko Diq case the interpretation of the term ‘foreign award’ may cause problems for future investors, generally in the mining sector.⁴¹ There is also the ICSID convention, 1966⁴² and more than fifty Bilateral Investment treaties (BIT).⁴³

³⁷ Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011, Act No. XVII of 2011.

³⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA) (10 June 1958) UNTS 330, 3.

³⁹ Ahmad Abdul Rehman Khan and Nafay Mohsin, Enforcement of International Arbitral Awards in Pakistan, *Leappakistan.com*, 2020, <https://leappakistan.com/wp-content/uploads/2020/05/Enforcement-of-Internl-Arbitral-Awards-in-Pakistan.pdf> accessed 15 Sep 2020.

⁴⁰ *Maulana Abdul Haque* (n 7). Para 58, page 73.

⁴¹ Erik Richer La Fleche (ed), *The Mining Law Review* (6th edn, Gideon Robertson 2017) 158-166.

⁴² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1966. For additional information visit: <https://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.national.s.of.other.states.convention.washington.1965/landscape.pdf> accessed 15 September 2020.

⁴³ For example, Bahrain - Pakistan BIT (2014), Kuwait - Pakistan BIT (2011), Pakistan - Tajikistan BIT (2004), Kazakhstan - Pakistan BIT (2003), Australia - Pakistan BIT (1998), Pakistan - Sri Lanka BIT (1997), Italy - Pakistan BIT (1997).

REKO DIQ: CASE BACKGROUND

Before discussing the case, this section will discuss the background of the Tethyan Copper company and how they were allowed to mine in Pakistan. First of all, Reko Diq mine is named after the mountain in the remote Chagai Hills located in the district of Chagai, in the Tethyan belt⁴⁴ in Balochistan province, and wedged within the borders of Iran and Afghanistan. It is considered to be one of the world's largest copper and gold mines.⁴⁵ Despite the fact that this area has an enormous number of significant natural assets, it has stayed undiscovered because of Pakistan's financial crises and techniques needed to explore these territories.⁴⁶ Therefore, contracts are signed with foreign investors and companies, which consequently demand for the huge sum of share from the profit.⁴⁷ A similar

For Additional information visit: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan?type=bits> accessed 15 September 2020.

⁴⁴ The Tethyan belt stretches from Turkey and Iran into Pakistan and is considered to be amongst the world's top five goldmine reserves, in addition to bearing a vast amount of copper resources. Abdul Rafay, 'Pakistan's Need for Amicable Resolutions Concerning Foreign Investment Disputes: The Reko Diq Case' (2017) 4 LUMS Law Journal 1.

⁴⁵ Maqbool Ahmed, 'Magic mountains: The Reko Diq gold and copper mining project' *Herald Pakistan* (29 September 2017) <http://herald.dawn.com/news/1153283/magic-mountains-the-reko-diq-gold-and-copper-mining-projec> accessed on 12 September 2020.

⁴⁶ Geological Survey of Pakistan during 1978-79 discovered porphyry style alteration and copper oxides at unspecified centres at Reko Diq (formerly known as Koh-e-Dalil). For Additional information visit: <http://www.portergeo.com.au/database/mineinfo.asp?mineid=mn1333> accessed 15 September 2020.

⁴⁷ Bolan Mining Enterprises (BME) is a joint venture between the Government of Balochistan (GOB) and Pakistan Petroleum Limited (PPL) made in 1973, each sharing a 50 percent working interest. <<https://www.ppl.com.pk/content/associated-company/bolan-mining-enterprises>> Another agreement was with Metallurgical Corporation of China Ltd. (MCC) and

technique was observed in the Reko Diq case but with a greater profit interest.

The Reko Diq story initiated in 1993, when BDA, signed an agreement with the BHPM, an American based Mining firm on 12 July 1993 and named as Chagai Hill Exploration Joint Venture Agreement also known as CHEJVA *"for the purpose of conducting exploration for and, if warranted, developing any Mineral deposits lying within the Exploration Area"*.⁴⁸

Some of the major clauses of the agreement were that BHP would be entitled with 75% of share from the joint venture and 25% to be held by BDA.⁴⁹ The agreement also states about the exploration area, area available for prospecting licences and provided assurance of receiving mining licence from the provincial government at any time of the agreement.⁵⁰

Similarly, CHEJVA also provided exclusive rights to some of the areas for mineral exploration.⁵¹ In Other words, this agreement provided relaxation to about thirteen provisions of BMCR 1970,

a deal was made on 50 percent of profit for each. <https://archive.is/20130128130011/http://www.mcccchina.com/ENGLISH/ShowArticle.asp?ArticleID=5363> accessed 15 September 2020.

⁴⁸ Chagai Hills Exploration Joint Venture Agreement (hereinafter CHEJVA), Preamble, Clause A. The term "Mineral" is defined as "gold and where other minerals (as defined by the Mining Rules) occur in association with a particular gold deposit then, 'Mineral' shall mean gold and such associated minerals." Clause 1.1. The term "Exploration Area" is defined as "the area described in Article 5 and identified in the map comprising Schedule B." Clause 1.1.

⁴⁹ Ibid, art. 3.

⁵⁰ Ibid, art. 5. Clause 2 and 3.

⁵¹ Ibid, art. 5. 6.

which enabled the company to proceed its mining exploration without any complications.⁵² Moreover, according to article 16 the applicable law⁵³ shall be Pakistani law and international principles on which the parties agree upon.⁵⁴ They further agreed to refer any dispute concerning Reko Diq mine to ICSID for arbitration, in case ICSID refused to hear the case on the grounds of jurisdiction then the case was to be referred to an arbitration to be conducted pursuant to ICC rules, provided as “..To the extent required by the ICSID Convention each of the Parties agrees to submit to arbitration under the ICSID Convention, but should sub-clause 15.4.8 operate, then the Parties agree to submit to an arbitration conducted pursuant to the ICC Rules”.⁵⁵ These types of clauses play an integral part in providing a confidence to foreign companies to invest in Pakistani businesses.

Particularly, without any competitive bidding⁵⁶ CHEJVA was adopted by the caretaker government of Balochistan. In the agreement there were some clauses that directly favoured the BHP and created

⁵² Ibid.

⁵³ Ibid, art. 16. Read as: The Law applicable to this agreement is the law of Pakistan which the Parties acknowledge and agree includes the principles of international law.

⁵⁴ Ibid, art 16.

⁵⁵ Ibid, art 15.

⁵⁶ *Maulana Abdul Haque* (n 7) at Page 55, para 43. Competitive bidding is a process of issuing a public bid with the intent that companies will put together their best proposal and compete for a specific project. By law, this process is required for every government agency that issues a bid.

negative impact such as the percentage of shares,⁵⁷ leniency in prospecting and exploration rights,⁵⁸ arbitration clause and etc.⁵⁹

Interestingly, on 4th March in 2002 three parties, including Governor of Balochistan, for and on behalf of the Province of Balochistan, referred to as “GOB”, and the Balochistan Development Authority,⁶⁰ and BHP Minerals, made some changes to the agreement through an addendum.⁶¹ It provided definitions and interpretation of the terms used in the prior agreement, reviewed the article 2 and amended clause 1 and some other articles.⁶² Moreover, it clarified the role of BDA and made Government of Balochistan as the new contracting party to the agreement provided as “*the Government of Balochistan (GOB) is the party to the CHEJVA*” and all references to the BDA's role and authority as agent for the GOB, shall be deemed to mean the GOB”.⁶³ It also provided that other mining companies can become a new party to the contract.

Similarly within the same year BHP entered into an Option Agreement⁶⁴ and formed an exploration alliance with an Australian

⁵⁷ CHEJVA, art 3.2-3.4, the respective Percentage Interest were Balochistan Development Authority 25% and BHPM 75%.

⁵⁸ Ibid art 5.

⁵⁹ Ibid art 15.4.

⁶⁰ A statutory corporation created by and existing under the Balochistan Development Authority Act 1974.

⁶¹ The agreement refers to CHEJVA and Addendum No. 1. *Maulana Abdul Haque v Government of Balochistan* PLD 2013 SC 641 at page 12, Para 4.

⁶² Particularly article 5, 7, 8, 9, 11, 12, 14, 15 and 22.

⁶³ CHEJVA Addendum 2000 Clause 2.1.

⁶⁴ Also known as “2000 Option Agreement”. Option agreement basically is a contract between two parties that grants one party the right, but not the obligation, to purchase an asset from, or sell an asset to another party, and to benefit from an asset in the future.

based firm Mincor Resource⁶⁵. The agreement provided that Mincor will have the right to explore, develop, exploit and acquire mineral resources on exploration licences held by BHP and Mincor can acquire the sole and exclusive right and option to enter into alliance with BHP on the payment of 100\$ in consideration.⁶⁶ Consequently, a new company was formed known as “Tethyan Copper Company (TCC)” by Mincor to finance and operate the Alliance Agreement. After that BHP and TCC (as a nominee of Mincor) entered into an Alliance Agreement.⁶⁷

Consequently, after that it applied for new exploration licenses (EL) which were to be granted. Furthermore, in 2006 a Novation Agreement⁶⁸ was signed between the GOB, BHP and TCC, Through this agreement TCC replaced BHP as a new party in the prior agreements. As a result, TCC was granted all the rights to explore or mine the Reko Diq area and to acquire the 75% of shares from the mining project. It was referred to as a slightly modified and amended version of CHEJVA.⁶⁹

However, the intention behind these changes that were made CHEJVA, was to provide ease to mining companies and the parties to the contract but the legality of such agreements, Option agreement, Alliance agreement and Novation agreement was uncertain. From

⁶⁵ Mincor Resource is a company incorporated in Western Australia with its place of business situated at Perth.

⁶⁶ 2000 Option Agreement, art 2.2.1.

⁶⁷ *Maulana Abdul Haque (n 7) at paras 5-7.*

⁶⁸ *Ibid.* Novation Agreement is that in which the third party replaces the original party from the contract.

⁶⁹ *Ibid.*

1993 till 2006 no question was raised on the legality of the agreements with respect to the Reko Diq project but in 2006 a constitutional petition⁷⁰ under Article 199 of constitution of Pakistan, 1973 was filed in the Balochistan High Court on the grounds that the whole agreement was invalid and unconstitutional (referring to CHEJVA) and it must be set aside.⁷¹ In 2007, the High court dismissed the petition and upheld the validity of such agreements. Affected from the result the appeal was filed in the Supreme court against the decision.

1. Rejection of Mining Lease

Before the verdict of the Supreme court on, 26th August 2010, TCC submitted its feasibility study to the Government of Balochistan and after that on 15 February 2011, TCCP Applied for a Mining Lease which was rejected by the Balochistan Government. Within the same time, the federal government and balochistan government set up their own mine in the area of Reko Diq. Affected from all these circumstances TCC commenced two arbitration proceedings against Pakistan to seek monetary damages for, first one under the provisions of CHEJVA in the International Chamber of Commerce (ICC) arbitration and obtained a favourable preliminary ruling in 2014 but it has not concluded yet;⁷² and the second one in the ICSID arbitration under the Australia-Pakistan Bilateral Investment Treaty (BIT), while

⁷⁰ *Maulana Abdul Haq & others* filed as Constitution Petition No. 892 of 2006 in the High Court of Balochistan.

⁷¹ *Ibid.*

⁷² *Province of Balochistan v Tethyan Copper Company* [2020] EWHC 938.

the supreme court proceedings were still going on. The ICSID arbitration has made the Reko Diq case a center of attraction for the whole world when it ordered Pakistan to pay \$5.9 billion for damages to the TCC over the denial of Mining lease in Reko Diq.

2. Bilateral Investment Treaty

A bilateral investment treaty (BIT) is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory.⁷³ *Pakistan has been very subsequent in signing BIT with many States.*⁷⁴ Generally any company who invests in Pakistan would be given protection under BIT only if it is signed between the respective states, TCC being an Australian company falls under the Pakistan-Australia BIT,⁷⁵ because of which TCC was able to initiate the proceeding against Pakistan at ICSID. The referred BIT state about the settlement of disputes as, *“the dispute to be referred to the International Centre for Settlement of Investment Disputes (“the Centre”) for conciliation or arbitration..”*⁷⁶

Till now Pakistan has faced ten cases including Reko Diq, out of which two were decided in favor of investors, Karkey Karadeniz

⁷³ Pakistan International Investment Agreements Navigator, ‘UNCTAD Investment Policy Hub’ (2020) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan?type=bits> accessed 15 September 2020.

⁷⁴ Ibid.

⁷⁵ Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments (1998 No. 2) Australian Treaty Series <https://www.italaw.com/sites/default/files/laws/italaw6023.pdf> accessed 15 September 2020.

⁷⁶ Ibid. Article 12-14.

Elektrik Uretim A.S. v. Islamic Republic of Pakistan⁷⁷, in which an award of about 800 million dollar was given but now it is reported that matter has been resolved and Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan.⁷⁸ Many states have terminated their BIT and some have withdrawn from ICSID due to its arbitrary nature, while on the other hand Pakistan has shown no concern related to it even after being slammed by a huge amount of award in the Reko Diq case. Well, there is another case pending before the ICSID is Hilal Hussain Al-Tuwairqi and Al-Tuwairqi Holding v. Pakistan 2018, for which it has to face the consequences. The most recent BIT of Pakistan was signed with Bahrain in 2014.⁷⁹ However, Pakistan cannot terminate its signed BIT's due to systematic flaws such as lack of resources, investments, incompetence, corruption etc.

For a country like Pakistan it would not be effective to terminate BIT because at this stage it needs investments and through BIT many foreign corporations may invest in it as they also need security for the protection of their investments. Other alternatives can be used for this purpose such as it can create its own model text for BIT such as India which terminated its sixty-nine BIT and framed a model through which it restricted the right of foreign investors to initiate arbitral proceedings. The other countries such as the United States have also

⁷⁷ Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan ICSID Case No. ARB/13/1 www.italaw.com/cases/2024 accessed 15 September 2020.

⁷⁸ UNCTAD Investment Policy Hub (n 62).

⁷⁹ Ibid.

incorporated similar provisions in the agreement⁸⁰ and restricted the jurisdiction of the arbitration tribunal.⁸¹

3. Arguments Raised by the Petitioner:

The constitutional petition, initiated under Article 184(3), raised the question on the legality of the licence granted to the mining companies on the grounds of partiality, violation of applicable law and negative effect on the interests of Pakistan⁸². The petitioner argued that some provisions of CHEJVA are in contradiction with the Balochistan Mineral Concession Rules.⁸³

In other words, according to the petitioner the undue favor was granted to the American based mining company (BHP) under the CHEJVA for the exercise of mining rights.⁸⁴ Basically their whole argument was based on the excessive relaxation provided by the Government of Balochistan to the mining company as this also points at the likelihood of corruption in the deal.

Moreover, the relaxation granted did not specify any particular minerals which was in direct violation of the Regulation of Mines and Oilfields and Mineral Development Act, 1948 which states that

⁸⁰ United States–Mexico–Canada Agreement (USMCA).

⁸¹ Nathalie Bernasconi-Osterwalder, 'USMCA Curbs How Much Investors Can Sue Countries—Sort of' (2 Oct, 2018) <https://www.iisd.org/articles/usmca-investors> accessed 15 September 2020.

⁸² Constitution of Pakistan 1973, art 184(3).

⁸³ Balochistan Mineral Concession Rules 1970.

⁸⁴ *Maulana Abdul Haque v Government of Balochistan* PLD (2013) SC 641 at para 11.

“relaxation would be specified for a particular mineral”.⁸⁵ Concerning that point it is clear that the relaxations that were not specific to a particular mineral is a proof that CHEJVA may be a result of corruption – since such a general relaxation is not only illegal, but also unreasonable. In addition to this, under the rule 98 of BMCR 1970 the relaxation is granted where there are cases of individual hardships⁸⁶ or can be granted under special circumstances but on certain terms and conditions to be fixed but in this case nothing was presented or submitted for the grant of relaxation, hence all relaxations were granted in excess of authority and were entirely beyond the scope of the provisions of the law.⁸⁷

Lastly, the emphasis was also drawn on the fact that under the BMCR rule 14 the mining licenses are granted to the companies that are registered or incorporated in Pakistan, whereas, BHP was neither registered nor incorporated.⁸⁸ This provision also violated the Contract Act, 1872⁸⁹ and Registration Act, 1908.⁹⁰

Furthermore, the argument related to the percentage share of BDA was also discussed, the question was raised on the authorities who

⁸⁵ Regulation of Mines and Oilfields and Mineral Development (Government Control) Act 1948, Act XXIV of 1948, s 5.

⁸⁶ ‘Hardship’ is defined as the “The severity with which a proposed construction of the law would bear upon a particular case, founding, sometimes, an argument against such construction, which is otherwise termed the “argument ab inconvenient.” [Black’s law dictionary]. *Maulana Abdul Haque v Government of Balochistan* PLD (2013) SC 641 at para 21.

⁸⁷ Ibid at para 23.

⁸⁸ *Maulana Abdul Haque* (n 7) at paras 51, 57.

⁸⁹ Contract Act 1872, ACT No. IX of 1872.

⁹⁰ Section 17 of Registration Act, 1908. (Act XVI of 1908).

were involved in this deal and emphasised that even on the comments provided by federation as per letter⁹¹ dated 28.04.1992 to enhance share to 50% on commercial production of minerals but the share of BDA was not increased and it didn't follow their recommendations.⁹²

The major drawback of these relaxations was that it granted more area to BHP to explore and mine with some additional benefits that were not permitted under the BMCR 1970.⁹³ Other than that, the CHEJVA signed with BHP was uncompetitive, non-transparent, illegal and void ab initio because of no competitive bidding.⁹⁴

4. Arguments Presented by the Respondent

In return to these arguments, the respondent clarified that the CHEJVA was approved and negotiated by Governmental authorities and also reaffirmed through the addendum by the Governor of Balochistan.⁹⁵ They further addressed that many rules including the rule 98 of BMCR 1970 has been repealed through the BMR 2002.⁹⁶ Moreover, under the BMCR 1970, GOB has power to make rules

⁹¹ National Centre for Technology Transfer, Ministry of Science and Technology, Government of Pakistan addressed to the Chairman BDA with reference to his request for the views and comments of the Federal Government on CHEJVA in this letter.

⁹² *Maulana Abdul Haque* (n 7) at paras 11 and 82.

⁹³ *Ibid.* Para 31. Rule 28 of Balochistan Mining Concession Rules (BCMR) 1970 which provides a maximum limit of 10 square miles, i.e., 25.4 sq. km per licence, and area granted was four times greater than this.

⁹⁴ *Ibid.* para 43.

⁹⁵ *Ibid.* para 77.

⁹⁶ *Ibid.* para 14.

likewise it has been empowered to relax the rules and to act accordingly.⁹⁷

Secondly, on the legality of CHEJVA it was stated that it should not be taken into account with respect to relaxation because it was the Government which itself relaxed the rules in order to facilitate the foreign investors for the future benefit of Pakistan.⁹⁸ Additionally, they stated that foreign companies are not required to register or incorporate in Pakistan to carry out their activities.⁹⁹

Moreover, they also argued that BHP and TCC are two different legal entities and were established in Pakistan on the basis of different agreements. Thus, TCC is only bound by the Novation Agreement and it has nothing to do with CHEJVA or Relaxation.¹⁰⁰ So even if CHEJVA was illegal or invalid it wouldn't affect the legality of the Novation Agreement. With regard to the argument of share, they stated that GOB was granted 25% of share without spending any penny on the project, while on the other hand BHP was bearing 100% cost of the exploration of the Reko Diq area.¹⁰¹ Hence, they argued that the object of CHEJVA was lawful and all the other agreements were proper, just and not contradictory to the public policy.¹⁰²

⁹⁷ Balochistan Mining Concession Rules 1970, rule 3, 6, 28.

⁹⁸ *Maulana Abdul Haque* (n 7) para 14.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid* at para 77.

¹⁰² *Ibid* at para 79.

DECISION MADE BY THE HONOURABLE SUPREME COURT

The supreme Court of Pakistan headed by the Chief Justice Iftikhar Muhammad Chaudhry, on 7 January 2013 announced the verdict of the case, ruling against the TCC and declaring CHEJVA and all other agreements based on CHEJVA illegal and void on the basis of corruption and violation of mining rules, contract act and transfer of property act.¹⁰³ Moreover, the Supreme court observed that there was no agent principal relation between the BDA and Government of Balochistan, with reference to that the agreements signed by BDA on behalf of government of Balochistan was void as it was not authorised to do so.¹⁰⁴

It held that CHEJVA was against the public policy in terms of Section 23 of the Pakistani Contract Act, 1872 and relied on the principle of public policy, applied by the international center of settlement of investment disputes, which state that the claim based on the contract, made out of corruption, could not be upheld by the tribunal because to do so would be a violation of international public policy.¹⁰⁵ Moreover, the investments made in violation of the host country laws are also illegal.¹⁰⁶

¹⁰³ Ibid at para 122.

¹⁰⁴ Ibid at para 88.

¹⁰⁵ *World Duty Free v. Kenya* ICSID Case No ARB/00/7.

¹⁰⁶ *Tokios Tokelès v. Ukraine* ICSID Case No ARB/02/18 and *Inceysa v. El Salvador* ICSID Case No ARB/03/26.

It further stated that the “Relaxations” granted were not in accordance with the law of Pakistan.¹⁰⁷ As under the rule 98 of BMCR 1970, relaxation can be granted where the case of individual hardship is established by the parties which means that the parties are required to prove that extreme suffering has been made by them and as a consequence that relaxations are required but the same was not done in the present case. In Fact, on the request of BHP the relaxations were granted, without showing any hardship or special circumstances, which does not fall under the criteria laid down by the Supreme court.¹⁰⁸ Hence, these relaxations were also illegal as these were in contradiction to the provisions of law¹⁰⁹ and the key provisions of CHEJVA were based on it.¹¹⁰

Furthermore, the Supreme court observed that the mining licence granted for exploration under the CHEJVA was illegal. On the grounds that the prospecting licence was extended for five years instead of three years as stated under Rule 31 of BMCR.¹¹¹ Moreover, the exploration license was extended to nine years to BHP/TCC ,thus the total period, including all extensions, given to BHP/TCC for prospecting/exploration license in the area of Reko Diq was seventeen

¹⁰⁷ *Maulana Abdul Haque* (n 7) at paras 108 and 110.

¹⁰⁸ *Ibid* para 15 and *Abid Hassan v. P.I.A.C.* PLD (2005) SCMR 25 and *Aman Ullah Khan v. Federal Government of Pakistan* PLD (1990) SC 1092.

¹⁰⁹ *Abdul Haq and others vs. Province of Sindh and others* PLD (2000) Karachi 224.

¹¹⁰ *Maulana Abdul Haque v Government of Balochistan* PLD (2013) SC 641. para 15.

¹¹¹ Rule 31 of BMCR 1970, which provides that no further extension for prospecting license beyond 3 years will be granted.

years. These clauses under the CHEJVA were clearly an extraordinary and unjustified favour granted to BHP/TCC.¹¹²

The Supreme Court relied on the fact that the area that was granted to BHP/TCC for exploration and prospecting exceeded the limit mentioned under BMCR Rules.¹¹³ Not only this, it also observed that after the enactment of Balochistan Mining Rules 2002 (BMR 2002), GOB was obliged to call for tenders or competitive bidding under the Rule 67 but the TCC was granted with prospecting and exploration license without any public advertisement, thus the whole procedure was illegal.¹¹⁴

With regard to ICSID, the Supreme Court held that the jurisdiction of ICSID cannot be invoked because Pakistan itself was not party to any of the agreements but can be invoked voluntarily under the provisions of the Bilateral Investment Treaty (between Australia and Pakistan). Moreover, the Court observed that TCC has disrespected the proceedings of the case and Supreme court, by bringing a case before ICSID.¹¹⁵

Moreover, the court also finds out that CHEJVA was not registered under section 17 of the Registration Act 1908 and for the purpose of license or lease the company must be incorporated in Pakistan as provided under the rule 14 of BMCR but the BHP was

¹¹² Maulana Abdul Haque (n 7) at pages 42, 48, 49, paras 28, 34, 35.

¹¹³ Ibid at para 98.

¹¹⁴ Ibid at para 35.

¹¹⁵ Ibid at pages 131-135, paras 109-111

not.¹¹⁶ Moreover, they failed to provide or submit any document related to registration which means that it was not registered in Pakistan and hence, not eligible for exploration or prospecting rights.¹¹⁷

According to the foreign investment regime of Pakistan, foreign investors have to register a company in Pakistan. Where the company has been registered or incorporated in Pakistan it had to abide by the law of Pakistan. With regard to that any agreement between the Government and that company will also fall under the international treaties to which both contracting parties or states are signatory such as Bilateral investment treaty.

On the above grounds the Supreme Court declared CHEJVA and all other agreements including Addendum No.1, Option Agreement, Alliance Agreement and Novation Agreement illegal, void, and *non est*.

ICSID ARBITRATION

TCC submitted the case before the ICSID arbitration against Pakistan in November 2011, claiming that the rejection of mining lease has resulted in the breach of FET¹¹⁸ and provisions of BIT

¹¹⁶ Ibid at paras 51, 52, 57, 74, 75.

¹¹⁷ Ibid at pages 71-72, para 57.

¹¹⁸ A fair and equitable treatment (FET) standard, which requires each contracting party to ensure fair and equitable treatment of the investments by investors of the other contracting party under Article 3.2 reference can also be made to the “umbrella clause”, which requires each contracting party to observe any obligation it has entered into with an investor of the other contracting party with regard to their investment under Article 2.4.

including expropriation¹¹⁹ and non-impairment clauses. In June 2015, Pakistan submitted evidence of corruption by TCC and raised objections on jurisdiction and admissibility of ICSID. However, in the decision given in March 2017 the tribunal affirmed its jurisdiction.

On 10 November, 2017 the decision on jurisdiction and admissibility was made publicly available. The tribunal held that TCC had a valid agreement and investment under the BIT. In addition to this, Pakistan presented the argument that CHEJVA was void as declared by the Supreme Court of Pakistan according to them the investments were in contradiction to the domestic law and for that reason it does not fall under the ambit of the treaty. This claim was rejected by the TCC on the grounds that the treaty deals with the investments that were in line with national law of Pakistan at the time it was signed. Moreover, it also rejected the objection of corruption on the basis of lack of evidence.¹²⁰ With regard to the Breach of FET tribunal found that Pakistan had breached the Treaty and held that *“the protection of an investor’s legitimate expectations is an important element of the FET standard under Article 3(2) of the Treaty.”*¹²¹

Furthermore, the tribunal stated that CHEJVA, and the assurance provided by the Government of Pakistan and other officials clearly

¹¹⁹ Under investment treaty arbitration, expropriation occurs when a state has taken a foreign investor’s property for which compensation is required.

¹²⁰ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* ICSID Award Case No. ARB/12/1 at page 15, para 22. The reasons are set out in paragraphs 209 to 1496 in Decision on Respondent’s Application to Dismiss the Claims (with reasons) ICSID Case No. ARB/12/1.

¹²¹ Decision on Jurisdiction and Liability, ¶ 812.

states that Tethyan's expectation of receiving the mining lease was legitimate and entitled to receive it under the rule 48(3)(a) of the 2002 BMR. Moreover, it stated that GOB was under obligation to support and facilitate the Tethyan investment, provided as

*“the GOB was under an obligation to provide administrative support in procuring the required licenses and permits and to perform all reasonable acts to give effect to the purposes of the CHEJVA.”*¹²²

Tribunal also examined the grounds provided in License authority's notice of Intent to reject the mining lease. According to the tribunal the reasons given in the Notice of Intent to Reject for example, *“TCCP was not the proper applicant; that the Feasibility Study, which formed part of the Mining Lease Application, did not provide for processing, smelting and refining of the ore; and that TCCP failed to submit a proper/complete feasibility study on the discovered deposits in the exploration area”*¹²³ does not justify the rejection of the Mining Lease Application. According to that, the Tribunal asserted that the denial of exploration license violated the provisions of good faith provided in the CHEJVA. Secondly, CHEJVA doesn't obligate Tethyan to provide processing, smelting and refining minerals so the rejection of license on the basis of the above point is not a valid ground. The Tribunal further stated that the procedure of denial of license was not fair enough and the reasons provided for the rejection were insufficient. Not only this, Tethyan

¹²² *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* ICSID Case No. ARB/12/1 at para 139.

¹²³ *Ibid* at para 141.

was not given the right to present its application and further meetings were also declined.

It stated that the rejection of Tethyan's Mining Lease Application was equivalent to expropriation.¹²⁴ It also found the denial discriminatory because the whole purpose behind the rejection of Tethyan's mining license was to incorporate a local project in the Reko Diq area.¹²⁵ It held that there was an indirect expropriation because the rejection "*substantially deprived the investment of its value*" hence violated the BIT and "*impaired the use of Tethyan's investment in violation of Article 3(3) of the Treaty*".¹²⁶

With regard to the jurisdiction of counterclaim presented by Pakistan, the tribunal accepted its jurisdiction under the ICSID Convention but rejected those claims on the valid ground. It stated that Tethyan has made a "*qualifying investment*," so the Pakistan's objection on jurisdiction and admissibility were dismissed by the Tribunal, and affirmed that Pakistan has breached the all three treaties.¹²⁷ The tribunal found that Pakistan unlawfully denied the licence to Tethyan and is liable for all the damages incurred by the company.

¹²⁴ Ibid at para 156.

¹²⁵ Ibid at para 158.

¹²⁶ Ibid at para 283.

¹²⁷ Ibid at para 1841.

In order to decide the valuation of investment market value Tribunal followed the “*Discounted cash flow*”¹²⁸ method. After that Tribunal imposed a compensation of about USD 4,087 million, plus pre and post award interest, in addition to this the cost of arbitration and in total about USD 5.8 billion is imposed on Pakistan as a penalty. With reference to that tribunal stated that the compensation was justified because of the time invested and investment made by the company.

After a few days, on 9th August TCC filed a suit for the enforcement of the ‘Arbitral’ award issued against Pakistan in the World bank. However, in the same year just after three months Pakistan filed a plea before ICC for annulment of the award. The plea was registered and subsequently a stay was granted on the proceedings of enforcement of the award on 18 November, 2019. However, on 17 September, 2020, the ICSID granted the stay on the enforcement of award. Moreover, ICSID is considering appeal of Pakistan against the enforcement of the Arbitral award and a final hearing to take place in May 2021.¹²⁹

¹²⁸ The Discounted Cash Flow (‘DCF’) method is used to adjust cash flow for risk and timing and this method is for fair value estimates under accounting guidelines and well supported in valuation and finance theory literature.

¹²⁹ *News Desk*, ICSID grants stay on enforcement of the award issued against Pakistan in the Reko Diq dispute, *Mettis global* (September 17, 2020) <<https://mettisglobal.news/icsid-grants-stay-on-enforcement-of-the-award-issued-against-pakistan-in-the-reko-diq-dispute>> accessed 19 September 2020.

CRITIQUE ON THE DECISION AND THE AWARD

First of all, after seeing all these arguments and decisions it is clearly visible that the incompetence of the Government of Balochistan created a devastating scenario for the State of Pakistan at the international Platform, like in 1993 caretaker government signed the first agreement (CHEJVA) with the foreign company, which it should not have done because it is not in its mandate to do so.¹³⁰ It would not be wrong to say that this whole case was the result of Balochistan government's mishandling because for about eighteen years the successive governments in Balochistan completely ignored the Reko Diq project and TCC until it began to receive media attention.¹³¹ The consequences of these mishandling have thrown the Reko Diq project into a protracted and sophisticated litigation process within Pakistan as well as at international level.¹³²

The whole fiasco started with an agreement that was signed between the caretaker government of Balochistan and the BHP. CHEJVA itself was objectionable for several reasons, many provisions were directly favouring the BHP.¹³³ With this regard, it was the duty of the BDA or government to make sure that this deal

¹³⁰ Adnan Aamir, Bearing the burden: The cost of the Reko Diq (Balochistan) disaster. *Asia research institute* (17 Oct 2019) <https://theasiadialogue.com/2019/10/17/bearing-the-burden-the-cost-of-the-reko-diq-balochistan-disaster/> accessed 15 September 2020.

¹³¹ *Ibid.*

¹³² TNS, The Reko Diq mystery, *ISDS Platform* (23 April 2017) <http://isds.bilaterals.org/?the-reko-diq-mystery&lang=fr> accessed 18 September 2020.

¹³³ Such as CHEJVA Clauses 5.2, 5.4.1, 5.4.2, 5.6, 5.9, 5.10, 5.11, 6.1, 6.4, 6.5, 14.1, 14.2 & 18.1.

turns out prolific for Pakistan but they acted negligently throughout the whole process from signing of the agreement to the adoption of wrong policies.¹³⁴ This case emphasizes on the fact that, how can an unelected person (caretaker government) make such agreements and are they competent enough to deal with such issues?¹³⁵ Additionally, why did they agree to give 75% of share in return of 25% when the deal can be based on 50% of the profit as it was made in the previous mining projects.¹³⁶ There is no answer to these questions but it can be assumed that for their own profit they let the CHEJVA be signed without any credentials.¹³⁷

Interestingly, relaxations were made in the provincial law just to provide ease to the BHP.¹³⁸ The most important provisions were the relaxation of area, exclusive right that other than BHP no one would have right to prospect or explore the area, and the government's right to take over, merge, acquire the project was waived off.¹³⁹ Moreover, the authorities also waived off BHP an annual fee of 3.47 million rupees as a massive concession on the request of extension for the

¹³⁴ News Desk, 'Bhoothani blames Balochistan govt for losing Reko Diq case' *The DAWN*, (22 Oct 2020) <https://www.dawn.com/news/1494098> accessed 28 Oct 2020.

¹³⁵ According to Articles 2(A) and 48(5) of the 1973 Constitution, only elected representatives can run the affairs of the state.

¹³⁶ CHEJVA, art 3.2-3.4.

¹³⁷ Christopher Finnigan, 'Long Read: The Reko Diq 'Fiasco' in Perspective: Pakistan's Experience of International Investment Arbitration' *LSE* (2020) <https://blogs.lse.ac.uk/southasia/2019/08/14/long-read-the-reko-diq-fiasco-in-perspective-pakistans-experience-of-international-investment-arbitration/> accessed 15 September 2020.

¹³⁸ CHEJVA Clause 3.2, 5.2, 5.6, 5.3.1, 5.3.2, 5.4.1, 5.4.2, 5.8, 6.1, 11, 14.

¹³⁹ *Maulana Abdul Haque* (n 7) at para 39.

deposit of the fee.¹⁴⁰ The BMR 2002 was also prepared by the law firm of TCC which was also available on the firm's website but removed later on.¹⁴¹ The new rules were only propagated to favour the foreign firm.¹⁴²

The analysis can be drawn from this case that BHP intentionally invested in Pakistan and created an imbalanced situation between the signed parties of the agreement. Not even this, they played another important part to secure their position by making the government of Balochistan as a party to the agreement. It was evident that what they were trying to do but the Balochistan government was so negligent that they were not able to understand their tactics and they were letting them do it intentionally. Moreover, there was no competitive bidding on the part of the concerned authorities for the project of the Reko Diq.¹⁴³ After all the relaxations were made they sold the legal rights of the project to another foreign company and surprisingly, the government of Balochistan did not object to the transfer, even at that time they had an opportunity to hold BHP accountable as they failed to provide significant progress in the project of Reko Diq but they didn't.¹⁴⁴

According to the provision of law¹⁴⁵ no joint venture can be created for prospecting license with a foreign firm not registered in

¹⁴⁰ Ibid at Para 48.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid at para 43.

¹⁴⁴ Ibid at para 113.

¹⁴⁵ Section 17 of Registration act 1908; s20, 23,29 & 62 of contract act 1872, Balochistan Mining Concession Rules 1970 and BMR 2002.

Pakistan and BDA has no legal authority to enter into such joint venture as a party, the agreement entered into was therefore made in violation of the law existing at the time. This background justifies the decision given by the Supreme Court but this judgment lacked the judicial reasoning that could have been acceptable at an international forum.¹⁴⁶

Simply, as discussed above, it was another reason Pakistan could not defend its case in ICSID.¹⁴⁷ The first reason is that the decision did not refer to the separability doctrine¹⁴⁸ directly, but at first glance a decision to declare a contract invalid despite an arbitration provision seems to go against the doctrine.¹⁴⁹ However, the Supreme Court emphasized on the fact that there were allegations of corruption, whereas the parties petitioning before the court for a declaration that the agreement was void and illegal were not original parties to the agreement itself.¹⁵⁰ Moreover, the separability doctrine is not absolute, however, there are circumstances where the *invalidity, or*

¹⁴⁶ Waqar Rana, Lessons from Reko Diq, *The News*, August 8, 2019, <<https://www.thenews.com.pk/print/509825-lessons-from-reko-diq>> accessed on September 19, 2020.

¹⁴⁷Femi, 'The lessons of Reko Diq' *Bilateral.org* (25 July 2019) <https://www.bilaterals.org/?the-lessons-of-reko-diq> accessed 19 September 2020.

¹⁴⁸ The "separability doctrine" provides that an international arbitration agreement is almost invariably treated as presumptively separable or autonomous from the underlying contract in which it is found. The separability doctrine has also been endorsed previously by the courts in Pakistan.

¹⁴⁹ Nicolas Peacock and Mike McClure, 'Pakistan Supreme Court declares a contract – and the arbitration clause within that contract–void on public policy grounds' *Herbert Smith Freehills* (9 September 2013) <https://hsfnotes.com/publicinternationallaw/2013/09/09/pakistan-supreme-court-declares-a-contract-and-the-arbitration-clause-within-that-contract-void-on-public-policy-grounds/> accessed 15 Sep 2020.

¹⁵⁰ *Ibid.*

termination of the parties' underlying contract may affect the validity or effectiveness of the arbitration clause; whereas, this was not considered by the Supreme Court directly, and it can be observed that such circumstances exist in this case.¹⁵¹

Moreover, the parent agreement was signed between the BHP, not the TCC, the latter has already invested millions of rupees in the area of Reko Diq,¹⁵² so the court should have considered it. Whereas, the Supreme court declared all agreements void, apparently on the ground that parent agreement (CHEJVA) was illegal.¹⁵³ It also raised the argument of undue favour that was granted to BHP. These favours were granted by the government of Balochistan and TCC was enjoying their right legally under these agreements, so the negligence was on the part of authorities who were responsible for such agreements, not the TCC. These companies are more powerful than any state because of platforms like ICSID and their main target is developing countries.¹⁵⁴ For example, in 2004 Indonesia wanted to ban open-pit mining in protected forested areas but allegedly under threat of international arbitration it granted exemptions to about twelve mining companies.¹⁵⁵ Another example, where these corporations were set free from liabilities by international arbitration platforms is the case of El Salvador.

¹⁵¹ Ibid.

¹⁵² Abdul Rafay, Pakistan's Need for Amicable Resolutions (n 44).

¹⁵³ Ibid.

¹⁵⁴ See Chris, 'The Secret Threat That Makes Corporations More Powerful Than Countries' (28 August 2019) <https://www.buzzfeednews.com/author/chrishamby> accessed 19 September 2020.

¹⁵⁵ Ibid.

Additionally, the Supreme court dealt the case on the grounds of the legality and illegality of CHEJVA and said that since it is illegal, hence all the other agreements are also illegal, so on that basis TCC cannot refer the case to the International tribunal. The supreme court should have also considered the Bilateral Investment Treaty (BIT) which directly empowers the foreign investors to refer the matter in case of dispute to international arbitration tribunals and Pakistan has signed the BIT Australia to protect and promote Australian investors¹⁵⁶ and it also provides that in cases of dispute matter is to be resolved by an international arbitration tribunal before ICSID.¹⁵⁷

Moreover, the Supreme court assumed that their verdict was binding on the ICSID but they forgot that it is a private and independent international forum under article 41 of the ICSID Convention who is not bound by the verdict of any domestic courts.¹⁵⁸

With regard to the ICSID, it has many flaws in it and usually fails to act as a fair arbitrator.¹⁵⁹ Subsequently, these types of platforms are used by the multinational corporations to get away from the questionable proceedings initiated by the developed or underdeveloped States.¹⁶⁰ Similarly, in the Reko Diq case the TCC

¹⁵⁶ Pakistan-Australia Bilateral Investment Treaty, art 3.

¹⁵⁷ Ibid Article 12 and 13.

¹⁵⁸ ICSID Case No. ARB/81/1.

¹⁵⁹ Nicolas Boeglin, 'ICSID and Latin America: Criticisms, withdrawals and regional alternatives' *bilaterals.org* (June 2013) <https://www.bilaterals.org/?icsid-and-latin-america-criticisms> accessed 19 September 2020.

¹⁶⁰ Chriss Hamby, 'Inside The Global "Club" That Helps Executives Escape Their Crimes' *BuzzFeed.News* (28 August 2016) <https://www.buzzfeednews.com/article/chrishamby/super-court> accessed 19 September 2020.

did the same.¹⁶¹ Moreover, the tribunal with no expertise of Pakistani law,¹⁶² ruled that TCC would be compensated for all the future profits that they would have received from the non-existent project if the project had started.¹⁶³ In other words, the “discounted cash flow approach”, used for awarding Tethyan, failed to properly account for certain risks and uncertainties in the project and the calculated damages were based on a projected fifty six year of operating period for the mine company even though no lease or permits for the project were ever issued by Pakistani authorities for that period.¹⁶⁴ Moreover, the size of award is also questionable because it was determined by the argument presented by the TCC that it has the right to receive from Pakistan the present value of the future project’s profit. Additionally, they relied on assumptions and most unreliable values of gold and copper for the determination of award.¹⁶⁵

However, one of the other drawbacks was that once the decision is given by the ICSID then the States such as Pakistan cannot appeal, can only file for the revision or annulment of the Award.¹⁶⁶ The ICSID platform has been used by powerful corporations to threaten

¹⁶¹ *ibid.*

¹⁶² Saad Hassan, Leading economist slams World Bank’s unjust arbitration fine on Pakistan, *TRTWORLD* (2 December 2019) <https://www.trtworld.com/business/leading-economist-slams-world-bank-s-unjust-arbitration-fine-on-pakistan-31756> accessed 19 September 2020.

¹⁶³ *Ibid.*

¹⁶⁴ ‘Pakistan moves US court to stop over \$6bn fine in Reko Diq case’ *Bilateral.org* (10 January 2020) <https://www.bilaterals.org/?pakistan-moves-us-court-to-stop> accessed 15 December 2020.

¹⁶⁵ *Ibid.*

¹⁶⁶ ICSID Convention, art 51 and 52.

developing countries.¹⁶⁷ It has been estimated that most of the cases brought before ICSID are by these corporations and only about one percent by the states. ICSID awards always lack public scrutiny and are not bound by any judicial precedent of any country or court except their own.¹⁶⁸ The same can be observed in the Reko Diq case. Pakistan being a party to BIT is likely to be found in the similar cases in the near future as ICSID gains jurisdiction over the matter by BIT.

IMPACT OF THE CASE NO THE MINING INDUSTRY AND ECONOMY OF PAKISTAN

The Reko Diq case has affected the integrity of Pakistan at many levels. First of all, an international arbitral tribunal affected the sovereignty of Pakistan by declaring its superior court's decision ineffective. The case has created an adverse effect not only on the mining industry but the whole of Pakistan. It has created a negative image of Pakistan at the international level. After the Reko Diq fiasco, any cooperation or company would rarely like to invest in Pakistan due to its systemic flaws that have been highlighted by the case. Moreover, the progress of foreign investment in Pakistan has slowed

¹⁶⁷ See Chris (n 160).

¹⁶⁸ 'Speaker's Corner: ICSID Critics Misguided As Investment Treaties Deliver Significant Benefits' *Law Times* (30 December 2013) <https://www.lawtimesnews.com/archive/speakers-corner-icsid-critics-misguided-as-investment-treaties-deliver-significant-benefits/261129> accessed 15 December 2020.

down.¹⁶⁹ During the whole proceedings, no progress was made in the Reko Diq project, as the stay was granted by ICSID during the proceedings on the project for the exploitation of the Reko Diq area which the Balochistan Government has started, it was another setback for the mining industry of Pakistan. Therefore, this delay in the project has resulted in great financial burden on Pakistan. A wrong impression has been floated in the world for the mining sector, which can greatly harm the economy of Pakistan. As, the Mining sector holds a great importance with regard to the economy. This case has not only affected the mining industry or Balochistan, but it changed the scenario for all the sectors of Pakistan. The award given by ICSID worth more than 5 billion dollars cannot be paid because of the economic condition.¹⁷⁰ It was one of those issues, which taught Pakistan a great lesson with regard to international affairs. After the announcement of the award Pakistan was left with four options, the first one to pay, second one to negotiate with TCC, third one to hand over the Reko Diq project completely to the TCC and fourth one to annul the ICSID verdict, which it did. If in case they chose to opt the third one it would have a great loss to the mining sector of Pakistan because it would get deprived of the precious minerals, which are more valuable and more worthy than the award granted.

1. Future of Foreign Investment in Pakistan:

¹⁶⁹2020 Investment Climate Statements: Pakistan, Available at: <https://www.state.gov/reports/2020-investment-climate-statements/> accessed 15 December 2020.

¹⁷⁰ 'World Bank tribunal issues stay in Reko Diq case' *Dawn* (18 September 2020) <https://www.dawn.com/news/1580294> accessed 15 December 2020.

The verdict of the Supreme court in the case of Reko Diq is an indication of discouragement for foreign investors. This decision has created vulnerability for foreign investment in Pakistan and disturbed the whole cycle of international commercial arbitration.¹⁷¹ Not only in the Reko Diq case even before that there were some other cases which have helped Pakistan to earn an unstable reputation. Concerning the *HUBCO Power Company v WAPDA*¹⁷² case in which the superior court ruled that arbitration agreement cannot be enforced on the grounds of corruption and invalidity of the commercial contract.¹⁷³ The supreme court has also declared that in case of unfavourable award granted by ICSID, award will not be enforced on public grounds. However, according to Article III of the New York Convention and Article 54(1) of the ICSID Convention the Contracting State is under obligation to enforce and recognize the arbitral award. Hence, being a party to these conventions Pakistan is under obligation to abide by its provisions and rules. These verdicts of supreme court set a negative impact of Pakistan on foreign investors. While on the other hand, the ICSID verdict has created a lose-lose situation for Pakistan as if it pay, then its economy would almost collapse, or if it may refuse to pay and have the verdict set aside then its violating the ICSID Convention, thus sending the

¹⁷¹ Christopher Finnigan, 'The Reko Diq 'Fiasco' in Perspective: Pakistan's Experience of International Investment Arbitration' *LSE Blogs* (14 August 2019) <https://blogs.lse.ac.uk/southasia/2019/08/14/long-read-the-reko-diq-fiasco-in-perspective-pakistans-experience-of-international-investment-arbitration/> accessed 15 December 2020.

¹⁷² PLD (2000) SC 841.

¹⁷³ Barrington, Louise, 'Hubco V. Wapda: Pakistan Top Court Rejects Modern Arbitration' (2000) 11 *Am. Rev. Int'l Arb.* 385.

message to the whole community of foreign investors that it is not safe to invest in Pakistan.

However, these verdicts can make Pakistan 'a black spot' in regard to arbitration or foreign investments.¹⁷⁴ After all these circumstances, no foreign investor would like to invest in a State where their investment is at stake because of the interference of the judiciary and they could not obtain a fair chance to defend themselves in the domestic courts.¹⁷⁵ The lesson Reko Diq teaches to the foreign investment community is that their investments are not protected at any time an action can be taken in contradiction to their interest. Pakistan courts need to restructure its approach related to international arbitration and investment law.¹⁷⁶ The supreme court concern in the respective case was the interpretation of Agreement (CHEJVA) under Pakistani law and on the basis of that declared that agreement void.¹⁷⁷ Moreover, in order to support its decision it referred to other ICSID decisions on corruption in other bilateral investment treaties and its decision to declare that the arbitration clause was void were unlikely to be accepted by ICSID.

Basically, the Supreme court needs to understand the concept of private investors as in the Reko Diq case the supreme court did not provide detailed reasoning of where foreign companies were at fault

¹⁷⁴ Naima Ahmed, 'Pakistan's Case With Arbitrability' *Courtingthelaw* (13 August 2015) <https://courtingthelaw.com/2015/08/13/commentary/pakistans-case-with-arbitrability/> accessed 19 September 2020.

¹⁷⁵ *Ibid.*

¹⁷⁶ Femi, The lessons of Reko Diq (n 147).

¹⁷⁷ *Ibid.*

and what they did was wrong.¹⁷⁸ Secondly, In order to attract foreign investment it needs to reform the legal framework of international investment law of Pakistan to provide them security.

Concerning the case Pakistan has cleared its stance that the Reko Diq deal was signed with the provincial government and it is not in the country's long term interest.¹⁷⁹ Moreover, the government has assured to facilitate the foreign investors. According to the State bank report, the foreign investments in Pakistan have decreased in the year 2019.¹⁸⁰ However, the surety provided by the government to the international foreign community can work. Moreover, Balochistan board of investment is highlighting the investment opportunities through digital media in order to facilitate, provide ease and support to the foreign investors.¹⁸¹

CONCLUSION

Conclusively, the Reko Diq case has affected the integrity of Pakistan in the field of foreign investment. This case has highlighted the systematic flaws and incompetence of the state authorities with

¹⁷⁸ Abdul Rafay, Pakistan's Need for Amicable Resolutions (n 44).

¹⁷⁹ Daniel Wagner, 'Expropriation: Pakistan's Message to Foreign Investors' (February 2010) <https://www.irmi.com/biographies/daniel-wagner> accessed 19 September 2020.

¹⁸⁰ 2020 Investment Climate Statements: Pakistan, Available at: <https://www.state.gov/reports/2020-investment-climate-statements/> accessed 19 September 2020.

¹⁸¹ 'Board aims to facilitate business activities', *The Tribune* (8 November 2020) <https://tribune.com.pk/story/2271493/board-aims-to-facilitate-business-activities> accessed 9 November 2020.

regard to such matters. Countries like Pakistan must settle their disputes domestically in order to avoid such liabilities because these kinds of judgements impose a negative impact on its integrity and economy. After the reko Diq case it seems that Pakistan has to face a backlash from the international community and the chances of foreign investment may decline. In order to attract foreign investors, it is not sufficient to enforce international foreign investment or arbitration standards or rules but it also needs to reform its judicial approach. Moreover, the Supreme court has to act more vigilantly while considering the cases where foreign investors and companies are involved who have invested a huge sum of money, in order to avoid such consequences.

BIBLIOGRAPHY

PRIMARY SOURCES

Legislation and International Treaties

1. Balochistan concession mining rules 1970 (BMCR)
2. Balochistan concession rules 2002
3. Australia-Pakistan BIT (1998) (adopted 7 February 1998, entered into force 14 October 1998)
4. Chagai Hill Exploration Joint Venture Agreement (CHEJVA)
5. Constitution of Islamic Republic of Pakistan, 1973
6. Contract Act, 1872
7. Fair and equitable treaty (FET)
8. Foreign Private Investment (Promotion and Protection) Act 1976
9. ICSID convention, 1966
10. Mines Act 1923
11. New York Convention on the Recognition and Enforcement Foreign Arbitral Awards 1958
12. Protection of Economic Reforms Act 1992
13. Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011
14. Registration Act 1908
15. Regulation of mines and Oilfields and Mineral Development (Government Control) Act, 1948

CASE LAW

16. *Abdul Haq and others vs. Province of Sindh and others* PLD (2000) Karachi 224
17. *Abid Hassan v. P.I.A.C.* PLD (2005) SCMR 25
18. *Aman Ullah Khan v. Federal Government of Pakistan* PLD (1990) SC 1092
19. *HUBCO Power Company v WAPDA* PLD (2000) SC 841
20. *Maulana Abdul Haque v Government of Balochistan* PLD (2013) SC 641
21. *Inceysa v. El Salvador* (2003) ICSID Case No ARB/03/26
22. *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (2013) ICSID Case No. ARB/13/1
23. *Province of Balochistan v Tethyan Copper Company* [2020] EWHC 938
24. *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (2012) ICSID Case No. ARB/12/1
25. *Tokios Tokelès v. Ukraine* (2002) ICSID Case No ARB/02/18
26. *World Duty Free v. Kenya* (2000) ICSID Case No ARB/00/7

SECONDARY SOURCES

Books and Journal Articles

27. Abdul Rafay, Pakistan's Need for Amicable Resolutions Concerning Foreign Investment Disputes: The Reko Diq Case, (2017) LUMS Law Journal 4.1
28. Alejandro Garcia, 'Breach Of Fair And Equitable Treatment Standard (ICSID)', (Herbert Smith Freehills, 16 Jan, 2014) <<https://hsfnotes.com/arbitration/2014/01/16/breach-of-fair-and-equitable-treatment-standard-icsid/>> accessed 19 November 2020
29. Amber Darr, The Reko Diq Fiasco in Perspective: Pakistan's Experience of International Investment Arbitration (London School of Economics and Political Science, 2019) <<https://blogs.lse.ac.uk/southasia/2019/08/14/long-read-the-reko-diq-fiasco-in-perspective-pakistans-experience-of-international-investment-arbitration/>> accessed 19 November 2020
30. Black, Henry Campbell, et al. *Black's law dictionary* (Vol. 196. St. Paul, MN: West Group 1999)
31. Correspondent T, 'Opportunities Exist for Investment In Balochistan', *Dawn* (Lahore, 4th September, 2020) <<https://www.dawn.com/news/1577823>> accessed 19 September 2020
32. Daniel Wagner, Expropriation: Pakistan's message to foreign investors. *International Risk Management Institute* (2010) <<https://www.irmi.com/articles/expert->

- commentary/expropriation-pakistan%27s-message-to-foreign-investors> accessed 9 September, 2020
33. Faisal Daudpota, *Rejecting the Right to International Arbitration on Domestic Public Policy Grounds-The Case of Tethyan Copper Company in Pakistan*, *SSRN* (2013) <<https://ssrn.com/abstract=2315702>> accessed 19 September 2020
34. Ghouri A and others, 'Pakistan's Woes With Foreign Investors - Ways To Prevent The Tethyan Saga -- *Kluwer Arbitration Blog*' (Kluwer Arbitration Blog, 2019) <<http://arbitrationblog.kluwerarbitration.com/2019/11/18/pakistan-s-woes-with-foreign-investors-ways-to-prevent-the-tethyan-saga/>> accessed 19 September 2020
35. Hasnaat Malik, Pakistan's foreign assets at stake in Reko Diq case: AGP, *The Express Tribune*, (Lahore, 26th February, 2020) <<https://tribune.com.pk/story/2165014/1-pakistan-s-foreign-assets-stake-reko-diq-case-agp/>> accessed 19 September 2020
36. Hassan Raza, 'International Arbitration: Is Pakistan Finding New Avenues?', (Kluwer Arbitration Blog, January 31 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/01/31/international-arbitration-is-pakistan-finding-new-avenues/>> accessed 19 September 2020
37. Ikram Sehgal, 'The Painful Lessons of Reko Diq' (2019) 22 *Defence Journal* 80

38. Ikram Ullah, 'Reko Diq Case: Another Intervention from Supreme Court of Pakistan' (2014) 17 *International Arbitration Law Review* 61
39. Muhammad Waqar Rana, 'Lessons From Reko Diq', *The news*, (Lahore, 8th August, 2019) <<https://www.thenews.com.pk/print/509825-lessons-from-reko-diq>> accessed 9 September 2020

Newspaper Articles and other Online Sources

40. 'Pakistan Seeks Relief Over \$5.8Bn Fine in Reko Diq Lease Case', *DAWN* (Lahore, 12 September, 2020) <<https://www.dawn.com/news/1579190>> accessed 19 September, 2020
41. 'Reko Diq Verdict: ICSID Approves Pakistan's Petition Seeking Review Over \$6Bn Fine', *The news*, 31 Jan 2020, <<https://www.thenews.com.pk/latest/606459-pakistans-petition>> accessed 9 September 2020
42. Saad Hassan, Multi-billion dollar fine on Pakistan puts the spotlight on a secret court, *TRT WORLD*, <<https://www.trtworld.com/magazine/multi-billion-dollar-fine-on-pakistan-puts-the-spotlight-on-a-secret-court-29141>> accessed 9 September 2020
43. Saleem Shahid, 'Balochistan to Seek Review of ICSID Decision in Reko Diq Case', *DAWN*, (Lahore, 8 Oct 2019, <<https://www.dawn.com/news/1509620>> accessed 19 October, 2020