Neutral Citation Number: [2021] EWHC 1884 (Comm)

Case No: CL-2019-000491

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QUEEN'S BENCH DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6th July 2021

Before :

MR JUSTICE ROBIN KNOWLES CBE

- -

In an arbitration claim between:

PROVINCE OF BALOCHISTAN	**Claimant**
- and -	
TETHYAN COPPER COMPANY PTY LIMITED	**Defendant**

- -
- -

Christopher Hancock QC, George Spalton and Sam Goodman (instructed by **Gresham Legal**) for the **Claimant**
Lord Goldsmith QC, Patrick Taylor and Tom Cornell (instructed by **Debevoise & Plimpton**) for the **Defendant**

Hearing dates: 1 – 3 March 2021
- -

Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Robin Knowles J:

Introduction

1. This is the judgment of the Court determining certain preliminary issues in an arbitration claim ("the Arbitration Claim").

2. The Arbitration Claim is brought pursuant to section 67 and section 68 of the Arbitration Act 1996 ("the 1996 Act") in respect of a Partial Award dated 8 July 2019 ("the ICC Partial Award") of an arbitral tribunal in an ICC arbitration (ICC Case No. 18347/VRO/AGF/ZF/AYZ/HTG) ("the ICC arbitration").

3. London was designated as the seat of the ICC arbitration.

4. The arbitral tribunal in the ICC arbitration comprises Lord Collins of Mapesbury, Sir David A. R. Williams QC and Dr Michael Moser ("the ICC tribunal").

5. The Arbitration Claim challenges the jurisdiction of the ICC tribunal. The ICC tribunal upheld its own jurisdiction in 2014, in a decision that was later, in 2019, incorporated into the ICC Partial Award.

6. The Defendant in the Arbitration Claim (and Claimant in the ICC arbitration) is Tethyan Copper Company Pty Limited ("TCCA"). TCCA is an Australian company owned by two of the world's largest mining corporations, Antofagasta (a Chilean corporation) and Barrick Gold (a Canadian corporation)

7. The Claimant in the Arbitration Claim, the Province of Balochistan (Respondent in the Arbitration), is one of the four provinces of the Islamic Republic of Pakistan.

8. The Chagai District of the Province of Balochistan, located close to Pakistan's border with Iran and Afghanistan, contains what is believed to be the world's fifth largest goldmine. TCCA alleges that in breach of contract the Province of Balochistan denied an application in 2011 for a Mining Lease in the Chagai District.

Context

9. The contract in question is the 'Chagai Hills Exploration Joint Venture Agreement' ("the CHEJVA") dated 15 or 29 July 1993, together with related agreements. These include an Addendum dated 4 March 2000 ("the Addendum") and a Novation Agreement dated 1 April 2006 ("the Novation Agreement"). Over time other agreements were entered into including what was known as an Alliance Agreement, and share-purchase agreements, together with transfers of interest.

10. The question whether the Government of Balochistan (and hence the Province of Balochistan) was a party to the CHEJVA has been in issue.

11. The stated purpose of the CHEJVA was to explore and evaluate the economic viability of mineral deposits in the Reko Diq area of the Chagai District.

12. TCCA was not originally a party to the CHEJVA. On its face the CHEJVA was originally entered into by BHP Minerals Intermediate Exploration Inc. ("BHP") and Balochistan Development Authority ("BDA"). The Novation Agreement provided for TCCA to replace BHP as a party.

13. In due course, in 2008, the Islamabad High Court granted a Scheme of Arrangement ("the Scheme of Arrangement"). Under this (broadly speaking, as the Province puts it) TCCA's rights were transferred to its wholly owned Pakistani subsidiary ("TCCP"). However the question of the extent to which TCCA's rights in relation to the CHEJVA were transferred has been in issue.

14. Among other allegations, the Province of Balochistan alleges that TCCA and its predecessors paid significant bribes to Government of Balochistan officials over a period of many years (before and after the commencement of the CHEJVA). The officials, it is said, were caused to violate their public duties and to award various illegitimate benefits in relation to the CHEJVA and the natural resources in the Chagai District. Investigations into alleged corruption are said to continue.

15. In light of exploration over a number of years, an area of 99.47 km was in due course made the subject of an application to the Government of Balochistan to grant a Mining Lease to TCCP. The application was refused and two arbitrations have followed.

16. The first is the ICC arbitration (between TCCA and the Province of Balochistan). The agreement to arbitrate on which the ICC arbitration is founded is contained in the CHEJVA.

17. The second is an ICSID arbitration under the Bilateral Investment Treaty between Australia and the Islamic Republic of Pakistan ("the BIT"). The arbitral tribunal in the ICSID arbitration comprises Professor Dr Klaus Sachs, Lord Hoffmann and Dr Stanimir Alexandrov.

18. Related proceedings were commenced in the Courts of Pakistan, including the Supreme Court of Pakistan. A constitutional petition was filed pursuant to Article 199 of the Constitution of Pakistan.

19. On 7 January 2013, following a hearing of 25 days and reserving its full reasons, the Supreme Court of Pakistan made an order declaring that the CHEJVA was "illegal, *void* and *non est*". The Supreme Court of Pakistan further declared that all agreements "which are based upon, and emanated from, CHEJVA", including the Novation Agreement, "are also held to be illegal and void" and "do not confer any right" on TCCA.

20. On 10 May 2013, the Supreme Court handed down its full reasoned judgment ("the Judgment of the Supreme Court of Pakistan"), extending to 149 pages. In this it also expressed the conclusion that "no operative part of the [CHEJVA] survives to be independently enforceable and the principle of severability [sic] cannot be applied to save any part thereof".

21. On 10 November 2017, the ICSID tribunal issued a 'Decision on Jurisdiction and Liability' and a 'Decision on Respondent's Application To Dismiss The Claims (With Reasons)'.

22. In summary, in these two Decisions, the ICSID tribunal held that it had jurisdiction under the BIT to determine TCCA's claims, and that Pakistan had breached various provisions of the BIT. The ICSID tribunal dismissed allegations of corruption in relation to the CHEJVA, although the Province emphasises (in a third witness statement of Mr Diego Gosis of GST LLP, the law firm now representing the Province in the ICC arbitration) that the allegations in the ICSID proceedings and the allegations made here "are not all exactly the same and there are important differences".

23. On 12 July 2019, the ICSID tribunal awarded TCCA US$ 4.087 billion and approximately US$ 1.7 billion in interest. The Province of Balochistan's legal team believe the award to be the second largest award in ICSID history. The award is currently being challenged in ICSID annulment proceedings, including a challenge on the basis that the ICSID tribunal lacked jurisdiction.

24. The ICC tribunal issued 'Rulings on Preliminary Issues' on 21 October 2014. These included rulings by the ICC tribunal that the arbitration agreement in the CHEJVA (with the Addendum and Novation Agreement) was valid and that the ICC tribunal had jurisdiction to consider TCCA's claims. Following and on the basis of an exchange of correspondence with the ICC tribunal, which is considered further below under the discussion of 'the October/November 2014 exchange', the rulings were later incorporated into the ICC Partial Award.

25. Appearing before the Supreme Court of Pakistan, Counsel for the Province of Balochistan criticised the decision of the (Federal) Government of Pakistan to enter into the BIT, arguing that this was "without consultations from Balochistan or any other Province". In its Judgment, the Supreme Court (at paragraph [107]) recorded Counsel's argument, after further development, as including the following:

> "The consequence is what we are witnessing; identical claim is made before ICSID along with one in ICC. This issue is required to be considered by the Federal Government before signing any further BITs …".

The Corruption Allegation and the Issues for Determination

26. The preliminary issues for determination by this Court use the term "Corruption Allegation". The term is defined to mean the allegation by the Province of Balochistan to the effect that the ICC tribunal lacked jurisdiction because the CHEJVA and related agreements were void due to the existence of corruption.

27. That definition is recorded in an Order dated 7 August 2020 made by Henshaw J. Henshaw J also required the Province to serve a document identifying the corruption allegations on which it seeks to rely on for the purpose of its challenge under section 67 of the 1996 Act. A "Schedule of Known Corruption Allegations" was served.

28. In his Order dated 7 August 2020, Henshaw J ordered the following 7 preliminary issues for determination, among others:

> (1) Whether the Corruption Allegation is precluded by section 73(1) of the 1996 Act (Preliminary Issues Order paragraph 2.1, first part).

(2) Whether the Corruption Allegation is precluded pursuant to the doctrine of waiver by election (Preliminary Issues Order paragraph 2.1, second part).

(3) Whether TCCA is precluded by an issue estoppel arising from the Judgment of the Supreme Court of Pakistan from alleging separability of the arbitration agreement (Preliminary Issues Order, paragraph 2.2(a)).

(4) Whether TCCA is precluded by an issue estoppel arising from the Judgment of the Supreme Court of Pakistan from denying that the arbitration agreement is governed by the law of Pakistan (Preliminary Issues Order, paragraph 2.2(b)).

(5) Whether the Province of Balochistan is precluded by section 73 of the 1996 Act from denying separability of the arbitration agreement (Preliminary Issues Order, paragraph 2.2(c)).

(6) Whether the Corruption Allegation seeks impermissibly to challenge the ICC tribunal's decision on the merits of the claim before it (Preliminary Issues Order, paragraph 2.3).

(7) Whether the Province of Balochistan cannot pursue the Corruption Allegation on the basis that it was not included in the Arbitration Claim Form (Preliminary Issues Order, paragraph 2.4).

29. To these issues, another has been added:

(8) Whether an application dated 21 January 2021 by the Province of Balochistan to amend the Arbitration Claim Form should be granted?

30. Although there was some development of the issues in their written arguments, by the time of the hearing the parties were agreed that one issue ordered by Henshaw J should be deferred, and a second should be deferred depending on the answer to issue (5). These are, respectively:

(9) Which law governs the issue of separability of the arbitration agreement and, in particular, whether section 7 of the 1996 Act applies in this case? (Preliminary Issues Order, paragraph 2.2(d))

(10) If English law applies to separability of the arbitration agreement, which of the Province's grounds of objection to the jurisdiction of the ICC tribunal thereby fall away? (Preliminary Issues Order, paragraph 2.2(e))

31. The parties' agreement that issue (9) should be deferred is as a result of the recent decision of the Supreme Court of the United Kingdom in Enka v Chubb [2020] UKSC 38. The decision affects the evidence and argument they will wish to adduce. The parties have not adduced evidence of the law of Pakistan at this stage of the Arbitration Claim.

32. The Province of Balochistan canvassed deferring other issues. TCCA resisted that course.

33. I should decide what I can from the list of (substantive) issues before the Court on this occasion. However, if (as the parties agree) issue (9) is deferred then in my judgment so should issue (10) be deferred. Whether issue (10) arises depends on the answer to issue (9). I add that on my current understanding of the parties' positions, even if the Province of Balochistan is precluded from denying separability of the arbitration agreement under issue (5), the Province does not accept that separability is applied in the same way under English law and under the law of Pakistan.

34. There are also some issues concerned with case management of the Arbitration Claim in light of the decisions reached on the preliminary issues. An application for disclosure of documents is proposed to be addressed at a later date.

The Judgment of the Supreme Court of Pakistan (10 May 2013)

35. The primary position of the Province of Balochistan on Issue (1) was that it was not necessary to analyse the Judgment of the Supreme Court of Pakistan "because the fact of the allegation of corruption before the ICC tribunal is all that matters for present purposes". However, the Province went on to argue (see in particular at paragraph 46 and Annex 2 of its written argument) that the Supreme Court "did make findings of corruption".

36. As a result of the full argument that I have heard across the issues, it is clear to me that I should examine what the Supreme Court did and did not find in relation to corruption.

37. In addressing the Judgment of the Supreme Court of Pakistan, I shall refer as far as is realistic to the exact language of the Judgment, and in full. Referring to the exact language will lengthen this judgment, but it is a course I take for two reasons. First, out of respect for the Supreme Court of Pakistan. Second, because I do not wish to cause further argument between the parties from the use of paraphrase or summary. That said, and simply for ease of understanding for present purposes, at points I will separate out some of what was written by the Supreme Court and take some of it in an adjusted order.

The concluding paragraph

38. The Judgment of the Supreme Court of Pakistan, delivered by the Chief Justice of Pakistan, concludes, at paragraph [122], in these terms (italics as original):

> "Above are the reasons in support of the short order passed by this Court, by which the titled CPLA was converted into appeal, and the appeal as well as the Constitution Petitions under Article 184(3) of the Constitution were allowed with costs throughout whereas the Miscellaneous Applications were disposed of. In consequence, the Chagai Hills Exploration Joint Venture Agreement dated 23.07.1993 was held to have been executed contrary to the provisions of the Mineral Development Act, 1948, the Mining Concession Rules, 1970 framed thereunder, the Contract Act, 1872, the Transfer of Property Act, 1882, etc., which was even otherwise not valid, therefore, the same was declared to be illegal, *void* and *non est*. In pursuance of the above

> declaration, Addendum No. 1 dated 04.03.2000, Option Agreement dated 28.04.2000, Alliance Agreement dated 03.04.2002 and Novation Agreement dated 01.04.2006, which were based upon, and emanated from, CHEJVA were also held to be illegal and void. It was further held that all those instruments did not confer any right on BHP, MINCOR, TCC, TCCP, Antofagasta or Barrick Gold in respect of the matters covered therein. It was lastly held that [exploration licence] EL-5 was tantamount to exploration contrary to rules and regulations as the claim of TCCP was based on CHEJVA, which document itself had been held to be *non est*. Therefore, before exploration it was incumbent upon it to have sought rectification of its legal status."

39. For the Province of Balochistan, Mr Christopher Hancock QC, Mr George Spalton and Mr Sam Goodman described this paragraph as extremely broad, with (as Mr Hancock QC put it) a "whole raft" of reasons for the findings made.

40. Those are fair observations. However, for the purposes of the issues before this Court it is important specifically to ascertain whether the Supreme Court of Pakistan decided that the CHEJVA and related agreements were void due to the existence of corruption.

The parties

41. Paragraph [112] of the Judgment, dealing with the parties before the Supreme Court is dealt with separately later in this judgment.

The law applicable to the CHEJVA

42. At paragraphs [105], [106] and [3], the Supreme Court held that the law applicable to the CHEJVA was the law of Pakistan.

The statutory framework of mining law in Balochistan

43. The Supreme Court addressed the fact that there were legal restrictions imposed in relation to exploration, prospecting and mining in Balochistan. These included under the Balochistan Mining Concession Rules 1970 ("BMCR 1970") and, later, the Balochistan Mining Rules 2002 ("BMR 2002"). The Supreme Court observed that (paragraph [21]):

> "Section 2 of the [Mineral Development] Act of 1948 provides that the appropriate Government shall have the power to make rules to provide for all or any of the matters stated therein. BMCR 1970 were framed in exercise of the power conferred by section 2 …"

44. BHP was, held the Supreme Court, "well aware of the restrictions imposed by statute". BHP was seeking departures from them, and "also attempting to bind future governments to ratify the departures being made from the law" (paragraph [21]).

The relaxations sought were granted but not "by [the Government of Balochistan] at their own without asking of the respondents" (paragraph [21]).

45. The Supreme Court held that:

> "Any exemptions made under the BMCR 1970 must … conform to the provision of the Act of 1948 …" (paragraph [21])

It referred to section 5 of that Act of 1948 under which:

> "[in] the case in hand, the power to grant exemptions in relation to a mineral or any class or description of minerals lay with [the Government of Balochistan]" (paragraph [21]).

BMCR 1970

46. Turning to the BMCR 1970 themselves, the Supreme Court continued:

> "Rule 98 [] provides that the Government shall have the power to relax any or all the provisions of these Rules in cases of individual hardship and under special circumstances to be recorded in writing and on terms and conditions to be fixed by it.
>
> …
>
> [W]hile invoking the provision of relaxation, the party seeking it is required to make out a case of hardship and also show the special circumstances warranting exercise of such power, and in turn, the Authority granting such relaxation is required to record reasons for the exercise of such power." (paragraph [21-22]).

47. The Supreme Court observed:

> "… neither BHP nor BDA in seeking relaxation of the rules fulfilled the requirements stated in rule 98, namely, showing hardship and special circumstances, …" (paragraph [23])
>
> "[The] notification dated 20.1.1994 granting the said relaxations … recited that [the Government of Balochistan], in exercise of the powers conferred by rule 98, was pleased to grant those relaxations as a special case, again making no mention of hardship of whatever nature, or the existence of any special circumstance making out a case for invoking the provision of said rule. The competent authority also failed to determine the terms and conditions to be fixed in granting the relaxations sought for." (paragraph [23])
>
> "… [T]he competent authority issued the relaxations in the form of a bulleted list without explaining what terms and conditions governed the extent of the relaxations as required under rule 98 … The letter presents no explanation of … what was the hardship and what were the special circumstances warranting the grant of relaxations. It is equally silent on the terms and conditions being fixed on the grant of such relaxations. … In the instant case, the relaxations

granted by the Provincial Government to the Joint Venture [were] against the letter and spirit of rule 98 … illegal relaxations". (paragraph [26]).

48. The Supreme Court decided that these were the consequences:

> "In this view of the matter, in absence of the requirements of rule 98 being fulfilled in the instant case, all relaxations were granted in excess of authority and were entirely beyond the scope of the provisions of the law, and therefore *ultra vires* the powers granted under rule 98 of BMCR 1970 read with section 5 of the Act of 1948, and thus *void*. Shorn of the relaxations so granted, CHEJVA has no legal sanctity and consequently remains an agreement entered into against the provisions of law, hence not enforceable." [paragraph [23], original italics)
>
> "As all the key provisions of CHEJVA were made subject to a reliance on relaxations that were illegal and *void ab initio*, the illegality of the agreement seeps to its root. As such no operative part of the agreement survives to be independently enforceable and the principle of severability [sic] cannot be applied to save any part thereof. The agreement is, therefore, void and unenforceable in its entirety under the law". (paragraph [24])

49. The Supreme Court also considered whether the relaxations sought in respect of BMCR 1970 were contemplated by the CHEJVA:

> "… BHP and BDA exceeded their mandate by going beyond the scope of the actions envisaged in Article 2.1 (i) and (ii) of CHEJVA, namely, the parties seeking/receiving from the relevant competent authorities in the Federal and/or the Provincial Government within six months of the date of agreement 'all consents and approvals necessary under Pakistani law' and 'all assurances as to fiscal parameters for investment in any future mining venture'.
>
> …
>
> BHP/BDA's representations, rather misrepresentations led the [Government of Balochistan] authorities to issue the … relaxations, inasmuch as the terms 'consents', 'approvals' or 'assurances as to fiscal parameters' used in the aforesaid sub-clauses of CHEJVA are not synonymous with the term 'relaxation'.
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> …
>
> [S]ub-clause 24.6.2 of CHEJVA provides that the parties shall be just and faithful to one another and will not do or omit to be done anything, which prejudices the interests of the Joint Venture.
>
> …
>
> [U]nder clause 2.2 of CHEJVA, BHP could have sought only 'consents', 'approvals' or 'assurances', and not the 'relaxation' of any rule.
>
> …

Unfortunately, in respect of every provision of CHEJVA, which ran contrary to the provision of any rule of BMCR 1970, relaxation in the name of [consent, approval and assurance] was sought. BHP, therefore, could not be said to have been acting justly and faithfully from the very inception of their relationship with BDA as contemplated by the parties in sub-clause 24.6.2 of CHEJVA." (paragraph [25]).

50. The Supreme Court identified a number of further or specific instances where the CHEJVA did not comply with BMCR 1970:

(a) Clause 5.10 of CHEJVA "negatived" rule 28 and 42 of BMCR 1970. In particular:

> "What was done in the instant case was that initially an area of 50 sq km was granted to the licensee for exploration, which was illegally extended to 1000 sq km pursuant to the request made by BHP-BDA. This part of the CHEJVA was also entered into against the letter and spirit of the law." (paragraph [32]).

(b) Parts of Clause 5 and 6 of CHEJVA were contrary to rules 3 and 53 of BMCR 1970. In particular:

> "BHP-BDA applied for relaxation of these along with a host of other rules, though under clause 2.2 of CHEJVA they could only have sought 'consents', 'approvals' or assurances' and not the 'relaxation' of rules. No previous sanction of the Government was sought in terms of rule 3 for issuance of a prospecting licence otherwise that in accordance with BMCR 1970. It was a mandatory requirement, non-fulfilment whereof rendered the whole exercise a nullity in the eyes of the law." (paragraph [33]).
>
> "These relaxations being in the nature of exemptions being granted from the application of the Rules to BHP and the entire CHEJVA project without a reference having been made to the provision of rule 3 of BMCR 1970 rendered nugatory BMCR 1970 in all substantial aspects" (paragraph [21]).

(c) Clause 18.1 of CHEJVA (confidentiality) "runs contrary to the provision of rule 39" of BMCR 1970 (paragraph [37]).

(d) As regards royalties:

> "From a perusal of the relaxation sought and the provision of [rule 65 of BMCR 1970], it is clear that the entire procedure to be followed in case of non-payment of royalty was done away with under CHEJVA. Such a relaxation too could not be sought and granted in the name of 'consent, approval or assurance' It was an illegal exercise." (paragraph [38]).

(e) Further:

> "… [C]lauses 5.2, 5.3 and 5.4 [of the CHEJVA] clearly violate rules 30, 31 & 32 of BMCR 1970." (paragraph [28].

> Clause 5.6 of CHEJVA extended beyond what was permitted by rule 27 of BMCR 1970. And Clause 5.9 beyond what was permitted by rule 38. (paragraphs [29]-[30]).

51. Addressing prospecting licences following CHEJVA, the Supreme Court said:

> "[P]rospecting licences were renewed for a period of one year in 1998 and in 1999 and [one] respondent was extended the facility of prospecting licence … for a period of 5 years as against 3 years provided under rule 31, which provides that no further extension beyond 3 years will be granted.
>
> This provision was attempted to be circumvented by issuing a fresh prospecting licence (PL-14) on 21.02.2000 for the same area of 240,620.20 acres for 2 years wherein the licensee was given the option to retain the area beyond one year subject to their giving one month's notice
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> …
>
> This was contrary to rule 30 of BMCR 1970, which stipulates grant of PL for a period not exceeding one year." (paragraph [34])

BMR 2002

52. As regards the advent of the BMR 2002, the Supreme Court wrote:

> "… licences and leases granted prior to the notification of BMR, 2002 and … continuing at that time were protected by means of rule 125 of the BMR 2002, which stipulates that any licence or lease granted, renewed or saved under any law for the time being in force and existing immediately before the coming into force of these Rules shall be deemed to be granted, renewed or saved for the subsisting period.
>
> …
>
> It is noteworthy that BHP did not have any mineral title at the time of notification of BMR 2002 as PL-14 had already expired on 21.02.2002 and was not further renewed." (paragraph [35])
>
> …

The Addendum, the Novation Agreement and Others

53. Of the agreements that followed the CHEJVA, the Supreme Court wrote:

> "As held hereinbefore, CHEJVA itself was a void agreement from its inception.
>
> …

> [T]o cure the invalidity of CHEJVA, BHP in the name of Addendum unsuccessfully attempted to enter into a new agreement, where in place of the original two parties, three parties were attempted to be introduced.
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> …
>
> CHEJVA having been found and declared to be a void agreement in the earlier part of this judgment, there was no room left for BHP to build the superstructure on its basis, namely, [Addendum Agreement], Option Agreement, Mincor Option, Alliance Agreement, Novation Agreement, or the subsequent share-purchase agreements. Consequently, the transfers of interest from BHP to Mincor NL to TCC to Atacama to Barrick Gold to Antofagasta to TCCP all were illegal transactions entered into by the concerned parties at their sole risk and cost, and are so declared hereby." (paragraph [36]).

The Directorate of Mineral Development/ Industries, Commerce and Mineral Resources Department (1994)

54. The Supreme Court addressed the approach, actions and inactions of the Directorate of Mineral Development/ Industries, Commerce and Mineral Resources Department in 1994 in these terms:

> "The undue favours being extended to BHP in the transaction further continued and the already inadequate consideration of CHEJVA (25:75 percentage interests [25 to Balochistan]) was being mitigated in many untold ways
>
> ….
>
> Here, it may be mentioned that the Directorate of Mineral Development vide letter dated 19.07.1994 informed BDA that the Licensing Authority had accepted the request of BDA/BHP for reservation of gold area in relaxation of the limits of the area as fixed under Annexure-IV to BMCR 1970 and also approved the plan for period of three years, and permitted it to start the prospecting/mining operation for gold mineral over an area of 33,47,226 (thirty three lac forty-seven thousand two hundred twenty-six) acres situated in Chagai District on [specified] terms and conditions.
>
> …
>
> In the aforesaid letter, it was further mentioned that in case of acceptance of the … terms and conditions, if needful was not done strictly within the stipulated time, the reservation of the area would be treated to have lapsed without any notice and they would be required to apply afresh if they still desired to get the prospecting licence/mining lease, and such application would be considered de novo and decided in accordance with the relevant rules.
>
> Surprisingly, though BHP failed to comply with the above said terms and conditions, including the payment of annual fee within the stipulated period,

but instead of treating the reservation to have lapsed, the Mineral Department vide letter dated 10.09.94 pursuant to BDA's letter dated 11.08.1994 granted further period of 20 days to comply with the said terms and conditions with the condition that in case of failure to do the needful in the extended period, letter dated 19.07.1994 would stand withdrawn.

It appears that the aforesaid terms and conditions were not complied with and the Industries, Commerce and Mineral Resources Department, instead of acting upon their letters dated 19.07.1994 and 19.09.1994, by their letter dated 16.11.1994 waived off the annual fee of Rs.3.347 million for gold exploration in an area of 33,47,226 acre for a period of three years.

…

Quite strangely, as in the case of grant of large scale relaxation of the rules, the authority here too does not mention the circumstances in which it had become inevitable to relax the provision regarding allocation of exploration area. It also fails to mention why it was necessary to exempt BHP from paying the annual fee, or other dues.

…

It appears that neither did BHP-BDA pay the annual fee nor did it comply with other conditions so prescribed, and the Department suddenly by its aforesaid letter dated 16.11.1994 conveys the approval of the competent authority to the waiving of annual fee of Rs 3.347 million mentioning once again no justification for the said waiver, as was done in granting relaxation of bulk of the provisions of BMCR 1970.

…

[T]he undue favours being extended to BHP are further established from the contents of the aforesaid letters. The Directorate of Mineral Development, in its letter dated 19.07.1994 states that BHP has been exempted from the payment of annual fee @ Rs.5/- per acre in relaxation of rule 33 of BMCR 1970, as a result whereof BHP will be required only to deposit a some of Rs.33, 47, 226/- on that account at the nominal rate of Rs.1/- per acre instead of Rs.5 per acre. Then the Industries Department in its letter dated 16.11.1994 waives the already reduced amount from Rs.5/- per acre to Rs.1/- per acre. It was an extraordinary treatment meted out to BHP whereby a loss of Rs.1,67,36,130/- per annum was caused to the public exchequer without any justification whatsoever having been brought on the record" (paragraphs [39]- [41])

55. The passages above begin with a reference to inadequate consideration under the CHEJVA. I propose to omit passages dealing in more detail with adequacy of consideration, and with the question whether the reference to inadequate consideration provided a full perspective once, for example, risk allocation, responsibility for cost, cashflow and taxation are taken into account (paragraphs [76]-[84]). However important for other purposes, they are not material for present purposes.

Contract Act 1872

56. The Supreme Court considered the consequences of Pakistan's contract legislation.

> "It is noteworthy that section 23 of the Contract Act 1872 provides that the consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful, and every agreement of which the object or consideration is unlawful is void.
>
> In the instant case, CHEJVA was entered into in violation of a large number of provisions of BMCR 1970. It is, therefore, opposed to public policy, which calls for across the board enforcement and application of the laws of the land. CHEJVA is hit by section 23 of the Contract Act, on this score." (paragraph [44]).

57. The Supreme Court added, in relation to section 23:

> "… Various recitals in CHEJVA, Addendum, Novation Agreement, Mincor Option, Alliance Agreement, all have purported to bind the Government and its functionaries in the discharge of their statutory duties, which is not permissible. This aspect too is opposed to public policy in terms of section 23 of the Contract Act, 1872. Accordingly, all the said instruments are void and not enforceable in the courts of law." (paragraph [47])

(In the course of his argument before this Court, Mr Hancock QC drew attention to one of a number of illustrations that are included in section 23 of the Contract Act 1872 of Pakistan. This illustration (f) is in these terms: "A promises to obtain for B an employment in the public service, and B promises to pay 1000 rupees to A. The agreement is void, as the consideration for it is unlawful."

58. Section 29 of the Contract Act was addressed in these terms:

> "… [A]according to clause 5.3.1 of CHEJVA, the aggregate prospecting area shall not be more than 50 sq km. However, by virtue of clause 5.10, the map covering an area of 13,000 sq km, annexed with CHEJVA as "Schedule B", may be revised so as to accurately represent the current status of the area from time to time. It clearly establishes that the area is not final and constitutes uncertainty within the ambit of section 29 of the Contract Act." [72]

59. The Supreme Court addressed section 62 of the Contract Act as follows:

> "Section 62 of the Contract Act 1872, which deals with novation, rescission and alteration of contract, provides that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. EL-5 and other rights under the Alliance Agreement were all rights that depended on the existence of CHEJVA for their existence. A necessary element for the execution of a valid novation of contract is the validity of the original agreement that is to be substituted. Where an agreement is void, all subsequent alterations, variations or novations based

upon such agreement will also be invalid. When a contract is unlawful or illegal as being prohibited by a specific provision of the statute, it could not be enforced, although the parties might have entered into a novation of the contract on the basis of such unlawful or illegal consideration. … [I]t has been held that a court of law should decline to enforce even a perfectly innocent and legal contract where it arises out of a collateral illegal contract or an immoral contract or any legal contract which has for its basis an earlier illegal or immoral contract, in spite of the fact that the parties may have entered into a novation. And if there is a direct connection between a fresh contract after novation and the earlier illegal contract or the earlier collateral contract, the novated contract would still continue to be illegal or immoral and the court would refuse to enforce the same in view of the provisions of section 23 of the Contract Act. It was further held that in the case of an illegal contract, both parties being in the position of guilty persons, the court should refuse assistance to any one of them on the basis of an illegal contract or on the basis of a novated legal contract, which has for its basis an earlier or a collateral illegal contract. CHEJVA having been held to be void for the reason stated above, the entire superstructure built upon it also falls to the ground." [87]

The Transfer of Property Act 1882

60. After examining rules in BCMR and clauses in CHEJVA concerning assignment, transfer, alienation and sub-letting, the Supreme Court said:

> "… [I]n the instant case, CHEJVA itself has been declared to be void in terms of various provisions of the Contract Act, 1872, including sections 20, 23, etc., and consequently unenforceable. No transfer or assignment of an interest under a void agreement can be made by any of the parties to such agreement under any principle of law. This appears to be violative of the principle contained in section 7 of the Transfer of Property Act, 1882, which provides that only such person is competent to transfer property who is competent to contract and entitled to transferable property or authorized to dispose of transferable property." [90]

The Registration Act 1908

61. The Supreme Court addressed the subject of non-registration of CHEJVA:

> "… Section 17(1)(b) of the [Registration Act 1908] provides that an instrument, which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future any right or interest of the value of one hundred rupees and upwards to or in immovable property shall be registered.
>
> In the instant case, BHP-BDA failed to get CHEJVA registered under section 17 of the Registration Act. Similarly, subsequent assignment of rights under CHEJVA as purported to be done under the Alliance Agreement was also not registered in terms of said section 17. Here too, the law of the land applicable to the agreement as per its own clause was not followed." [57]

62. I propose to omit passages dealing with company registration points (paragraphs [51-55]) as, however important for other purposes, they are not material for present purposes.

UNIDROIT Principles of International Commercial Contracts

63. Looking beyond domestic legislation to UNIDROIT principles where international commercial contracts are involved, the Supreme Court said:

> "The respondents attempted to take undue advantage out of the political instability prevailing at that time, inasmuch as at that time, a Caretaker Government was in place. The foreign companies by means of CHEJVA, Addendum No. 1 and other agreements preyed upon the huge gaps in understanding on the part of [the Government of Balochistan] of large scale mineral extraction and were in a distinct position to manipulate and dominate the will of [the Government of Balochistan].
>
> Under article 3.2.7 of the principles of the UNIDROIT Principles of International Commercial Contracts under the title of gross disparity, a contract which has been conceived by a party seeking to take unfair advantage of the other party's dependence, economic distress or its improvidence, ignorance, inexperience and lack of bargaining skill cannot be enforced." (paragraph [45]).

Apparent absence of tenders and public advertisement

64. The Supreme Court of Pakistan examined the question of tenders and public advertisement before CHEJVA was entered into:

> "We have scanned the record made available to the court to find out whether at any stage prior to the award of CHEJVA, any tender was floated by the BDA, but unfortunately we have not come across any document showing any initiative taken by the BDA or any other department of [the Government of Balochistan] to publish advertisement in the press and invite tenders with a view to providing opportunity to other investors in the field of mining to come forward and to compete with others.
>
> No doubt foreign investment in any modern economy is to be encouraged by all means, but all such activities are required to be carried out observing due process of law, which alone is a sure guarantee of the protection and promotion of the public interest. … In the instant case, it appears that BDA entered into negotiations with BHP and took up the issue of grant of exploration rights with [the Government of Balochistan] in a most haphazard manner.
>
> …
>
> The processing of the matter by [the Government of Balochistan] … substantiates that public advertisements were not resorted to in the interest of

transparency and to obtain the best competitive price for the disposal of public property, i.e., mineral resources in Reko Diq, and thereby denied participation to other investors of the field to the detriment of the general public, and especially the people of Balochistan. Such a handling of an issue of great public importance was against public policy as well because it certainly caused injury to the public good and, therefore, provides a basis for denying the legality of the transaction in question." (paragraph [44])

65. Dealing specifically with rule 67 of BMR 2002, the Supreme Court said:

> "[The Government of Balochistan] was empowered under rule 67 of BMR 2002 to invite bids to tender for award of exploration licences for the same area. However, [the Government of Balochistan] did not exercise its prerogative and instead granted exploration licence (EL-5) for the Reko Diq area, which was renewed for a further period of 6 years.
>
> …
>
> Under CHEJVA, BHP/TCC enjoyed rights for exploration in the Reko Diq area between 1994 and 1996; held a prospecting licence for the same area for 5 years and an exploration licence for the same area for 9 years, meaning thereby that the exploration/prospecting facility was extended to BHP/TCC for a total period of 17 years, which is an extraordinary and undue favour in itself granted under CHEJVA." (paragraph [35])

The Finance Department

66. The Supreme Court examined the question of scrutiny by the Finance Department:

> "Nothing has been brought on the record to show that the Finance Department, which is required under [the Government of Balochistan] Rules of Business, 1976 to scrutinize such a venture by [the Government of Balochistan] had approved this project. In absence of non-approval [sic] of the JVA by the Finance Department, CHEJVA was executed between BDA and BHP." (paragraph [45])

The BDA

67. The Supreme Court examined the position of the BDA:

> "… BDA possesses its own legal personality, distinct and separate from [the Government of Balochistan]. BDA is not even listed as an attached department under any of the Departments of [the Government of Balochistan] in the [Government of Balochistan] Rules of Business, 1976. However, BDA in entering into the Addendum remained in a state of confusion as to whether CHEJVA was, or any subsequent agreement on the subject had, to be entered into by it independently of any other department of [the Government of Balochistan]. All that BDA through its Board of Directors was required to do was to seek approval of [the Government of Balochistan] for the project of

mineral exploration in terms of section 4 of BDA Act, 1974 and enter into a Joint Venture Agreement in terms of section 17 read with section 16 of the Act. All subsequent agreements/instruments in connection with CHEJVA would have followed the same position. This confusion on the part of BDA as well as [the Government of Balochistan] hierarchy unfortunately led to a fundamental uncertainty and ambiguity in CHEJVA which rendered the contract void ab initio on this score as well ....” (paragraph [75])

“[The Government of Balochistan] could not have validly appointed BDA or its Chairman to act as [the Government of Balochistan’s] agent either at the time of execution of CHEJVA or at any time thereafter. It was, therefore, not permissible to rely on the so called affirmation or ratification made in Addendum as was sought to be done by the learned counsel for BHP. Having examined this aspect of the matter in some detail, we find that [the Government of Balochistan] was not a party to CHEJVA, therefore, [the Government of Balochistan] could not be said to have entered into an agreement with any company or a prospective licensee of the nature referred to in CHEJVA or the Addendum. Accordingly it is held that CHEJVA suffered from uncertainty as to parties to the agreement and was void *ab initio*…” (paragraph [88])

The Chairman of the BDA

68. The Supreme Court heard and responded to argument over the conduct of the Chairman of the BDA, Mr Jaffer:

> “Learned counsel for [the Government of Balochistan] stated that the documents relating to CHEJVA, Addendum, Novation agreements, relaxations, etc., showed a clear pattern of irregularities.
>
> He pointed out that Mr Ata Muhammed Jaffer, Chairman BDA, who also happened to be Additional Chief Secretary, was convicted by a Court functioning under National Accountability Ordinance, 1999 after being charged for an offence of having assets and living beyond his means.
>
> In response learned counsel for TCC argued that the petitioners had made a bald assertion that elements of corruption and corrupt practises were involved in the award of contracts, and failed to produce any substantial evidence in support of such an assertion. Further, no nexus was established or shown to exist between the corrupt practices allegedly committed by Mr Ata Muhammed Jaffer with CHEJVA.
>
> A perusal of the record shows that the executant of CHEJVA Mr Ata Muhammad Jaffer held dual position of Chairman BDA and Additional Chief Secretary at the relevant time.
>
> The two positions are very distinct in the eyes of the law. The first is an office holder in a statutory incorporated body while the latter is an officer of [the Government of Balochistan] authorized to represent the Government. The same person holding both offices may have contributed to the impression

created by BDA that the Governmental authorities were under an obligation to issue the relevant relaxations and licences.

In the former position he forwarded the case to the Provincial Government whereupon in the latter position he chaired the meeting wherein decisions regarding CHEJVA were taken. It was a clear conflict of interest. The record also shows he was hand carrying the file, which showed a visible haste on his part to execute the agreement.

In fact, there was a greater burden on the officer not only to be fair in his adherence to the law but also to have disassociated himself from the matter as far as his position as applicant was concerned. The record also shows that he disregarded caution sounded by several departments.

As per the Balochistan Civil Servants (Efficiency and Discipline) Rules 1983, living beyond one's means is an act of corruption. The factum of his conviction had not been rebutted by the learned counsel for TCC or anyone else." (paragraphs [49-50])

Mining Leases

69. The Supreme Court addressed the framework for the granting of mining leases (sometimes referred to as licences):

> "… Part III of BMCR 1970 provides for the issuance of a mining lease and the statutory procedure for making applications for the same. In the absence of the application of BMCR 1970 CHEJVA attempted to exercise the statutory right of creating rules governing its operations, which is a right reserved for the competent authority under section 2 of the Act of 1948.
>
> Article 11 of CHEJVA provides for its own framework for the transfer of interests under the contract for mining development far away from the statutory framework provided in BMCR 1970. It utterly disregards all the rules provided therein and attempts to create an ad hoc system of awarding the parties mining leases automatically. It declares that Prospecting Licences issued by the Provincial Government shall be 'converted into' Mining Licences.
>
> This goes much beyond the scope of an exemption and is tantamount to usurpation of executive and legislative prerogatives. No exemption or relaxation of rules can grant a foreign company the power to create *ad-hoc* rules to apply to a specific contract with regard to licences issued by a statutory body.
>
> Article 11.8.2 provides that where the Joint Venture, or pursuant to subclause 11.3.2, a Participating Party elects to develop a mine, then, subject only to compliance with routine Government requirements, it shall be entitled to convert the relevant Prospecting Licence(s) into Mining Licences so as to give a secure title over the required Mining Area. Article 11 not only renders the rules redundant, but also creates the possibility of continuing 'Mining

Development' without Government approval and even to the exclusion of BDA under sub-clauses 11.3.3 and 11.4.1-2.

This also disregards the terms and conditions of the Prospecting Licences issued to BHP by the Directorate of Mineral Development, Balochistan, which, *inter alia,* provided that the licence would not confer upon BHP any rights of renewal of the prospecting licence or grant of a mining lease over the area or any part thereof unless the prospecting or work obligations as required under the licence have been carried out to the satisfaction of the Directorate of the Mineral Development.

Besides CHEJVA provides for the inclusion of other parties in the future as a mining consortium without recourse to government licencing or authorization. Such permission to extend rights to parties not conceivable at the time of granting exemptions to the exclusion of both the present parties of the contract amounts to an attempt to disregard all relevant law for an undefined period of time.

The same disregard for the laws of the host country and its law making institutions is expressed under Article 17, inasmuch as it provides that in the case of change in legislation which is applicable to the Joint Venture, then if the change or the new provision is more favourable to the Joint Venture or one of the parties than the relevant laws, acts, rules or regulations in effect on the date this Agreement was signed, the Joint Venture and the party concerned shall promptly apply to receive the benefits of such change or new provision. However, if, on account of the change or new provision, the economic benefits to any Party or the Joint Venture existing, or to arise under CHEJVA, are materially and adversely affected, directly or indirectly, then CHEJVA shall continue to be implemented in accordance with its original terms. Clearly, this clause of CHEJVA too, gives an overriding effect to CHEJVA over the legislative process and thereby attempts to make subservient the laws of a sovereign country, which cannot be approved." (paragraph [62])

The record relating to CHEJVA

70. In a passage of the Judgment that understandably attracted attention from the parties, the Supreme Court said this:

> "… On 8th February, 2011 this Court directed the production of entire record relating to CHEJVA. The said record was retrieved and filed through several applications. It made shocking disclosures of extensive irregularities and corruption. The Government examined the same and decided not to defend the said acts and accordingly it decided to render full assistance to this Court from the record that was filed. Further, this Court has always encouraged that the Government officials must perform their functions in accordance with law and give no weight/consideration to any unlawful order let alone protect the irregularities of their predecessors". (paragraph [63]; see also paragraph [116] quoted below)

Mistake

71. The Supreme Court also said it found the CHEJVA "void and unenforceable" on the basis of a mistake as to whether the Governor of Balochistan was a party to the CHEJVA (originally or by means of Addendum) and whether BDA was an agent of the Governor of Balochistan, with consequences for the Option Agreement and Alliance Agreement too. (paragraphs [69][73][74][75][85][88])

72. The Supreme Court wrote:

> "The legal position is that the BDA Act, 1974 does not authorize BDA to act as an agent of [the Government of Balochistan], rather the Act requires BDA to seek approval of the [Government of Balochistan] in certain matters while performing its functions enumerated in the Act." (paragraph [73]) An undated letter from the Governor purporting to authorize the Chairman of the BDA to sign the Addendum on behalf of the Governor was held to be "improper and untenable in the eyes of the law" (paragraph [71])

Forum

73. Forum was addressed towards the beginning and towards the end of the Judgment of the Supreme Court:

> "The law of Pakistan being the law applicable to the agreement, the Courts of Pakistan are the appropriate forum to decide the legality of CHEJVA.
>
> …
>
> Learned counsel for [the Government of Balochistan] stated that in this regard [the Government of Balochistan] and the Government of Pakistan have respectively put both the ICC and ICSID on notice *vide* respondent's Answer to the Claimant's Request for Arbitration and Counterclaim dated 16.11.2012 that matter of CHEJVA is pending before the Supreme Court of Pakistan in the following words:
>
> > "2. Matters relating to the enforceability, validity and *vires* of CHEJVA the addendum of 2000 and the novation of 2006 ("the joint venture contract") are pending before the Supreme Court of Pakistan .... The Claimant, its Pakistani subsidiary and its parent companies are before the Supreme Court of Pakistan and before were present before the Balochistan High Court. In excess of 50 applications have been filed and are pending before the Supreme Court. It is plain that only the Supreme Court of Pakistan has the jurisdiction to decide on the validity of the joint venture contract and no tribunal has the authority or power to usurp such jurisdiction. Therefore, this Tribunal should suspend any further proceedings in this arbitration until such time the Supreme Court of Pakistan determines the validity, legality and vires of CHEJVA.
> >
> > 3. During the Course of the Supreme Court proceedings allegations of corruption have been raised. It is the Supreme Court of Pakistan which

> is the appropriate forum for determining whether corruption is a factor in this matter before it and then take appropriate decisions. In this regard, Article 34 of the UN Convention on Corruption allows the Supreme Court, in part being the sub-set of the State to continue with pending legal proceedings."
>
> Even otherwise in addition to section 4 of the New York Convention Act referred to above, article 2(3) of the New York Convention, which is incorporated in Pakistan's domestic law as an act of Parliament in 2011, states that the court of a contracting state when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
>
> Moreover, Article 34 of the UN Convention Against Corruption 2003 provides that with due regard to the right of third parties, acquired in good faith, each state party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. And, in this context, states parties may consider corruption relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action. This indeed furnishes additional basis under international law to this Court to decide upon CHEJVA and related documents." (paragraphs [3], [106])

74. It is important to set out the next paragraphs, although long, in reasonably full terms:

> 115. … Mr Khalid Anwar, Sr ASC [shown in the Judgment of the Supreme Court as Counsel for TCCP and Muslim Lahkani; see later in this judgment] argued that … if [the relevant authority] had refused to grant [the Mining Lease] there would be no complaint against them to be agitated before this court unless this court had given the findings that the international arbitration clause of CHEJVA was illegal and unconstitutional; ICSID and ICC Arbitration should not have taken place; and the verdict, if any, given by the Arbitrators would be null and *void*. He requested the Court not to give such a finding and suggested that proper course for the Court would be to stay its hands off and wait for the outcome of those proceedings being carried out under the laws of Pakistan namely the Arbitration (International Investment Disputes) Act, 2011, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, and the Fourth Schedule to the Constitution of Pakistan under which the international arbitration treaties are binding upon the Government of Pakistan.
>
> …
>
> 116. We have given anxious consideration to the arguments of the learned counsel. The Constitution Petitions were filed by the petitioners in the instant case and entertained by this Court by way of public interest litigation considering the peculiar facts and circumstances of the instant case where despite the fact that grave illegalities and irregularities were committed in the execution of CHEJVA and other instruments, but [the Government of Balochistan] failed to defend the petition filed before the Balochistan High Court under Article 199 of the Constitution and protect the interests of the

people of Balochistan. The petitioners genuinely apprehended that the CPLA filed against the judgment of the Balochistan High Court before this Court might also not [sic] meet the same fate. The petitions under Article 184(3) of the Constitution have raised questions of public importance with reference to enforcement of Fundamental Rights. Learned counsel for [the Government of Balochistan] rightly argued that there is no question of retraction of pleadings on the part of [the Government of Balochistan] inasmuch as the law permits parties to modify position if there are developments subsequent to the filing of the case or new facts come to light. The developments in this regard included the approval of Dr. Samar Mubarakmand's project [heading a team working on the nearby H-4 area] … in December 2010 and accordingly CMA 252/2011 was filed apprizing the Court of this development and requesting a decision on merits. The objection raised by the learned counsel for TCC is, therefore, not tenable. On 08.02.2011, this Court directed the production of entire record relating to CHEJVA. The said record was retrieved and filed through several applications. It made shocking disclosures of extensive irregularities and corruption. The Government examined the same and decided not to defend the said acts and accordingly it decided to render full assistance to this Court from the record that was filed. Further, this Court has always emphasized that the government functionaries must perform their functions in accordance with law. In this regard, reference may be made to the cases reported as *Ghulam Bib v. Sarsa Khan* (PLD 1985 SC 345), *Zahid Akhtar v. Government of Punjab* (PLD 1995 SC 530), *Iqbal Hussain v. Province of Sindh* (2008 SCMR 105), *Human Rights Cases Nos. 4668 of 2006, 1111 of 2007 and 15283-G of 2010* (PLD 2010 SC 759), *Mst. Mumtaz Begum v. Province of Sindh* (2004 CLC 697) and *Dilshad Ali v. Ahmed Khan* (2007 CLC 441). It may be mentioned that this Court has wide powers in terms of Article 184(3) of the Constitution to oversee the acts/actions of the other organs of the State, namely, Executive and Legislature. It is also well settled that under the principle of trichotomy of powers, the Judiciary plays a crucial role of interpreting and applying the law and adjudicating upon disputes arising among governments or between State and citizens or citizens inter se. The Judiciary is entrusted with the responsibility for enforcement of Fundamental Rights, which calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society. The discharge of constitutional duty by the State functionaries in deviation to the spirit of the Constitution can be anvil to the Constitution and challengeable on diverse grounds including mala fide and colourable exercise of the power in bad faith for ulterior motive. It is difficult to confer validity and immunity to the mala fide act or action from judicial scrutiny in exercise of power of judicial review which is inherent in the superior courts. Reference in this behalf can be made to the cases of *Miss Benazir Bhutto v. Federation of Pakistan* (PLD 1988 SC 416), *Muhammad Nawaz Sharif v. President of Pakistan* (PLD 1993 SC 473), Wasey Zafar v. Government of Pakistan (PLD 1994 SC 621), *Sabir Shah v. Federation of Pakistan* (PLD 1994 SC 738), *Al-Jehad Trust v. Federation of Pakistan* (PLD 1996 SC 324), *Asad Ali v. Federation of Pakistan* (PLD 1998 SC 161), *Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388), *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan* (PLD 1998 SC 1263), *Farooq Ahmad Khan Leghari v. Federation of Pakistan* (PLD 1999 SC 57), *Liaqat Hussain v. Federation of Pakistan* (PLD 1999 SC 504), *Khan Asfandyar Wali v. Federation of*

Pakistan (PLD 2001 SC 607), *In the matter of Reference No.2 of 2005 By the President of Pakistan* (PLD 2005 SC 873), *Javed Jabbar v. Federation of Pakistan* (PLD 2003 SC 955), *Iqbal Haider Capital Development Authority* (PLD 2006 SC 394), *Muhammad Mubeen-us-Salam v. Federation of Pakistan* (PLD 2006 SC 602), *Wattan Party v. Federation of Pakistan* (PLD 2006 SC 697), *Pakistan Muslim League (N) v. Federation of Pakistan* (PLD 2007 SC 642), *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879), *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan* (PLD 2010 SC 61), *Mobashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265*), Bank of Punjab v. Haris Steel Industries (Pvt) Ltd.* (PLD 2010 SC 1109), *Shahid Orakzai v. Pakistan* (PLD 2011 SC 365), *Munir Hussain Bhatti v. Federation of Pakistan* (PLD 2011 SC 407), *Federation of Pakistan v. Munir Hussain Bhatti* (PLD 2011 SC 752), *Wattan Party v. Federation of Pakistan* (PLD 2011 SC 997).

117. As regards the power and jurisdiction of the municipal courts to nullify any action of the Government where it is established that the decision-making authority has exceeded its powers; committed an error of law or breach of the rules of natural justice; reached a decision which no reasonable forum would have reached; or abused its powers, reference may usefully be made to the case of *Bhanu Constructions Company v. A.P. State Electricity Board* [1997 (6) ALT 328] ...

Thus it is clear that this Court has the jurisdiction to adjudge the validity of CHEJVA on the above grounds, including non-transparency, violation of law/ rules, curtailment of the fundamental rights of the general public, etc.

118. In this regard, it is pertinent to mention that a number of tribunals have held that, where an investment is made in violation of the general principles of law, which include violations of certain host country laws, such as where an investment results from the commission of crimes, e.g. fraud or bribery, the tribunal possesses both the ability and the obligation to prevent the investor from benefiting from the right under the relevant bilateral investment treaty. The ICSID Tribunal in World Duty Free v Kenya [ICSID Case No ARB/00/7), Award, 25 September 2006] rejected the claimant's attempts to characterize the payment made to the then president of Kenya as something other than a bribe to secure a contract, and also laid out the legal consequences of that bribe - that the tribunal could not uphold claims based on contracts of corruption because to do so would be a violation of international public policy. In that case, the claimant did not dispute Kenya's assertion that a payment had been made to the then president nor did claimant dispute the manner in which Kenya described the payment as having been made. The tribunal rejected the claimant's argument that the payments made on behalf of the claimant to the then president of Kenya were "a personal donation for public purposes" that were "sanctioned by customary practises and … regarded as a matter of protocol by the Kenyan people". The tribunal held that the payments were a bribe because they "were made not only in order to obtain an audience with President Moi (as submitted by the claimant) but above all to obtain during that audience the agreement of the president on the contemplated investment." In the course of its reasoning, the tribunal explained that where a payment is received corruptly by a state official - i.e. where it is a covert bribe - receipt of the payment is not legally imputable to the state itself and that "if it were otherwise, the payment would not be a

bribe." After satisfying itself as to the objective existence of a transnational public policy rule against bribery conducted by identifying the rule "through international conventions, comparative law and arbitral awards," the tribunal looked away from norms of international law to the law applicable to the dispute - English and Kenyan - and found nothing that would justify bribe taking but instead plenty to proscribe it. The tribunal also asserted that, even in contexts where "corruption is widespread either within the purchasing country or in the particular sector of activity … all arbitral tribunals [have] concluded that such facts do not alter in anyway the legal consequences dictated by the prohibition of corruption … [regardless of the fact that] in some countries or sectors of activities, corruption is a common practise without which the award of a contract is difficult – even impossible" … and that the tribunal "agree[d] with such a conclusion." Interestingly, and of particular relevance for our case, is the fact that the claimant was the successor in title to the contract and was not even in existence as a juridical person when the payment was made and "ha[d] no knowledge, actual or constructive, of any payment which could be characterized as improper and unlawful." Nevertheless, as noted above, the tribunal refused to uphold the claims based on the corrupt contract.

119. In *Tokios Tokeles v Ukraine* [(ICSID Case No ARB/02/18), Decision on Jurisdiction and Dissent, 29 April 2004] it was observed that the requirement "that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern [bilateral investment treaties]," while noting that "the purpose of such provisions … is 'to prevent the bilateral treaty from protecting investments that should not be protected, particularly because they would be illegal'.

120. In *Inceysa v El Salvador* [(ICSID Case No ARB/03/26), Award, 2 August 2006] it was held that a contract made in violation of host country law does not benefit from the protections of the relevant bilateral investment treaties or the rights granted by them, including the right to arbitration. In that case, the illegal act was fraud committed by the investor in obtaining a contract with the host state. The tribunal found that such an outcome was mandated by the principle of good faith, as well as by the fact that granting treaty rights or protections in such cases would violate both the principle of nemo auditur propiam turpitudinem allegans and international public policy. The tribunal also found that the claimant's failure to act in good faith - by making fraudulent misrepresentations in obtaining its contract with El Salvador - meant that "… it did not make it in accordance with Salvadoran law" and that this rendered the tribunal "… incompetence [sic] to hear [the Investor's] complaint, since its investment cannot benefit from the protection of the [treaty]." With respect to nemo auditur propiam turpitudinem allegans, the Inceysa tribunal held that: "… a foreign investor cannot seek to benefit from an investment effectuated by means of one of several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud". It was found further that investments made in violation of host state law were contrary to international public policy, which it defined as "… consist[ing] of a series of fundamental principles that constitute the very essence of the State, and its essential function is to

preserve the values of the international legal system against actions contrary to it. That bilateral investment treaties commonly contained a provision requiring investments to be made "in accordance with law" was a "clear manifestation" of the signatories' commitment to this international public policy and of their intent to exclude from the treaty's protection investments made in violation of the internal laws of each of signatory. The tribunal further found that the language "in accordance with law" in bilateral investment treaties "…follow[ed] international public policies designed to sanction illegal acts and their resulting effects" and that "it is uncontroversial that respect for the law is a matter of public policy … in any civilised country … and that a meta-positive provision [exists] prohibit[ing] attributing effects to an act done illegally," a provision that prevented the tribunal from hearing the dispute. The tribunal concluded its discussion of international public policy by holding that "it is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which … is a principle of international public policy.

121. While dismissing the case on other jurisdictional grounds the tribunal in TSA Spectrum de Argentina SA v Argentina [(ICSID Case No ARB/05/5), Award, 19 December 2008] noted that, had these other grounds not been available, it would have reserved the issue of corruption in the granting to the claimant of a concession (contract for the privatization of the management and control of the Argentine radio spectrum) for the merits of the case and would not have decided them at the jurisdictional stage. Such reservation followed from the fact that investigations into bribery and misuse of public office in connecion with the granting of the concession were, at the time of the decision, ongoing in Argentina, with the alleged bribery still being investigated and two indictments, but no judgments, having issued from the misuse of public office investigations."

75. In these paragraphs the Supreme Court explained why, in its view, a court with its responsibilities might properly consider the challenges raised by the Province of Balochistan or the Government of Pakistan rather than leave them to be addressed by an arbitral tribunal.

The concluding paragraph of the Judgment of the Supreme Court of Pakistan (paragraph [122], page 148-149))

76. The next paragraph in the Judgment of the Supreme Court of Pakistan was the concluding paragraph, paragraph [122], to which Mr Hancock QC drew particular attention, and which is set out above.

77. The paragraph begins with a reference to reasons "above". But it refers to legislation and rules that led the Supreme Court to declare that the CHEJVA was "illegal, *void* and *non est*", and, that declared, led the Supreme Court to hold that further identified instruments based upon, and emanating from the CHEJVA were illegal and void, and that no right was conferred on BHP, "TCC", TCCP and others "in respect of the matters covered therein".

78. In completing its summary of what it had held, the Supreme Court said "lastly" this was "that [exploration licence] EL-5 was tantamount to exploration contrary to rules

and regulations as the claim of TCCP was based on CHEJVA, which document itself had been held to be *non est*. Therefore, before exploration it was incumbent upon it to have sought rectification of its legal status.".

79. At no point in the paragraph did the Supreme Court refer in terms to corruption or the Corruption Allegation.

80. The paragraph does however include the phrase:

> "… which was even otherwise not valid,"

Given this phrase, and given that the Judgment does not confine its conclusions to the concluding paragraph, it is important to look back again at the treatment of corruption in the body of the Judgment to see whether the CHEJVA and related agreements were held void (or "not valid") due to the existence of corruption.

Section 23 of the Contract Act

The treatment of corruption in the body of the Judgment of the Supreme Court of Pakistan

81. The conclusion that the CHEJVA was void had been reached by the time the Supreme Court reached paragraph [36] of its Judgment; that is within the first 49 pages of the Judgment. That paragraph makes clear that the CHEJVA had already by that point been held to be a void agreement ("[a]s held hereinbefore") and "having been found and declared to be a void agreement"). By that point there had been no reference in the Judgment to corruption.

82. There had been a reference at the end of paragraph [35] to "extraordinary and undue favour … granted under CHEJVA", but in my judgment it is not that characterisation of events that, either in terms or when seen in context, is used by the Supreme Court to found the conclusion that the CHEJVA and related agreements were void.

83. The treatment in the Judgment of the absence of tendering and of section 23 of the Contract Act (see in particular paragraph [44]) was a treatment in terms of public policy, rather than corruption. The conditions set out under section 23 of the Contract Act would have allowed the Supreme Court to involve the term "fraudulent" but it did not.

84. Where corruption or an allegation of corruption is referenced in the body of the Judgment of the Supreme Court of Pakistan, it is not by way of a finding that the CHEJVA and related agreements were void due to the existence of corruption. The reference to living beyond one's means being an act of corruption does not do that (paragraph [50]). The same is true for the reference to the produced "entire record" making "shocking disclosures of extensive irregularities and corruption" (paragraphs [63] and [116]).

85. Paragraph [106] affirms the entitlement of "states parties" to advance and the Supreme Court to decide on corruption but does not proceed to decide that the basis on which the CHEJVA is void is due to the existence of corruption.

86. The Province references specifically that the descriptions of corruption include where the Supreme Court was addressing the question of arbitration and whether it should (as the Province characterises it) stay its decision pending arbitration. Mr Hancock QC underlined that the Supreme Court addressed "decisions, including ICSID decisions," where corruption had led to tribunals refusing to uphold claims.

87. It is important, in my view, to keep in mind that the ICSID decisions are addressed where the Supreme Court was considering the question of forum (paragraphs [119]-[121]). Taken in context, the "objection raised by the learned counsel for TCC" referred to at paragraph [116] was that the Supreme Court of Pakistan "stay its hands off and wait for the outcome of" the ICC and ICSID arbitration proceedings.

88. I noted above that in these paragraphs the Supreme Court explained why, in its view, a court with its responsibilities might properly consider the challenges raised by the Province of Balochistan or the Government of Pakistan rather than leave them to be addressed by an arbitral tribunal. It seems clear that a case where corruption had brought about a contract would, in the view of the Supreme Court of Pakistan, be such a case. But that is not to say that the Supreme Court of Pakistan found corruption had brought about the CHEJVA, even though it observed that the record made disclosures of corruption, and in my judgment it did not.

89. What is clear is that illegalities and irregularities of the nature discussed when the Supreme Court analysed the discrepancies between what BMCR 1970 required and what CHEJVA did would, in its view, be sufficient to allow it properly to consider the challenges rather than leave them to be addressed by an arbitration tribunal, at least where matters of public interest and responsibilities were involved.

90. Annex 2 to the Province's written opening argument includes the references above but adds some additional references. The additions include, for example, references to illegality due to breach of BMCR 1970 and to mistake of fact and uncertainty. The full terms and setting of these references will appear from the fuller passages of the Judgment that I have set out above. They do not advance the Province's position in the context of the Corruption Allegation as defined.

91. In the result I do not consider the treatment of corruption in the body of the Judgment of the Supreme Court sufficient for the Province's purposes. Descriptions of or references to corruption are insufficient: the question with which the Corruption Allegation is concerned is whether the Supreme Court of Pakistan found that the CHEJVA and related agreements were void due to the existence of corruption. In my judgment it did not.

The interim hearing before Foxton J

92. At an interim hearing in the proceedings before this Court, and when dealing with security for costs, Foxton J, having read the Judgment of the Supreme Court of Pakistan, said in an ex tempore decision at [32] that:

> "… a decision in TCC's favour would involve this court rejecting arguments that had in some shape or form prevailed by the [Pakistan] Supreme Court … allegations of corruption and illegality [were] substantially upheld by the [Pakistan] Supreme Court".

93. The Province argues this was part of the ratio for a decision by Foxton J that if the English Court ultimately dismissed the Arbitration Claim and upheld the validity of the arbitration agreement, a consequent costs order might not be enforced in Balochistan on public policy grounds, because such a costs order could contradict the allegations of corruption which the Supreme Court had "substantially upheld".

94. TCCA responds that the issue whether the Supreme Court had made findings of corruption was not before Foxton J and he did not hold that the Pakistan Supreme Court invalidated the CHEJVA based on corruption.

95. I agree. In my judgment, Foxton J is not to be taken to have reached a binding decision that the Supreme Court of Pakistan held that the CHEJVA and related agreements were void due to the existence of corruption. A binding decision of that nature was not necessary for the purposes of the decision he had to reach on security for costs. It is unrealistic to contemplate that he was intending to reach a binding decision on what the Supreme Court had held when the hearing of the preliminary issues lay ahead.

Issue (1): the Corruption Allegation: section 73(1)

Section 73(1) of the 1996 Act

96. Is the Corruption Allegation precluded by section 73(1) of the 1996 Act? The subsection provides as follows:

> "73. Loss of right to object
>
> (1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
> (a) that the tribunal lacks substantive jurisdiction,
> (b) that the proceedings have been improperly conducted,
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection".

Principles and approach: the position of the parties

97. For the Province of Balochistan, Mr Hancock QC accepts that section 73(1) is intended to prevent parties from raising a late jurisdiction challenge; that is, one that was not raised when it should have been with the arbitral tribunal. He argues that it is important to distinguish between a headline 'ground of objection' being raised before the arbitral tribunal and underlying arguments which might be raised.

98. What has to be raised, argues Mr Hancock QC, is a 'ground' broadly construed; not specific evidence or argument. It is a new ground, not new evidence and new argument, that is precluded by section 73(1). New evidence, he argues, is not about preclusion but about case management. In this connection, he contends that a 'broad approach' is appropriate rather than a forensic analysis as if one were analysing a statement of case.

99. Mr Hancock QC posed the question in this way in his oral reply: was a jurisdictional issue based on corruption raised before the ICC tribunal? As Mr Hancock QC put it in his oral opening, once you have raised the ground then for the purposes of section 73 "that's that, unless you do something to lose it".

100. For TCCA, Lord Goldsmith QC, Mr Patrick Taylor and Mr Tom Cornell contend that section 73(1) requires an objection as to jurisdiction to be made fairly and fully so that the relevant arbitral tribunal can rule on it. It requires a party to raise an issue as an issue as to jurisdiction. To mention is not enough; the real question, they argue, is whether an issue was properly put to the arbitral tribunal as denying jurisdiction - whether it was raised, put forward, and argued with the arbitral tribunal having the opportunity to answer it.

Principles and approach: authority

101. Of section 73 of the 1996 Act, Moore-Bick J (as he then was) said in Rustal Trading v Gill & Duffus SA [2000] 1 Lloyd's Rep 14 at 19-20:

> "The effect of this section is that a party to an arbitration must act promptly if he considers that there are grounds on which he could challenge the effectiveness of the proceedings. If he fails to do so and continues to take part in the proceedings, he will be precluded from making a challenge at a later date. Moreover, it is clear from the language of sub- s. (1) itself that it is unnecessary for an applicant to have had actual knowledge of the grounds of objection in order for him to lose his right to challenge the award. If the respondent can show that the applicant took part or continued to take part in the proceedings without objection after the grounds of objection had arisen, the burden passes to the applicant to show that he did not know, and could not with reasonable diligence have discovered, those grounds at the time. It may often be necessary, therefore, to consider the applicant's conduct of the proceedings against the background of his developing state of knowledge.
>
> …
>
> The expression 'continues to take part in the proceedings' is broadly worded and the sub-section as a whole is designed to ensure that a party who believes he has grounds for objecting to the constitution of the tribunal or the conduct of the proceedings raises that objection, if he wishes to do so, as soon as he is, or ought reasonably to be, aware of it. He is not entitled to allow the proceedings to continue without alerting the tribunal or the other party to a flaw which in his view renders the whole arbitral process invalid. That could often result in a considerable waste of time and expense which is no doubt something which the legislation seeks to avoid. There is, however, a more fundamental objection of principle to a party's continuing to take part in

proceedings while at the same time keeping up his sleeve the right to challenge the award if he is dissatisfied with the outcome. The unfairness inherent in doing so is, of course, magnified if the defect is one which could have been remedied if a proper objection had been made at the time.

102. Colman J described a "principle of openness and fair dealing" in JSC Zestafoni v Ronly Holdings Ltd [2004] 2 Lloyd's Rep 335 at [64]:

> "… The principle of openness and fair dealing between the parties to an arbitration demands not merely that if jurisdiction is to be challenged under s.67 the issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator but that each ground of challenge to his jurisdiction must previously have been raised before the arbitrator if it is to be raised under a s.67 application challenging the award".

103. In Thyssen Canada Ltd v Mariana Maritime SA & Another [2005] EWHC 219 (Comm) at [18], Cooke J described a "fundamental point of fairness and justice":

> "The effect of section 73 is that an objection to a serious irregularity may not be raised by a party after participating in the proceedings without taking the objection, unless that party can show that at the time of participation the grounds for the objection were not known to him and he could not with reasonable diligence have discovered them. The approach to this section appears from the decision of Moore-Bick J in Rustal v Gill & Duffus [2000] 1 LLR 14 at page 20-21. If the respondent can show that the applicant took part in or continued to take part in the arbitration proceedings without objection, after the grounds of objection arose, the burden passes to the applicant to show that he did not know and could not with reasonable diligence have discovered those grounds at the time. Moreover, the expression 'continues to take part in the proceedings' in section 73 is broadly worded and is designed to ensure that a party who believes he has grounds for objecting on the basis of serious irregularity should raise that objection as soon as he is, or reasonably ought to be, aware of it. He is not permitted to allow the proceedings to continue without alerting the Tribunal and the other party to a serious irregularity, which, in his view, renders the whole arbitral process invalid. As Moore-Bick J points out, this is not only to avoid a waste of time and expense but is based upon a more fundamental point of fairness and justice. It cannot be right for a party to participate in proceedings, which he believes to be fundamentally irregular, with the intention of taking advantage of any decision in his favour, whilst keeping up his sleeve an objection to an irregularity, which he will only produce in the event of an unfavourable decision."

104. Aikens J (as he then was) explained in Primetrade AG v Ythan Ltd [2005] EWHC 2399; [2006] 1 All ER 367 at [59]-[61] and [112]:

> "59. It is clear that the intention behind section 73 is to ensure that a party objecting to jurisdiction, who has decided to take part in the arbitral proceedings, should bring forward his objections in those proceedings before the arbitrators. He should not hold them in reserve for a challenge to jurisdiction in the court. I agree with Colman J that this intention reflects a principle of 'openness and fair dealing' between parties who may, or may not, be bound by an arbitration clause. I also agree with Colman J, therefore, that

to fulfil this intention and to accord with that principle, the words 'any objection' and 'that objection' in section 73 must mean 'any ground of objection' and 'that ground of objection'.

60. But what does that phrase cover? I think that it is wrong to be prescriptive or try to lay down precise limits in the abstract. It is usually easy to recognise in particular cases whether a party is attempting to raise a new ground of objection to jurisdiction on an appeal. It was obvious in the National Basketball Association case and the Zestafoni case. Take this case: in my view Primetrade raised two "grounds of objection" to the arbitrators' jurisdiction. They are: that Primetrade was not a holder of the bills of lading at any relevant time; and that it did not make a claim against the Owners; therefore it is not bound by the arbitration clause.

61. Primetrade raises the same two grounds of objection on this appeal. I accept that it raises different and broader arguments on the first ground. But in my view all those arguments are within the same 'ground of objection' to the jurisdiction of the arbitrators. The argument that no right of suit is transferred to Primetrade even if it became a 'holder' of the bills under section 5(2)(c) is, in my view, within that first ground.

…

112. For convenience I summarise my conclusions:

(1) On the proper interpretation of section 73(1) of the Arbitration Act 1996, an appellant under section 67 of the Act is entitled to argue any point coming within the existing 'grounds of objection' to the jurisdiction that were raised before the arbitrators. The 'grounds of objection' should not be examined closely as if a pleading, but broadly. In this case all the arguments which the appellants wish to advance on the appeal are within the two grounds of objection to jurisdiction advanced before the arbitrators.

…"

105. Ases Havacilik Servis Ve Destek Hizmetleri v Delkor UK Limited [2012] EWHC 3518 (Comm) and Habas Sinai v VSC Steel Company Ltd [2013] EWHC 4071 (Comm) show Hamblen J (as he then was) putting Primetrade into practice. In Ases he said at [36]-[37]:

> 36. In Primetrade AG v Ytham Ltd at [60] [61] Aikens J emphasised the distinction between different grounds of objection and different or broader arguments relating to existing grounds.
>
> 37. In the present case I do not consider that ASES is seeking to raise new grounds of objection. Whilst the evidence and argument relied upon has expanded, ASES's underlying ground of objection has throughout been the same, namely that it is the arbitration agreement in the LML which is the governing agreement. In any event I would not therefore regard s.73 as precluding any of the arguments relied upon by ASES on this application."

In Habas Sinai, Hamblen J said at [86]-[87]:

> "86. In order to decide whether a new ground of objection is being raised "the 'grounds of objection' should not be examined closely as if a pleading, but broadly" – per Aikens J in Primetrade at [112]. The fact that it raises different and broader arguments or new evidence does not mean that it is a new ground – ibid at [61]-[62].
>
> 87. Adopting a broad approach I agree with Habas that in the circumstances of this case its arguments on actual and ostensible authority based on Turkish law falls within the ground of objection based on lack of authority made at the arbitration. However, as Habas itself stressed in oral argument, its objection based on failure to comply with the formal requirements for an arbitration agreement under Turkish law has nothing to do with authority. It derives from the Turkish International Arbitration Act and Code of Obligations. In my judgment this is a new ground of objection and as such is not open to Habas on its application by reason of section 73 of the 1996 Act."

106. In Konkola Copper Mines plc v U&M Mining Zambia Ltd [2014] EWHC 2210 at [18] Field J placed emphasis on time, and implicitly on certainty:

> "… . The parties are entitled to know the specific grounds which are to be advanced in a challenge to an arbitration award not only because they must know the case to be met but also because they should know the extent to which what would otherwise be a valid award is challenged. One of the objectives of arbitral proceedings is to achieve the speedy determination of disputes. It is accordingly very important that time requirements prescribed by the Act are strictly complied with and only allowed to be departed from in exceptional cases. No reasonable excuse has been proffered to the court for the failure to plead the grounds now sought to be introduced at the time the Arbitration Claim Form was issued. …"

107. In C v D1 and others [2015] EWHC 2126 (Comm) at [150] Carr J (as she then was) provided this summary:

> "I remind myself at the outset of the broad policy in play, as identified in Primetrade AG v Ythan Ltd ("the Ythan") … [2006] 1 All ER 367. As Moore-Bick J said in Rustal Trading v Gill & Duffus SA [2000] 1 Lloyd's Rep 14 (at paragraph 19), s.73(1) is designed to ensure that if a person believes he has grounds for objecting to the constitution of the tribunal or the conduct of the proceedings, he raises those objections as soon as he is aware of them or ought to be aware of them. It would be unfair if he took part in arbitration yet kept an objection up his sleeve and only attempted to deploy it later."

108. In A v B [2016] EWHC 3003 (Comm) Sir Jeremy Cooke said at [61]-[63]:

> "61. It was argued that the objection now raised was not a new ground of objection but merely an argument in support of the existing ground of objection. I was referred to the decision of Aikens J in Primetrade AG v Ythan Ltd [2006] 1 All ER 367, paras 54-60. At para 59, he stated that the intention behind section 73 was to ensure that a party which objected to jurisdiction but who had decided to take part in the arbitration proceedings, should bring forward his objections in those proceedings before the arbitrators and not hold them in reserve for a challenge to jurisdiction in the court. At para 60 he said that it was wrong to be prescriptive or to try to lay down precise limits in the

abstract as to what was meant by an objection which meant a "ground of objection". "It is usually easy to recognise in particular cases whether a party is attempting to raise a new ground of objection to jurisdiction on an appeal." At para 112, he said that the "grounds of objection" should not be examined closely as if a pleading, but broadly. Hamblen J in Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd [2014] 1 Lloyd's Law Rep 479, para 86, adopted the same line.

62. In my judgment it is clear that what is now being advanced is a new ground of objection. It is not merely another argument in relation to the ground of objection which was taken before the arbitrators. The only basis upon which E challenged the substitution of F as claimant in the arbitration was that such substitution was precluded by the decision of the Court of Appeal in the Baytur case [1992] QB 610. In its skeleton and oral arguments, E contended that, if the Tribunal were to exercise a discretion to allow such substitution, it should be allowed only on terms that E put up security for costs. In making that submission it is clear that E was accepting that the Tribunal had the power to order the substitution of F as claimant and expressly referred to the Tribunal as having that power as a condition of substitution of F as claimant. It took the position that section 38 of the Act, relating to security for costs was "not excluded by the [1998 Rules]". It is clear from the materials put in front of me that not only was E not making any argument that the ICC Rules did not allow for substitution but it was positively putting forward an alternative case that, if it was wrong on the Baytur point, the Tribunal should exercise its discretionary power to allow substitution only on terms.

63. In these circumstances E is precluded from raising the objection that it now takes by reason of section 73 of the Act. E participated in the arbitration without taking that objection and knew, through its advisers certainly, and could with reasonable diligence have discovered, the grounds for the objection in any event."

109. The editors of Russell on Arbitration, 24th Edition, write at 8-070:

> "… whilst the court has resisted the temptation to lay down precise limits in the abstract, the court will investigate whether the party is attempting to raise a new "objection". The concept of objections does however appear to be construed relatively broadly; objections do not have to be put in exactly the same way as they were put before the arbitrators."

110. In my judgment the relevant legislation and authorities support the following principles and approach relevant to the present case:

(1) The fundamental principle, or policy, is fairness, and justice, in the sense of openness and fair dealing between the parties: see Moore-Bick J in Rustal at 19-20, Colman J in Zestafoni at [64], Cooke J in Thyssen at [18], Aikens J in Primetrade at [59]-[61] and Carr J in C v D1 at [150].

(2) There is also a concern to seek to avoid waste of time and expense: see Moore-Bick J in Rustal at 19-20 and Cooke J in Thyssen at [18].

(3) The issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator: see Colman J in Zestafoni at [64].

(4) In addition, each ground of challenge to jurisdiction or of objection to jurisdiction must have been raised if it is to be raised; by this is meant the irregularity that the party considers renders the whole arbitral process invalid: see Colman J in Zestafoni at [64], Cooke J in Thyssen at [18] and Aikens J in Primetrade at [59]-[61].

(5) It is wrong to be prescriptive or try to lay down precise limits in the abstract for the meaning of the phrase "ground of objection", but it is usually easy to recognise (or obvious) in particular cases whether a party is attempting to raise a new ground of objection to jurisdiction on an appeal: see Aikens J in Primetrade at [59]-[61].

(6) The 'grounds of objection' should not be examined closely as if a pleading, but broadly, or adopting a broad approach. The fact that different and broader arguments are raised or new evidence is put forward does not mean that there is a new ground: see Aikens J in Primetrade at [59]-[61] and [112] and Hamblen J in Ases at [36]-[37] and Habas Sinai at [86]-[87].

(7) This is not to suggest a relaxed approach, especially bearing in mind (1) above. The other party (and the arbitral tribunal) must know the specific grounds which are to be advanced in challenge to an arbitration award not only because they must know the case to be met but also because they should know the extent to which what would otherwise be a valid award is challenged: see Field J in Konkola at [18].

(8) It would be unfair if a party took part in arbitration yet kept an objection up his sleeve and only attempted to deploy it later: see Moore-Bick J in Rustal at 10-20 and Carr J in C v D1 at [150].

(9) Different and broader arguments may be raised, and evidence and argument relied upon may be expanded, provided these are within the same existing "ground of objection" to the jurisdiction of the arbitrator: the fact that it raises different and broader arguments or new evidence does not mean that it is a new ground: see Aikens J in Primetrade at [61]-[62] and [112] and Hamblen J in Habas.

(10) It is not enough that the party mention an issue; the issue must be properly put to the arbitral tribunal as denying jurisdiction.

111. I accept point (10) from Lord Goldsmith QC's argument summarised above. Although the authorities may not quite reach this tenth point in terms, they lead to it and are not fully given effect without it. In the words of the statute, the objection must be "ma[d]e" or "raise[d]".

Applying the principles and approach: the contentions of the parties

112. With these principles and this approach in mind I have reviewed the material developments over the years. As I have done so I have taken into account the points made in respect of each material development.

113. For TCCA, Lord Goldsmith QC's essential contention is that at no stage before the ICC tribunal did the Province of Balochistan make a jurisdictional objection that was based on corruption allegations.

114. On behalf of TCCA, the jurisdictional objections that were raised by the Province are summarised as follows:

> "(i) that the arbitration agreement in the CHEJVA was void as a result of [the Judgment of the Supreme Court of Pakistan] (which created an issue estoppel and/or had binding effect as a matter of Pakistani law); (ii) that TCCA did not have standing to bring the claim because it had divested its rights under the CHEJVA in favour of its Pakistani subsidiary, TCCP; (iii) that [the Province of Balochistan] was not a party to the CHEJVA and could not therefore be a party to the arbitration agreement; and (iv) that the ICC Tribunal lacked jurisdiction to deal with TCCA's extra-contractual claims."

115. For the Province of Balochistan, Mr Hancock QC's essential contention is that applying the approach for which the Province contends, considering the objections brought before the ICC tribunal on a broad basis, and focussing on underlying grounds of objection, it is clear that corruption was raised by the Province; its challenge is not late and is not precluded by section 73.

116. In particular, the Province contends it raised corruption as a ground of objection repeatedly before the ICC tribunal over the period 2012-2014.

117. The Province highlights that there was even a heading entitled 'Corruption' when the ICC tribunal ruled on jurisdiction in its "Rulings on Preliminary Issues" on 21 October 2014. The Province contends that its position should be considered in its proper context and that it did not keep corruption 'up its sleeve' as a means of challenging jurisdiction.

118. After the ICC tribunal's "Rulings on Preliminary Issues", the Province's position is that the parties agreed a 'standstill' on jurisdiction (the Province of Balochistan reserving all its rights) in November 2014, and that in any event the Province has raised corruption as and when evidence has come to light.

119. Given the way the matter has been argued, it is in many places necessary to see exactly what was said or written and in what context, and so I will go into some detail in the paragraphs that follow. I divide the overall period into 6 stages.

The development of the ICC arbitration

Stage 1: The early period of the ICC arbitration to the Judgment of the Supreme Court of Pakistan – January 2012 to May 2013

120. On 27 January 2012, and before the arbitral panel was appointed, the Province of Balochistan filed "Objections to Jurisdiction" with the ICC Court under Article 6(2) of the ICC Rules.

121. In these Objections, the Province said:

> "1. We write to request the ICC Court of Arbitration to exercise its power under Article 6.2 of the 1998 ICC Arbitration Rules to stop this arbitration from proceeding as any tribunal that may be constituted to hear this matter cannot have any jurisdiction.
>
> 2. The Request for Arbitration invokes Clause 15.4 of the Chagai Hills Exploration Joint Venture Agreement ("CHEJVA") dated 29 July 1993, as amended by Addendum No. 1 dated 04 March 2000 ("the Addendum") and a Novation Agreement dated 01 April 2006 ("the Novation Agreement") (together "the Joint Venture Agreements"). The entire premise of [TCCA's] Request for Arbitration rests on challenging the denial of a mining lease application made to the Directorate General of Mines and Minerals ("the Licensing Authority") under the Balochistan Mining Rules 2002 ("the BMR Rules 2002"). Clause 16 of the CHEJVA provides that the applicable law is the "law of Pakistan which the Parties acknowledge and agree includes the principles of international law."
>
> 3. [TCCA] alleges that it has a right to be issued a mining lease by the Licensing Authority under the Joint Venture Agreements entered into with the Governor of Balochistan. The Governor of Balochistan cannot bind the Licensing Authority to give a particular decision. The Licensing Authority, which is the sole authority that can grant mining leases in the province of Balochistan, is not a party to the Joint Venture Agreements. No government entity, including the Governor of Balochistan, except the Licensing Authority has the power to grant mining leases under the BMR Rules 2002. This power is vested with the Technical Head of the Directorate General of Mines and Minerals under Rule 2(z) of the BMR Rules 2002.
>
> 4. An ICC arbitration panel constituted pursuant to the Joint Venture Agreements certainly does not have the jurisdiction to hear a claim challenging the decision of the Licensing Authority made under the BMR Rules 2002. [TCCA's] claim does not rest in contract and cannot be the subject of these ICC arbitration proceedings. If [TCCA] wishes to consider claims against the Licensing Authority's decision, a procedure is set out in the BMR Rules 2002, which we believe it is exercising. It is understood that [TCCA] made an application in the nature of an appeal under Rule 70 of the BMR 2002 on the 28th of November, 2011 which is still pending with the Secretary Mines and Minerals Development Department, Government of Balochistan. Ultimately, this is a case of judicial review for the courts of Pakistan to decide, and one that cannot be arbitrated at the ICC.
>
> …
>
> 10. It is also widely believed that the Joint Venture Agreements are tainted by corruption. The issues of procedural impropriety and corruption relating to the procurement and operation of the Joint Venture Agreements are the

subject of ongoing proceedings in the Supreme Court of Pakistan in which both the Claimant and the Respondent are parties. In this regard, CPLA No. 796 of 2007, Constitution Petition No. 68 and No. 69 of 2010 and No.1 and No. 4 of 2011, Crim. Org. Petition No. 1 of 2011 and Human Rights Case No. 53771-P/2010 are pending before the Honourable Supreme Court.

11.The fact that the Joint Venture Agreements were made in flagrant violation of Pakistani law is also indicative of the corruption at work. The official who was intimately involved with the conclusion of the agreement has been later convicted for 7 years imprisonment on corruption charges for collecting assets beyond means. Some learned judges, including the Chief Justice of Pakistan, made pointed comments in open court about the allegations of corruption surrounding the Joint Venture Agreements in the Supreme Court proceedings.

…

17. It is a well-established principle that contracts procured by corrupt practices and trading in influence are unenforceable as a matter of international public policy. This is also the case under Pakistani law, the governing law of the Joint Venture Agreements. The recent law evolved in Pakistan by the Supreme Court of Pakistan demonstrates that procedural irregularities in themselves can be sufficient basis to infer corruption even if there is no overt act of corruption detectable on the surface. There is ample authority to indicate that contracts that have been the result of illegality and/or corruption have led to the international arbitral tribunals declining jurisdiction.

18. For any and all of the above reasons, there is no contractual or statutory basis for an ICC arbitral tribunal to hear this hopeless claim as it falls well beyond the validity and scope of any arbitration agreement. The Supreme Court of Pakistan is seized of the matter and it is for that Court to make the relevant ruling on the legality of the Joint Venture Agreements. It is also the relevant forum to review the Licensing Authority's decision to refuse the mining lease application of [TCCA].

19. The ICC Court of Arbitration must decline this Request for Arbitration as it is self-evident that there is no jurisdiction. The entire premise of [TCCA's] request is flawed as it alleges that it was promised the grant of a mining lease by the Governor of Balochistan. Such a promise, even if it did exist, is unenforceable and void ab initio under the governing law.

20. If the ICC Court of Arbitration is unable to make a decision on the basis of this letter, [the Province of Balochistan] can provide further information or documentation. If the ICC Court of Arbitration still finds that its powers do not allow it to decline jurisdiction at this stage, it should instruct the arbitral tribunal to decide the objections in this letter as soon as possible as a threshold matter.

21. [The Province] reserves its rights to raise additional objections, including those relating to the locus standi of [TCCA], jurisdiction and/or admissibility of the claim. These include objections on the ground that [TCCA's] Request

for Arbitration was filed at the ICC in violation of the procedures set out in the Joint Venture Agreements."

122. The Province of Balochistan draws attention to the fact that the first line of the letter said: "any tribunal that may be constituted to hear this matter cannot have any jurisdiction" and that paragraph 18 says "for any and all of the above reasons" there was no jurisdiction.

123. For TCCA, Lord Goldsmith QC argued that the argument that "the Joint Venture Agreements were made in flagrant violation of Pakistani law is also indicative of corruption" was not raised as a jurisdictional objection, but the Province points out that the final sentence of paragraph 17 refers to "ample authority to indicate that contracts that have been the result of illegality and/or corruption have led to the international arbitral tribunals declining jurisdiction.".

124. The Province adds that any suggestion that this document did not contain allegations of corruption as a jurisdictional objection is at odds with what TCCA itself later said in 2015. TCCA was then to say that the Province of Balochistan had raised "allegations of corruption…since the outset of this arbitration" (paragraph 74 with a footnote 113 referring to this 2012 letter and in particular paragraphs 10-11 of it). In the same later document at paragraph 79(e) TCCA claimed that "Balochistan argued a series of preliminary issues aimed at invalidating the CHEJVA on various grounds, including alleging corruption".

125. In a letter dated 6 February 2012 from lawyers for the Province of Balochistan to the ICC International Court of Arbitration Secretariat the Province wrote:

> "Arbitral institutions should proceed with care and prudence in allowing arbitrations under their auspices in circumstances where the highest court of a major Sovereign State is clearly seized of the matter, particularly where the issues raised are of vital public interest.
>
> …
>
> What [TCCA] really wants is a review of the Licensing Authority's decision to reject the application for a Mining Lease to a subsidiary company which is not a party to any agreement with the Government of Balochistan.
>
> …
>
> Neither is the Licensing Authority a party to this arbitration."

126. TCCA observes that the Province of Balochistan does not mention corruption. However, the Province replies that this letter comes after the Province had already set out its jurisdiction objection to the ICC Court and does not purport to be a letter setting out all of the Province's objections to jurisdiction. Properly analysed, says the Province, it is consistent with a jurisdictional objection based on corruption which the Province of Balochistan had already made, and which would be addressed by the Supreme Court of Pakistan.

127. The ICC tribunal was appointed on 6 September 2012. TCCA made a "Request for Interim Relief" and on 23 October 2012 and the Province of Balochistan filed

submissions by way of Response to that Request. In those submissions the Province wrote:

> "3. [TCCA] seeks provisional measures from both the ICSID and ICC tribunals to restrain the Government from developing the RekoDiq Mining Area either by itself or with third parties. It does so, even though it has never held any title in its own right to the RekoDiq Mining Area. The exploration licence EL-5, which included the RekoDiq Mining Area, was held by the "TCCP-BDA Chagai Hills Exploration Joint Venture" and not [TCCA]. Under Article 1.1 of the joint venture contract, this licence was the property of the joint venture and not the individual contracting parties. EL-5 expired on 19th February 2012 and no further renewal was possible under the Balochistan Mineral Rules. In effect, [TCCA] is applying to preserve non-existent rights to territory that belongs to the Government of Balochistan.
>
> 4. The joint venture contract [TCCA] relies upon to claim a right to mine the RekoDiq Mining Area is seriously tainted by a strong suspicion of corruption. The joint venture contract is the 1993 Chagai Hills Exploration Joint Venture Agreement (the "CHEJVA"), amended in 2000, and novated in favour of the [TCCA] in 2006. The person who signed the 1993 CHEJVA on behalf of the BDA was subsequently convicted of corruption. Serious questions of irregularities and illegality have been raised by public interest petitions in various applications to the Supreme Court of Pakistan since 2007. As has subsequently emerged, the order passed by the High Court of Balochistan upon which [TCCA] relies as giving it a clean bill of health did not take into account all of the above facts.
>
> …
>
> VIII. OBJECTIONS TO JURISDICTION
>
> 60. Finally, these submissions are made without prejudice to the [Province of Balochistan's] position on a series of important jurisdictional issues. First, the matters in dispute are before the Supreme Court of Pakistan and are sub judice. Thus, for example, the Supreme Court of Pakistan will decide on the validity or invalidity of the relevant joint venture contracts and will look at such public interest issues as it considers appropriate. Secondly, the Supreme Court will state the law of Pakistan definitively with respect to the interpretation of those contracts and the application of the relevant legislation.
> …
>
> 61. Thirdly, there are other jurisdictional issues which will fall to be decided in due course, but are sufficiently obvious as to lead to the conclusion that this Tribunal should not order provisional measures in circumstances where it may well make a finding that it has no jurisdiction. This would be so, for example, if the contract was void ab initio for corruption or was ultra vires under Pakistan law.
>
> 62. Finally, both [TCCA] and the Government are parties to the public interest litigation in the Supreme Court of Pakistan and have complied with the orders and directions of that Court. In fact, the Supreme Court of Pakistan oversaw the Claimant's mining lease application. It has never been suggested,

nor could it be, that the conduct of the Supreme Court is in any way an abuse of process or a denial of justice.

63. The Government maintains its objections to the jurisdiction of this Tribunal. These were set out in the Government's letter to the ICC of 06 February 2012 [sic]. The parties have exchanged correspondence on these objections. These objections were made before [TCCA's] request for interim measures and ought to be decided before the Tribunal decides [TCCA's] application. The Government requests that the Tribunal, after hearing the parties on 4th December 2012, rules upon the matter of its own jurisdiction before it decides [TCCA's] application for interim measures."

128. TCCA argues that reference in paragraph 4 to "strong suspicion of corruption" is not an allegation of corruption, and nor is it a jurisdictional objection based on corruption. In paragraph 61, argues TCCA, the Province indicates that it might – at some stage in the future – raise an issue based on corruption. The Province of Balochistan replies that this was a response to an application issued by TCCA, and was not the place where the Province was to set out all of its jurisdictional objections in detail. Paragraph 60 was all the Province needed to say to respond to TCCA's application. Paragraph 61 was not an indication that the Province might bring a challenge in the future; it was a submission that the jurisdictional issues "would be decided in due course", and further that the objections to jurisdiction were sufficiently strong that interim relief should not be granted to TCCA.

129. On 16 November 2012 the Province of Balochistan filed its Answer to TCCA's Request for Arbitration and Counterclaim, in the ICC arbitration. This included these passages:

1. "[The Province] submits its Answer and Counterclaim in accordance with Article 7 of [the ICC Rules]. It does so while maintaining its position that this Tribunal has no jurisdiction over this dispute. [The Province] requests this Tribunal to adjudicate upon its objections to jurisdiction which were submitted on 27 January 2012 before any further steps are taken in this arbitration. Should the Tribunal find it has jurisdiction, [the Province] requests that [TCCA's] claims be dismissed in their entirety for the reasons set out in this submission and the relief requested in its counterclaim be granted.

II. OBJECTIONS TO JURISDICTION

This dispute is outside the Tribunal's jurisdiction

2. Matters relating to the enforceability, validity and vires of the CHEJVA, the addendum of 2000 and the novation of 2006 ("the joint venture contract") are pending before the Supreme Court of Pakistan … . [TCCA], its Pakistani subsidiary and its parent companies are before the Supreme Court and before were present before the Balochistan High Court. In excess of 50 applications have been filed and are pending before the Supreme Court. It is plain that only the Supreme Court of Pakistan has the jurisdiction to decide on the validity of the joint venture contract and no tribunal has the authority or power to usurp such jurisdiction. Therefore, this Tribunal should suspend any further

proceedings in the arbitration until such time the Supreme Court of Pakistan determines the validity, legality and *vires* of the CHEJVA.

3. During the course of the Supreme Court proceedings allegations of corruption have been raised. It is the Supreme Court of Pakistan which is the appropriate forum for determining whether corruption is factor in the matter before it and then take appropriate decisions. In this regard, Article 34 of the UN Convention on Corruption allows the Supreme Court, in part being the sub-set of the State to continue with the present legal proceedings.

…

II. Objections to Jurisdiction; The joint venture contract is a product of illegality and corruption.

10. [The Province] also maintains its objections to the jurisdiction of this Tribunal, set out in its letter to the ICC of 06 February 2012 [sic].

11. … The signatory to the CHEJVA, Mr Jafar, the then Chairman of the BDA, was convicted of corruption. The execution of the CHEJVA is riddled with irregularities which strongly infer corruption. One such example is that when the CHEJVA was signed in 1993 it was an express instruction of the caretaker Chief Minister of Balochistan that the agreement be termed as provisional. It was further contended that no-one really knew what the CHEJVA was and what sort of deal with BDA was getting into. However the concerns and instructions were brushed aside by BHP and the former Chairman of the BDA who was convicted of corruption.

12. The validity and legality of the CHEJVA, the Addendum and the novation agreement (together the "joint venture agreement") are before the Supreme Court of Pakistan. … [TCCA], TCCP together with their parent companies, Barrick Gold Company and Antofagasta plc, have participated in that litigation. …

15. The Honourable Judges of the Supreme Court during the various stages of the proceedings have expressed serious concerns about the merits and the circumstances in which the CHEJVA was executed and the unfair and unbalanced arrangement that it involved. …

…

18. The joint venture contract is void and unenforceable because it is a product of illegality and corruption. Applications seeking declarations of illegality and invalidity of the 1993 Agreement and the Addendum and Novation Agreements of 2006 are pending in the Supreme Court of Pakistan. This Tribunal must wait for the Supreme Court's decision which is expected shortly before proceeding further.

19. If the Supreme Court of Pakistan finds illegality, then the entire contract including the arbitration provision will be void. This Tribunal will have no jurisdiction."

130. The Province says that at paragraphs 10 to 34 it submitted that the ICC tribunal did not have jurisdiction because "the joint venture contract […] is a product of illegality and corruption" (paragraph 18). As such, argues the Province, it was addressing corruption, encompassing both pre- and post- contract fraud, which it contends are separate concepts as a matter of Pakistani law. It emphasises that, under the heading "Objections to Jurisdiction", it had the section called "The joint venture contract is a product of illegality and corruption". It argues it could not have made it clearer that this was one of the Province of Balochistan's jurisdictional objections.

131. TCCA maintains that the Province of Balochistan does not make a jurisdictional objection based on corruption. Its objection amounted to an argument that the Pakistan Supreme Court had jurisdiction – and was dealing with the matter – and therefore the ICC tribunal should not be permitted to conduct its own proceedings in parallel. Paragraph 18 was a "preface", as Lord Goldsmith QC put it.

132. Of the reference to "Mr Jafar, the then Chairman of the BDA, was convicted of corruption", TCCA says this is not a jurisdictional objection based on corruption, particularly given that Mr Jaffar was not convicted of any corruption relating to the CHEJVA and the Province of Balochistan does not allege that he was. For its part, the Province says that TCCA's suggestion that Mr Jaffar was not convicted of corruption relating to the CHEJVA is entirely at odds with the Judgment of the Supreme Court of Pakistan, in which his conviction was central to findings of corruption in relation to the CHEJVA. Amongst other things, argues the Province, if it had not been relevant to the validity of the CHEJVA, then the Supreme Court of Pakistan would not have relied on it (or even referred to it) in their judgment invalidating the CHEJVA.

133. The hearing of TCCA's Request for Interim Relief was on 4 December 2012. TCCA observes that the only time the Province of Balochistan referred to corruption during the hearing was in the course of describing what was before the Pakistan Supreme Court. There, the Province simply stated:

> "The person who signed the CHEJVA was later sentenced for corruption for … beyond means offence in Pakistan … he has just completed his sentence"

and no allegations were advanced linking this to the CHEJVA. The Province of Balochistan made no jurisdictional objection based on corruption allegations. For TCCA, Mr Donovan stated to the ICC tribunal:

> "I do want to suggest, though, that to the extent that there is any suggestions that appeared in the papers here that there is any corruption involved in this case -- and there are obviously extremely distinguished members of the Pakistani and English bar in front of the tribunal on the other side, but they have been very careful to frame their suggestions as there may be questions, there is no an iota of suggestion, nothing."

134. The Province of Balochistan responds that this was a hearing of TCCA's application for interim relief, not the hearing of its jurisdiction challenge. All the Province of Balochistan needed to do was reserve its rights on jurisdiction, which it did. But in any event, as above, the reference to Mr Jafar's conviction was a reference to corruption in relation to the CHEJVA.

135. The ICC tribunal gave its Ruling on TCCA's Request for Interim Relief on 19 February 2013. By now the Supreme Court had made its order but not delivered its judgment giving its reasons. The ICC tribunal wrote:

> "15. On January 27, 2012, the Government requested the ICC not to proceed with the arbitration pursuant to Article 6(2) of the ICC Rules.
>
> 16. The reasons included these: (a) the Governor of Balochistan cannot bind the Directorate General of Mines as the Licensing Authority to grant a Mining Lease; (b) the Tribunal would not have jurisdiction to hear a claim challenging the refusal of a lease; (c) if the Governor of Balochistan guaranteed or promised the grant of a lease, the agreement would be unenforceable and void, and ultra vires; (d) the CHEJVA was tainted by corruption; (e) there were proceedings relating to the validity of the CHEJVA pending before the Supreme Court of Pakistan, which was the final authority on all questions of Pakistani law.
>
> …
>
> 60. … The Government's objections to jurisdiction included grounds in addition to those indicated in its letter of 27 January 2012. …
>
> 61. In the course of this application, the Government has made these points on the merits of the claim (inter alia): (1) TCCA's application for a Mining Lease in February 2011 was in breach of the CHEJVA, and failed to meet the requirements for the grant of a Mining Lease pursuant to the BMR; (2) Article 5.9 provides for "the right to apply for a Mining Lease" and does not contain a right to be granted a Mining Lease, and the Government was not obliged to procure a Mining Lease under the CHEJVA; (3) even if Article 11.8.2 entitled TCCA to a Mining Lease, this would be in relation to a "mine" or a single mineral deposit in accordance with the provisions of and procedure set out in the CHEJVA, and not to at least 14 mineral deposits of substantial value contained in the Reko Diq Mining Area; (4) TCCA's Feasibility Study related to only two mineral deposits at H14 and H15 (which cover an area of 6 sq km); (5) TCCA did not commission feasibility studies for the other deposits, nor did it offer the Government any opportunity to develop those deposits; (6) TCCA unilaterally submitted an application for the entire 99.473 sq km in breach of the CHEJVA; (7) TCCA attempts in breach of law to bind the Licensing Authority's broad statutory discretion to refuse a Mining Lease application if it believes that this would not be in the interests of the development of the mineral resources of Balochistan; (8) Licence EL-5 was held by the Joint Venture and not by TCCA; (9) Licence EL-5 expired on February 19, 2011 and no further renewal was possible under the BMR; (10) in effect, TCCA is applying to preserve non-existent rights to territory that belongs to the Government; (11) the CHEJVA is seriously tainted by a strong suspicion of corruption: the person who signed the 1993 CHEJVA on behalf of the BDA was subsequently convicted of corruption, and serious questions of irregularities and illegality have been raised by public interest petitions in various applications to the Supreme Court of Pakistan since 2007; and (12) the Supreme Court of Pakistan has been seised of the fundamental questions concerning the validity and legality of the CHEJVA, and it is for the Supreme Court of Pakistan also to consider the meaning and effect of the BMR and

whether to follow the principle that the Government's discretion in granting a mining title cannot be curtailed by contract: Cudgen Rutile (No.2) Pty Ltd v Chalk [1975] AC 520.

…

87. It would appear that the Government's position now is that the CHEJVA is governed by the law of Pakistan and that the effect of the order of the Supreme Court of Pakistan is that the arbitration agreement in the CHEJVA is null and void and that the Tribunal is therefore deprived of jurisdiction. …

88. … It is well established that an arbitration agreement is severable from the contract of which it forms a part, and may be governed by a different law. It is not necessary to express a view on the question at this stage prior to any formal challenge to the Tribunal's jurisdiction by the Government, but it is arguable that the arbitration agreement is governed by English law on the basis that it has the closest connection with English law as the seat of the arbitration envisaged by the arbitration agreement in clause 15.4.3(a). Secondly, even if the arbitration agreement is governed by the same law as the CHEJVA, it is arguable that the reference to international law in clause 15.4.4 and clause 16 has the result that the CHEJVA is governed by international law and that the validity of the arbitration agreement is therefore unaffected by the ruling of the Supreme Court [of Pakistan] that the CHEJVA is null and void under the law of Pakistan. Accordingly the Tribunal is of the view that it retains prima facie jurisdiction pending the resolution of the Government's challenge to its jurisdiction.

…

Ruling

138. For the reasons given above the Tribunal considers that TCCA has not made out the conditions for the grant of interim relief."

136. TCCA contends that paragraphs 15 and 16 are simply summarising the Province of Balochistan's submissions made under its Article 6(2) application to the ICC Court; paragraph 61 is prefaced with "In the course of this application, the Government has made these points on the merits of the claim" and is to be contrasted with paragraph 60 where the ICC tribunal stet out the Province of Balochistan case on jurisdiction; paragraph 87 sets out the ICC tribunal's understanding of what the Province of Balochistan was alleging; and paragraph 138 is simply the ICC tribunal's finding on the interim relief application. There is nothing of relevance to the issues with which this Court is concerned, says TCCA.

137. In response the Province of Balochistan accepts that this Ruling is not a key one for present purposes; it dealt with TCCA's application only and made clear at paragraph 88 that everything the ICC tribunal did was subject to the Province of Balochistan's challenge to jurisdiction. Paragraph 87 shows that the ICC tribunal understood that the Province of Balochistan's case was that the effect of the Supreme Court's Judgment was to vitiate the arbitration agreement, including (says the Province) "on the grounds of corruption". That the ICC tribunal considered that a formal challenge to jurisdiction had been made is supported, says the Province,

by the ICC tribunal's reference at paragraph 88 to "pending the resolution of the Government's challenge to jurisdiction" and all the documents which had already been filed in the arbitration.

138. In my judgment the essential points from Stage 1 are:

(1) The jurisdiction point raised by the Province with the ICC Court was that an ICC arbitral tribunal would not have the jurisdiction to hear a claim challenging the decision of the Licensing Authority made under the BMR Rules 2002.

(2) The Province also referred to the possibility of corruption, and of corruption that went to jurisdiction.

(3) The possibility at (2) was identified by reference to the presence of suspicions, indications, comments, and the potential to infer corruption.

(4) The Province had made clear that its position was that these matters were before the Supreme Court and were for decision by the Supreme Court.

(5) The ICC tribunal had recorded that there was not yet "any formal challenge to the Tribunal's jurisdiction by the Government".

Stage 2: The Judgment of the Supreme Court of Pakistan – May 2013

139. This has of course been addressed in detail above.

140. I have sought to show above how and where the Supreme Court made reference to corruption. I have also sought to explain above that the Supreme Court did not however decide that the CHEJVA and related agreements were void due to the existence of corruption.

141. That conclusion on what the Supreme Court did and not decide follows close examination of what was a complex Judgment, with many dimensions, delivered by the Supreme Court of Pakistan. It is important to record that the point is not an easy one. It readily follows that it was properly open to the Province of Balochistan at the time to take a different view, with the benefit of the expert legal advice then available to it, and to argue that the Supreme Court did decide that the CHEJVA and related agreements were void due to the existence of corruption.

Stage 3: From the Judgment of the Supreme Court of Pakistan to the eve of the ICC tribunal's "Rulings on Preliminary Issues", including jurisdiction – May 2013 to October 2014

142. In 'Preliminary Objections to Jurisdiction and Admissibility' dated 14 June 2013 in the ICC arbitration, the Province of Balochistan wrote:

> "1. The Government of Balochistan ("the Government" or "the Respondent") requests that the preliminary jurisdictional and admissibility objections set out below are heard before this arbitration proceeds to the merits. The

Tribunal's power to hear these objections on a preliminary basis is set out in paragraph 52 of the Terms of Reference.

2. Firstly, this Tribunal must consider the impact of the [Supreme Court's] judgment…on its jurisdiction and the admissibility of the claims before it. The [Supreme Court] has declared that the contract – pursuant to which this arbitration arises – is "illegal void and non est" in its entirety. Pakistani law governs the CHEJVA, including the arbitration agreement contained therein. The Supreme Court's ruling, therefore, binds this Tribunal. The source of the Tribunal's jurisdiction is not an autonomous source, but derives from a contractual nexus between the parties. Once that nexus is declared finally and conclusively null and void, then all rights and obligations under it, including the jurisdiction of this Tribunal, fall away. The Tribunal has no inherent jurisdiction of its own independent of the contract.

…

26. The [Supreme Court] found that the CHEJVA was illegal void and non est on a number of grounds including the fact that officials involved in its conclusion violated their public duties under Pakistani law and were induced into giving undue advantages and benefits to [TCCA's] predecessor related to the CHEJVA. These findings are firmly in line with current international law and policy on anti-corruption.

27. Tellingly, the Supreme Court also held that the CHEJVA is "illegal void and non est" in its entirety:

> "As all the key provisions of the CHEJVA were made subject to a reliance on relaxations that were illegal and void ab initio, the illegality of the agreement seeps to its root. …"

28. … [T]he arbitration agreement is governed by Pakistani law. The Pakistan Supreme Court has determined that no part of the CHEJVA can be saved as the agreement is void ab initio, non existent and the illegality "seeps to the root[s]" of the CHEJVA. This determination of Pakistani Law by the Pakistan Supreme Court is not open to scrutiny by this Tribunal, nor can this Tribunal substitute its own finding for that of the Supreme Court.

…

31. … [I]t is important to note that this jurisdictional objection is not based on a claim or allegation of voidness/illegality of the agreement, but rather a finding of voidness / illegality by a court of competent jurisdiction. …

32. For the record, the Government submits that this Tribunal could not "uphold the validity of the arbitration agreement" even if it were governed by English law. Since (a) the underlying contract terms are governed by Pakistani law, and (b) the Pakistani Supreme Court has held that the underlying contract, including the arbitration agreement, is void ab initio for illegality. First, the illegality in this case is "palpable"; it is not contested. Second, the illegality directly impeaches the arbitration agreement [at footnote 20, the Province of Balochistan distinguished Fiona Trust "on the grounds that the "bribery" in that case did not entail the invalidity of the

> arbitration agreement, whereas the Province of Balochistan submission was that it did in its case"]. Third, the nature of the illegality is such that due to public policy reasons it would be unenforceable under English law and international public policy. Any award rendered by a Tribunal assuming jurisdiction under an unenforceable arbitration agreement (i.e. an arbitration agreement tainted by illegality) would be denied recognition and enforcement.
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> …
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> 49. The findings of the Pakistani Supreme Court and the Tribunal's obvious lack of jurisdiction over the parties to, and subject matter of, this dispute warrant urgent upfront consideration.
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> …
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> 51. In the exercise of its undoubted right to determine its own jurisdiction, the Government submits that the Tribunal will be compelled to find that it has no jurisdiction to hear this case. If the Tribunal accepts that the governing law of the arbitration agreement is Pakistani law, then the Supreme Court's finding that the arbitration agreement like the rest of the CHEJVA is void and tainted with illegality is dispositive of the matter. If the Tribunal takes the view that English law governs the arbitration agreement, the arbitration agreement is in any event unenforceable due to the illegality of the underlying terms of the CHEJVA. In this case, the illegality directly impeaches the arbitration agreement itself."

143. The Province of Balochistan says these paragraphs illustrate that the corruption and illegality upon which the Province relied in support of its jurisdiction objection related both to the conclusion of the CHEJVA and benefits afforded to the Province of Balochistan's counterparty in relation to the CHEJVA.

144. TCCA contends that at paragraph 2 the Province put the argument that the "Supreme Court has declared that the contract … is illegal, void and *non est* in its entirety". In paragraphs 26 and 28 TCCA argues the Province referred to the Pakistan Supreme Court Judgment, and made no jurisdictional objection based on corruption. TCCA notes that in paragraph 31 the Province itself said "it is important to note that this jurisdictional objection is not based on a claim or allegation of voidness/illegality of the agreement, but rather a finding of voidness / illegality by a court of competent jurisdiction." TCCA observes that in paragraph 32 the Province of Balochistan does not make any allegations of corruption; it bases its position on what the Supreme Court had decided. In footnote 20 the Province was, argues TCCA, simply describing the principle of separability identified in Fiona Trust. In paragraph 49 the Province of Balochistan summarised its jurisdictional objections, which, according to TCCA, do not raise corruption as a self-standing objection.

145. The Province replies that it is correct that paragraph 26 referred to the findings of the Supreme Court of Pakistan, but the Province's case was that as a result of those findings the arbitration agreement was void. In paragraph 31 the Province of Balochistan was, it contends, saying that its jurisdictional objections were rooted in findings rather than allegations alone. In paragraph 32 the Province of Balochistan described the principle in Fiona Trust and distinguished it on the facts of this case,

as "the illegality directly impeaches the arbitration agreement". Paragraph 49 was, says the Province, the conclusion not the recitation of all the arguments again.

146. In a letter dated 5 July 2013 to the ICC tribunal, TCCA wrote:

> "Balochistan argues that this Tribunal lacks jurisdiction, either because it is bound to accept the Pakistan Supreme Court's judgment purporting to invalidate all provisions in the CHEJVA, including the arbitration clause, or because the Supreme Court's conclusion that the entire contract is illegal necessarily renders the arbitration clause unenforceable.
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> …
>
> … Balochistan's theory confirms that the Tribunal would have to weigh the same evidence and consider the same legal arguments when assessing the validity of both the arbitration clause and the other CHEJVA provisions underlying TCCA's claims on the merits, including:
>
> (i) alleged "irregularities and corruption" surrounding the conclusion of the CHEJVA,
>
> (ii) the authority, under Pakistani law and in the factual circumstances, of the persons signing the CHEJVA and related agreements on behalf of Balochistan, and
>
> (iii) the effect of the alleged invalidity of the CHEJVA on later agreements that expressly reaffirmed its provisions, including the arbitration clause."

The Province of Balochistan contends that TCCA recognised here that the Province was taking a jurisdictional objection based on corruption. TCCA disagrees.

147. The Province of Balochistan made an "Application that Preliminary Objections to Jurisdiction and Admissibility be Determined Prior to Merits (Bifurcation)". The ICC tribunal gave its Ruling on 23 July 2013, writing:

> "30. "The claimant's position:… the respondent's objection that there is no valid arbitration agreement rests entirely on its position that the CHEJVA as a whole is invalid, and it has asserted no separate basis for its contentions that the claimant's claims are inadmissible….the Tribunal would have to weigh the same evidence and consider the same legal arguments when assessing the validity of both the arbitration clause and the other CHEJVA provisions underlying the claimant's claims on the merits, including: (i) alleged irregularities and corruption surrounding the conclusion of the CHEJVA; (ii) the authority, under Pakistani law and in the factual circumstances, of the persons signing the CHEJVA and related agreements on behalf of the respondent; and (iii) the effect of the alleged invalidity of the CHEJVA on later agreements which expressly reaffirmed its provisions, including the arbitration clause.
>
> …

> 41. The first main basis of [the Province's] claim that the Tribunal has no jurisdiction is that the CHEJVAand the associate[d] [sic] contracts are invalid by reason of, and for the reasons given by, the Supreme Court of Pakistan.
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> …
>
> 43. So also is the second main submission of the respondent closely entwined with the merits. [The Province's] position is that the BDA was not authorized to enter into the CHEJVA on behalf of [the Province] and that neither the respondent nor the Licensing Authority is party to the CHEJVA…."

148. The Province of Balochistan highlights that the ICC tribunal mentioned corruption when summarising the Province's submissions, at paragraph 30. Paragraphs 41-43 contain other jurisdictional objections raised by the Province because, the Province says, it had more than one objection. Paragraph 41 refers to the Supreme Court's findings, which, says the Province, included a finding of corruption.

149. The Province of Balochistan says it developed the same points in its written submissions ('Objections to Jurisdiction and Admissibility, Counter-Memorial on the Merits and Counter-Claim') dated 30 September 2013, which included these passages:

> 14. … the Supreme Court of Pakistan has definitively held in a well-reasoned decision that the CHEJVA Agreements (including the 2006 Novation Agreement) are illegal, void and non-existent in their entirety under the applicable law (i.e. Pakistani law). This undisputed and indisputable finding (not merely allegation) of illegality infects the arbitration clause in the CHEJVA upon which the Claimant seeks to establish the Tribunal's jurisdiction in this arbitration.
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> …
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> 119. On 8 February 2011, the Supreme Court of Pakistan directed the Government of Balochistan to produce and submit the entire record pertaining to the CHEJVA and the related contracts. Earlier the Supreme Court had been displeased with the failure on the part of the Government of Balochistan to produce the entire record of documents as the Supreme Court wanted to satisfy itself about the reasoned basis of the different position taken by Government in its pleadings before the Balochistan High Court and initially before the Supreme Court. In compliance with the said orders, the said record was retrieved from the archives of the BDA and other departments of the Government of Balochistan. The said record was then filed through several applications. It made shocking disclosures of extensive irregularities from which corrupt practices could be inferred.
>
> 120. The then government officials, including the Advocate General, examined the record and decided not to defend the irregularities and instead rendered full assistance to the court in relation to the record. Indeed, the Government of Pakistan and the Respondent have a duty to assist the Supreme Court under the Constitution of Pakistan, and the counsel representing the Governments is an officer of the Court. Neither can the Governments or its counsel hide documents from the Supreme Court, nor can they misrepresent such documents or the law pertaining thereto. Pakistani law

permits a modification of a party's position if there are developments subsequent to the filing of the case. The decision to adopt a neutral position was taken by the Government of Balochistan as the Supreme Court has repeatedly encouraged and instructed officials to perform their duties while disregarding any unlawful order or irregularities on the part of their predecessors. …

121. Once the full review of the case file had been completed, the Respondent, in good faith, withdrew its support for the CHEJVA and adopted a neutral position, submitting that the Supreme Court should decide the matter on the merits. Contrary to the Claimant's allegation, the Governments of Balochistan and Pakistan did not "attack" the CHEJVA. The Government of Balochistan's counsel performed its duty towards the Supreme Court by handing over additional documents, explained the position of Pakistani law to the best of their ability and left it to the Supreme Court to decide the matter on the merits.

II. THE FINDINGS OF THE SUPREME COURT

122. After lengthy hearings, the Supreme Court issued an order in relation to the various petitions brought before it in relation to the CHEJVA and TCCA's activities on 7 January 2013.That order, though providing a summary of the basis of its dispositive part, expressly stated that "detailed reasons [would] be recorded later".

123. Those reasons were rendered on 10 May 2013. They in essence rely on a finding that the conclusion of the CHEJVA by the BDA in 1993 (and even when considered in light of the 2000 Addendum) was ultra vires and thus void. In particular, the Supreme Court held that the conclusion of the CHEJVA fell outside the powers granted to State authorities under, inter alia, the 1948 Act and the 1970 BM Rules which were promulgated pursuant to that statute. Similarly, it held that the "relaxations" of the 1970 BM Rules were not done in accordance with Pakistani law. In summary, Pakistani law requires that such "relaxations" be granted only once "hardship" is established which it had not been in the present circumstances. As the conclusion of the CHEJVA was ultra vires, the Supreme Court declared that it was void and non est. As a matter of Pakistani law, it did not exist and did not confer any rights on BHP, Mincor, the Claimant in this arbitration, TCCP, Antofagasta or Barrick. This being so, each element of the contractual regime premised on the CHEJVA – including the 2000 Addendum, the 2000 Option Agreement, the 2002 Alliance Agreement and the 2006 Novation Agreement – was also void.

124. In greater detail, the Supreme Court held:

(a) once the Supreme Court had inspected [the CHEJVA record] it found that the record "made shocking disclosures of extensive irregularities and corruption"

…

312. The Supreme Court's finding of the illegality of the CHEJVA was utterly clear:

> "The said record [the entire record relating to CHEJVA] was retrieved and filed through several applications. It made shocking disclosures of extensive irregularities and corruption. …

313. The Supreme Court found that the CHEJVA was illegal, void and non est on a number of grounds including the fact that the officials involved in its conclusion violated their public duties under Pakistani law and were induced into giving undue advantages and benefits to the Claimant's predecessor relating to the CHEJVA. Furthermore, as discussed above, the Supreme Court found that the CHEJVA's object was unlawful as it was an attempt to contravene the provisions of Pakistani law, including the Constitution of Pakistan, the Mines Act 1948 and the 1970 BM Rules. Pursuant to Section 23 of the Pakistani Contract Act 1872 contracts with such unlawful objectives are void.

314. The preclusive effect of the Supreme Court's judgment is complete. The Court held that the CHEJVA is "illegal, void and non est" in its entirety…

315. The scope of this finding by the Supreme Court means that the arbitration agreement in the CHEJVA, which is governed by Pakistani law, cannot be saved. It, individually, is illegal and of no effect under its governing law. This determination of Pakistani Law by the Pakistan Supreme Court is not open to scrutiny by this Tribunal, nor can this Tribunal substitute its own finding for that of the Supreme Court.

316. It is important to emphasise that this jurisdictional objection is not based on a claim or allegation that the CHEJVA is void and illegal. Rather it is based on an express finding that the CHEJVA is void illegal [sic] by the most senior court of competent jurisdiction.

…

319. The Tribunal would be bound to accept that it could not "uphold the validity of the arbitration agreement" even if the arbitration agreement were governed by English law. This is so for three reasons. First, the illegality in this case is "palpable"; it is not contested. Second, the illegality directly impeaches the arbitration agreement. Third, the nature of the illegality is such that due to public policy reasons it would be unenforceable under English law and international public policy. Any award rendered by a Tribunal assuming jurisdiction under an unenforceable arbitration agreement (i.e. an arbitration agreement tainted by illegality) would be denied recognition and enforcement.

320. However, there are additional reasons, under Pakistani law, why the CHEJVA Agreements are illegal and void. First, the Respondent could not have entered into a joint venture agreement because the Pakistan Mines Act 1948, the legislative instrument under which the 1970 BM Rules were promulgated, did not allow provide for the execution of agreements, but only for the promulgation of rules. Therefore, the Rules already occupied the subject of regulating the mines and minerals in Balochistan. This concept of

an occupied field is well known in Pakistani law, and its effect is to render illegal and void any entry by the Respondent into a contract such as the CHEJVA.

321. Second, the fact is that the Respondent is not a party to CHEJVA. The Respondent never appointed the BDA or any of its officials to act as its agents for executing the CHEJVA. The Claimant's assumption that the Respondent was party to the CHEJVA is a critical mistake of fact. As a result, the CHEJVA is also void on account of Section 20 of the Contract Act 1872, which says: "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."

322. Third, the CHEJVA Agreements are also void because they are an effort to interfere with and curtail the discretion of a licensing authority. A licensing authority by its nature enjoys independence as it needs to consider the licencee's application. The 2002 BM Rules codify this independence. Only the appellate body has the mandate to set aside the decision of the Licencing Authority. Any attempt by the CHEJVA Agreements, as construed by the Claimant, to curtail this discretion of the Licensing Authority is void. …

323. This principle has been applied in Pakistani courts, including in the Balochistan High Court when it declared that the Chief Minister had no executive power to interfere with matters regulated by the Balochistan mining code. It is plain that, if the CHEJVA is considered by this Tribunal to grant a mining lease, which is denied by the Respondent, such contract would be illegal under Pakistani law.

324. Fourth, the CHEJVA Agreements suffer from uncertainty about the area which is the subject of any future mining rights. Although a general map covering 13 thousand square miles is annexed to the CHEJVA, clause 5.3.1 CHEJVA states that the aggregate prospecting area shall not be more than 50 square kilometres. The scope of the prospecting activities anticipated by the CHEJVA, along with the scope of any future mining activities, are inherently uncertain. Thus, on account of this uncertainty in respect of the area that is to be taken as subject matter of CHEJVA, Section 29 of the Contract Act renders it void.

325. For the foregoing reasons, the CHEJVA, the 2006 Novation Agreement and the arbitration agreements contained in each of those contracts are governed by Pakistani law, and are invalid as a result of the determinative finding to that effect by the Supreme Court of Pakistan (and would in any event be void by virtue of other aspects Pakistani contract law). The result is that the present Tribunal does not have jurisdiction under the CHEJVA Agreements to hear and decide the present dispute. The Tribunal must therefore decline jurisdiction."

150. This, says the Province, is an important document because TCCA accepts that it contains the Province of Balochistan's jurisdictional objection.

151. The Province of Balochistan argues that these paragraphs referred to and relied on the Supreme Court's findings, including (i) the disclosures in the Supreme Court record "from which corrupt practices could be inferred", (ii) the relaxations of BMCR 1970, (iii) the non-compliance of the CHEJVA with various statutory

provisions of Pakistani law (including s. 20 Contract Act 1872); and (iv) the fact that officials involved in concluding the CHEJVA "violated their public duties under Pakistan law and were induced into giving undue advantages".

152. TCCA observes that the Province of Balochistan was making submissions on why the Supreme Court's judgment had preclusive effect.

153. TCCA further contends that the Province of Balochistan does not argue that the Pakistan Supreme Court invalidated the CHEJVA or the arbitration agreement on the basis of corruption. The Province denies this. The Province of Balochistan also emphasises paragraph 316 as making the point that it does not need to rely on mere allegations alone because it has the Supreme Court's findings.

154. On 10 January 2014 the ICC tribunal wrote to the parties to set out preliminary issues for determination.

155. The Province of Balochistan requested in the ICC arbitration documents evidencing payments made by TCCA (and connected parties) to the Province of Balochistan's public servants. Mr Hancock QC emphasised that the Province relied on paragraph 313 of its Objections saying that there the assertion had been made that the Supreme Court had held that the CHEJVA was void due to corruption.

156. The Province's justification for the request (Request 8) was that:

> "… the issue of irregularities and corruption in relation to the CHEJVA Agreements is at the heart of the Supreme Court decision that the CHEJVA Agreements are illegal, void, ab-initio and non est under Pakistani law. The documents requested are relevant and material to establishing [whether bribes were paid]. Indeed, such document would in and of themselves strip this Tribunal of any jurisdiction to hear and decide the Claimant's claims."

157. The Province of Balochistan highlights that the Request unarguably states that corruption goes to the ICC tribunal's jurisdiction: thus the language, "strip this Tribunal of any jurisdiction".

158. On 12 February 2014, the ICC tribunal refused the Province of Balochistan's request 8, in these terms:

> "Some of the documents will be produced in the ICSID arbitration. The Supreme Court referred to corruption but did not invalidate the contracts on that basis, and [the Province] has not sought to make out an independent case on that basis. In any event the request is overly broad."

159. The Province of Balochistan says the ICC tribunal dismissed the case that the Province of Balochistan had been running that the Supreme Court had made findings of corruption. The Province argues that the ICC tribunal actually determined that the Supreme Court did not invalidate the CHEJVA as a result of corruption. It was the Province's contention in this document that that "corruption" was "at the heart" of the Supreme Court's decision to invalidate the CHEJVA, and that was the point which the ICC tribunal decided against it (as well as denying its request for documents). This determination was then repeated in the Rulings on Preliminary Issues.

160. TCCA makes the point that despite the ICC tribunal's decision, the Province of Balochistan did not seek to introduce a jurisdictional objection based on corruption.

161. In submissions dated 5 March 2014, TCCA argued:

> "252. The CHEJVA is not invalid due to corruption….Balochistan refers throughout its objections to alleged corruption or impropriety in the conclusion of the CHEJVA and subsequent Agreements, and contends that the Supreme Court invalidated the CHEJVA on that ground…..The Supreme Court did no such thing. As this Tribunal has already ruled…the Court "referred to corruption" but "it did not invalidate the contracts on that basis".
>
> 253. There was no corruption involved in the CHEJVA … the Tribunal should not indulge further unsubstantiated allegations of this kind".

162. The Province of Balochistan says that here TCCA opposed the Province's jurisdictional objections, including on the basis that the Supreme Court did not make any findings of corruption, and noted that the ICC tribunal had already decided that the Supreme Court of Pakistan did not invalidate the contracts on the basis of corruption. Mr Hancock QC put it in this way in oral argument: TCCA recognised it was an objection that was being taken.

163. In a 'Reply on Preliminary Issues' dated 14 May 2014, the Province of Balochistan wrote as follows:

> "17. After comprehensively considering the matter, the Supreme Court provided a 149-page reasoned judgment addressing the many issues placed before it. That judgment determined that, as a matter of Pakistani law, inter alia:
>
> - [BMCR 1970] required that, in order for any relaxations of the Rules to be legal, both "hardship" and "special circumstances" had to be shown, and the reasons for any relaxations had to be recorded in writing. Since these tests were not met, the relaxations of the BM Rules of 1970 were ultra vires, void and ineffective.
>
> - Balochistan did not have the legal power to enter into the CHEJVA or related agreements in the manner in which it purportedly did.
>
> - All key provisions in the CHEJVA were subject to reliance on relaxations which were illegal and void ab initio, so the illegality of the agreement "seeps to its root", and the principle of severability cannot save any part thereof.
>
> - Since the CHEJVA was void and illegal, so were the other related agreements."

By Footnote 11 the Province of Balochistan referred to its 30 September 2013 Objections to Jurisdiction (see above) for the reasons why the Supreme Court of Pakistan held that the CHEJVA was void, and those Objections, note the Province, expressly included corruption.

164. The heading to paragraph 137, and the terms of that paragraph and following were:

"E. ALTERNATIVELY, THE JUDGMENT OF THE PAKISTANI SUPREME COURT AMOUNTS TO A BINDING STATEMENT OF PAKISTANI LAW AS A MATTER OF PRECEDENT

(2) The Pakistani Supreme Court did not err on the facts underlying its findings of invalidity….

(d) Whether the CHEJVA was obtained by corruption…

137. For the avoidance of doubt, Balochistan does not presently allege that the CHEJVA was obtained by corruption. Of course, corruption, given its nature, is difficult to prove. But Balochistan does not need to demonstrate corruption.

138. In some countries, at some times, corruption has been rare. Lawyers and courts operating in those circumstances can adopt regulations and conduct themselves on the basis that it is inherently unlikely that any particular public act is the result of corruption. In those circumstances, it is not surprising that strict proof is required of such an allegation (despite the difficulties inherent in obtaining such proof).

139. Regrettably, however, not all countries have been so fortunate at all times. Where there is a greater likelihood of corruption affecting public acts, the legal system can take a different view of the inherent probability of the involvement of corruption. Its public law may develop differently, in the light of this greater risk.

140. In Pakistan, the law provides that, if a public servant is found to have greater assets than can be the result of his salary or legally-acquired funds, and he is unable to prove the contrary, corruption is inferred, without the need to prove a particular bribe. It was under that provision that Mr Jaffar was convicted (the former chairman of the BDA who procured the conclusion of the CHEJVA).

141. In any event, this is the law of Pakistan, and the law on which the Supreme Court reached its decision. In such circumstances, the Supreme Court cannot be criticised for making the statements it did. There was certainly evidence available from which one might infer that corruption was involved (chiefly, of course, that we now know that Mr Jaffar was a corrupt individual, but also his conduct in relation to the conclusion of the CHEJVA).

142. However, whether or not the Supreme Court was right to refer to corruption is neither here nor there. As the Claimant has rightly accepted, and as the Tribunal has already found in this arbitration, the Supreme Court did not conclude that Balochistan did not have power to make the relaxations or enter into the illegal CHEJVA and related contracts as a result of corruption. Whether or not there was actually corruption is irrelevant to the binding force of the Supreme Court's conclusions.

…

311. As a matter of Pakistani law, the arbitration agreement is invalid. This is because: (a) The Supreme Court adjudged it to be invalid, and that

constitutes a res judicata; and (b) The Supreme Court's judgment is binding as a matter of Pakistani law.

312. The Supreme Court expressly held that the entirety of the CHEJVA was rendered null and void by the illegality. No provision, including the arbitration agreement, was capable of being saved by the principle of separability:

> "As all the key provisions of CHEJVA were made subject to a reliance on relaxations that were illegal and void ab initio, the illegality of the agreement seeps to its root. As such, no operative part of the agreement survives to be independently enforceable and the principle of severability cannot be applied to save any part thereof. The agreement is, therefore, void and unenforceable in its entirety under the law."

165. TCCA emphasises the heading under which paragraphs 137 and 142 fall. In any event, urges TCCA, the Province does not make any allegations of corruption in these sections. The Province was making submissions on why the Supreme Court's judgment had preclusive effect. It did not argue that the Supreme Court invalidated the CHEJVA or the arbitration agreement on the basis of corruption.

166. TCCA notes that what the Province said in its submissions under "V. THE ARBITRATION AGREEMENT IN THE CHEJVA IS INVALID") was:

> " It is common ground that s.7 of the English Arbitration Act 1996 applies, so the invalidity of the CHEJVA (and related agreements) does not automatically lead to the invalidity of the arbitration agreement therein."

167. Notably, says TCCA, the Province said this before the ICC tribunal had decided that English law applies to the arbitration agreement. At paragraphs 293-338 the Province addressed the governing law of the arbitration agreement and the validity of the arbitration agreement under Pakistani law and the validity of the arbitration agreement under English law, and made no allegations of corruption.

168. The Province responds that footnote 11 referred to the 30 September 2013 submissions in which corruption was raised by the Province as a jurisdictional objection. The Province says that TCCA ignores that the arbitration agreement was said to be void, among other reason, for due to the invalidity of the CHEJVA (see e.g. paragraph 312). It argues that its submissions at the time have to be read by reference to the ICC tribunal's rulings in the Redfern Schedule on the disclosure application. The Province points out that at footnote 159 it expressly linked its submissions to the "finding" that the ICC tribunal had made in the Redfern Schedule on the disclosure application to the effect that the Supreme Court did not invalidate the CHEJVA on the basis of corruption. That is a finding, says the Province, which the Province challenges in this Arbitration Claim. Further, it was making the point at the time that whether or not there was corruption was irrelevant to the binding force of the Supreme Court's conclusions.

169. While TCCA again sought to take points about the ambit of the Province of Balochistan's case on jurisdiction in a final response of 12 June 2014 (see e.g. paragraph 287), the Province says TCCA recognised (as it had to) that the Province was maintaining a case on illegality.

170. In my judgment Stage 3 involved these essential points:

(1) The Province of Balochistan relied on the decision of the Supreme Court of Pakistan and its finding that the CHEJVA was void and illegal.

(2) The ICC tribunal was being asked by the Province to give effect to the consequences of the decision of the Supreme Court of Pakistan, and in particular its consequences for the alleged arbitration agreement and the ICC tribunal's jurisdiction.

(3) The ICC tribunal was not being asked by the Province to decide whether, independently of the decision of the Supreme Court of Pakistan, there was corruption rendering the CHEJVA and related agreements void.

(4) The ICC tribunal made clear that the Province had not sought to make out an independent case of corruption leading to the invalidity of the arbitration agreement.

(5) The ICC tribunal also made clear its view that whilst the Supreme Court of Pakistan referred to corruption it did not invalidate the CHEJVA and related agreements on that basis.

(6) The Province of Balochistan itself made clear it did "not presently allege that the CHEJVA was obtained by corruption", and did not need to.

(7) The Province further emphasised that "[t]he Supreme Court did not conclude that Balochistan did not have power to make the relaxations or enter into the illegal CHEJVA and related contracts as a result of corruption" and that "whether or not there was actually corruption is irrelevant to the binding force of the Supreme Court's conclusions."

171. In the result, the position of the Province of Balochistan was that what mattered was that the Supreme Court of Pakistan had decided that the CHEJVA and related agreements were void.

172. The Province must have concluded that that was enough for its purpose in the context of jurisdiction. If it was necessary to go into the reasons for the decision of the Supreme Court then where (for example) BMCR 1970 was concerned there could be no argument over how the Supreme Court used BMCR 1970 to reach its decision. It is therefore understandable that the Province should convey that it did not need to make a, more difficult, case that the basis of the Supreme Court's decision was because the CHEJVA and related agreements were obtained by corruption. But even leaving that point aside, what is clear is that the Province did not seek to make out an independent case of corruption leading to the invalidity of the arbitration agreement.

173. In the course of its argument over what I have termed Stage 3, and in relation to the refusal by the ICC tribunal of its request 8 for documents, the Province of Balochistan also says that the ICC tribunal denied the Province the opportunity to make out an independent case on corruption, when the Province had already said corruption was relevant to jurisdiction. In its written argument the Province says that the ICC tribunal decided on 12 February 2014 "that [the Province of Balochistan] should not be entitled to any disclosure to make out an independent

case of corruption for the purposes of a jurisdictional objection." Mr Hancock QC argued that "essentially, to put it bluntly, and with the very greatest of respect, the [ICC] tribunal put the cart before the horse, in the sense they said: you're not making an allegation so we're not going to give you the documents with which to found any such allegation".

174. I do not accept that the ICC tribunal denied that opportunity to the Province to make out an independent case on corruption. The ICC tribunal made clear that its reference point was that the Province had not sought to make out an independent case on the basis of corruption. That absence of an independent case was properly within the ICC tribunal's reasons for refusing request 8, rather than the refusal of request 8 being the reason for the absence of an independent case.

175. The allegation has to come first, to provide the foundation for the disclosure sought, and the Province was not making the allegation. It confined itself to the contention that what mattered was what (it argued) the Supreme Court of Pakistan had decided; that is, to an allegation that the Supreme Court's decision concluded the matter. In May 2014 the Province said in terms it did "not presently allege that the CHEJVA was obtained by corruption… [and did] not need to.". That was not a new position; it represented its position in February 2014 when the ICC tribunal ruled on its disclosure request. Its choice of allegation was a careful one.

Stage 4: The ICC tribunal's "Rulings on Preliminary Issues", including jurisdiction, on 21 October 2014

176. On 21 October 2014 the ICC Tribunal delivered its "Rulings on Preliminary Issues", including jurisdiction.

177. At paragraph 133, the ICC tribunal stated that:

> "the main factual elements in the Judgment of the Supreme Court [of Pakistan] which are immediately relevant are these: … (6) There were "shocking disclosures of extensive irregularities and corruption".

178. At paragraph 187, under the cross-headings "The Government's position" "*The arbitration agreement is invalid*" the ICC tribunal wrote:

> "The Government's position is that the arbitration agreement is governed by Pakistani law, and that it is invalid under that law. The Supreme Court found (para 24) "… no operative part of the agreement survives to be independently enforceable and the principle of severability cannot be applied to save any part thereof. The agreement is, therefore, void and unenforceable in its entirety under the law" and also said that no stay was available under the New York Convention (para 102 [sic]), which only made sense if it had decided that the arbitration agreement was null and void.

179. At paragraph 236 the ICC tribunal decided that the arbitration agreement in the CHEJVA was governed by English law:

> "… under which it is valid, unless any of the vitiating factors alleged by the Government [of Balochistan] to exist under Pakistani law apply so as to invalidate the arbitration agreement".

180. At paragraph 374, under the cross-headings "The Government's Position" and "*Corruption*" the ICC tribunal wrote:

> "The officials involved in the conclusion of the CHEJVA violated their public duties under Pakistani law and were induced into giving undue advantages and benefits to TCCA's predecessor relating to the CHEJVA. Once the Supreme Court had inspected "the entire record relating to CHEJVA", it found that the record "made shocking disclosures of extensive irregularities and corruption."

181. At paragraph 391, the ICC tribunal recorded TCCA's position that:

> "The CHEJVA is not invalid due to corruption. Contrary to the Government's assertions, the Supreme Court did not find corruption. It referred to corruption but did not invalidate the contracts on that basis. There was no corruption involved in the CHEJVA or the relaxations of the 1970 BM Rules.".

182. At paragraph 393, under the cross-heading "The Tribunal's conclusions" the ICC tribunal wrote:

> "The Supreme Court found that (1) the agreements were invalid by virtue of section 23 of the Contract Act because of unlawful relaxations of the BM Rules requirements; (2) the agreements were void by virtue of section 20 because of a mistake of fact, namely that the BDA was an agent for the Government and/or there had been unlawful relaxations; (3) the agreements were void for uncertainty under section 29 because the map annexed did not correlate with the CHEJVA."

183. At paragraph 396, under the cross-headings "The Tribunal's conclusions" and "*Corruption*" the ICC tribunal wrote:

> "Although the Supreme Court said (at para 116) that the record showed "extensive irregularities and corruption" it made no finding, and did not invalidate the Agreements on this ground. No separate arguments or evidence have been put before this Tribunal, and therefore the Tribunal makes no ruling on this question."

The paragraph of the Supreme Court's judgment to which the ICC tribunal referred (paragraph [116)] is set out earlier in this judgment.

184. The Province of Balochistan says that it is plain that corruption was an issue before the ICC tribunal, otherwise there would have been no need to refer to the parties' positions on it and then address it.

185. In its paragraph 396, says the Province, the ICC tribunal restated the ruling made in response to document requests that the Supreme Court of Pakistan had made no finding of corruption and that the Province had not made out an independent case on corruption. However, the Province says, it had in fact argued before the ICC tribunal that the Supreme Court of Pakistan had made findings of corruption and

that these invalidated the arbitration agreement. At the very least though, the ICC tribunal ruled that the Supreme Court had made no findings of corruption, and that is a point which the Province challenges in this Arbitration Claim.

186. The Province argues (a) the Province plainly raised corruption as a jurisdictional 'ground of objection' (in terms and/or by reference to the Judgment of the Supreme Court of Pakistan), (b) TCCA sought to address that submission, and (c) the ICC tribunal then addressed the ground of objection in its decision (even if ultimately it found against the Province).

187. Significantly, says the Province, this was apparently recognised by TCCA itself in its initial evidence for this Arbitration Claim. In particular, at paragraph 75(b) of a first witness statement on behalf of TCCA Ms Natalie Reid addressed 'corruption' noting that "[t]he ICC Tribunal found that the [Judgment of the Supreme Court of Pakistan] did not invalidate the CHEJVA generally, or the arbitration agreement specifically, on grounds of corruption and Balochistan had not advanced new arguments before the ICC Tribunal." Accordingly, the Province argues, it raised corruption as a ground of objection and TCCA recognised that the point was before the ICC tribunal. The Province adds that its submissions encompassed a range of sub-points or arguments – including the BM Rules, mistake under the Contract Act and inferences of corruption concerning bribes (including pre/post contract corruption).

188. TCCA says that the ICC tribunal did not "restate" its ruling on the Province's documents request or find that the Province had not "made out" an independent case on corruption. Rather, it decided that the Supreme Court made no finding of corruption and had not invalidated the Agreements on that ground. When the ICC tribunal then said "No separate arguments or evidence have been put before this Tribunal, and therefore the Tribunal makes no ruling on this question.", in short, the ICC tribunal was saying the Province did not make a case of corruption, so the tribunal did not need to rule on corruption.

189. In my judgment the essential points for Stage 4 are:

    (1) The ICC tribunal was being asked by the Province to accept and apply the decision of the Supreme Court, which was said to include that the arbitration agreement was null and void.

    (2) The ICC tribunal was not being asked by the Province to decide whether, independently of the decision of the Supreme Court of Pakistan, there was corruption rendering the CHEJVA and related agreements void.

    (3) The ICC tribunal decided that the Supreme Court made no finding of corruption, and that the Supreme Court did not invalidate any agreement on this ground.

    (4) The ICC tribunal made no ruling itself on the question of corruption because no separate arguments or evidence had been put before it.

    (5) Corruption was not an issue before the ICC tribunal other than as identified above. What is identified above shows why the ICC tribunal referred to the parties' positions and then addressed corruption in the way that it did.

(6) Reference by the Province of Balochistan before the ICC tribunal to the effect that the Supreme Court of Pakistan had made findings of corruption and that these invalidated the arbitration agreement was confined to the compass of challenge identified above.

Stage 5: The October/November 2014 exchange, between the parties and the ICC tribunal

190. By email dated 29 October 2014 the ICC tribunal wrote to the parties in these terms:

> "The Tribunal stated … that the rulings were not an interim or partial award and would be incorporated in a partial or final award on the merits of the proceedings.
>
> The ICC has suggested that, to avoid any possible prejudice to either party from the adoption of that course, the parties should be given the option of the rulings being given as a partial award after the normal scrutiny by the ICC. The Tribunal has agreed to that suggestion and the parties are therefore informed that if either party indicates (or both parties indicate) by November 21, 2014, that it wishes (or they wish) that course to be adopted, the Tribunal will (subject to scrutiny by the ICC) make a partial award."

191. The parties responded by a letter dated 21 November 2014 to the ICC tribunal:

> "The Parties have consulted following the President's email to them on 29 October 2014. Neither Party requests that the Tribunal issue the Rulings on Preliminary Issues dated 21 October 2014 as a Partial Award, with the understanding that [TCCA] will not assert that [the Province of Balochistan's] decision not to seek review of the Rulings prior to the Tribunal's incorporation of those Rulings into an Award shall compromise whatever right [the Province] may have in relation to challenging, the enforcement of, the recognition of, or any other form of review of the Award, upon its issuance."

192. There is a dispute between the parties as to the effect of this exchange ("the October/November 2014 exchange").

193. The Province of Balochistan describes this as a "standstill agreement". On the Province's case its effect was that after this point, the Province did not "take part" or "continue to take part" in the arbitration within the meaning of section 73. After this point, says the Province, everything it did was subject to its right to challenge jurisdiction. The parties' response itself says that the agreement to delay the incorporation of the Rulings on Preliminary Issues into an Award shall not prejudice "whatever right" the Province has. That also means, says the Province, that any subsequent disavowal of corruption as a ground for a jurisdiction challenge is irrelevant.

194. TCCA's position is that this is not a "standstill agreement". The parties were agreeing, says TCCA, that if the Province of Balochistan did not challenge the Rulings on Preliminary Issues within 28 days, then it would not lose its right to

bring a challenge to this Court under the 1996 Act. This agreement solely related to the question of the timing of a challenge in the English courts. There is nothing in the exchange, says TCCA, suggesting that the Province could continue to participate in the arbitration without raising any jurisdictional objections with the ICC tribunal. Neither TCCA nor the ICC tribunal would have agreed to this, suggests TCCA.

195. In my judgment it is not fruitful to debate whether the exchange is well described as a "standstill agreement", because that simply invites a debate about what the term "standstill agreement" can encompass, and that may depend on context and more.

196. In terms, the October/November 2014 exchange comprised an agreement to postpone the point at which "review of the Rulings", including "challenging", "enforcement" and "recognition", required to be sought until "the Tribunal's incorporation of those Rulings into an Award".

197. Section 70(3) of the 1996 Act requires an application to the Court under section 67 (substantive jurisdiction) or section 68 (serious irregularity) to be brought within 28 days of an award. Section 67(1) and section 68(1) each include reference to the fact that a party may lose, under section 73, the right to object. Section 73 has been set out above.

198. So far as material for the purposes of the present case, in my judgment the October/November 2014 exchange amounted to the following in relation to jurisdiction:

(1) The parties agreed that the Rulings were not yet an award.

(2) The 28-day period under section 70(3) of the 1996 Act would therefore run not from the Rulings but from the point at which an award was made.

(3) In the meantime, a right to object to the substantive jurisdiction of the ICC tribunal would not be lost under section 73 where the objection had been made in the proceedings before the ICC tribunal that resulted in the Rulings.

(4) The parties' position in relation to an objection that was not made remained governed by section 73; the October/November exchange did not encompass or affect the position of any objection that was not made, whether it was not made because a party did not know and could not with reasonable diligence have discovered it, or for any other reason.

199. It follows that I reject the contention of the Province of Balochistan that after the October/November 2014 exchange, the Province did not "take part" or "continue to take part" in the ICC arbitration within the meaning of section 73. I accept that after the October/November 2014 exchange everything the Province did was subject to its right (in the sense of "whatever right [the Province] may have") to challenge jurisdiction where that meant challenge ("or any other form of review of") the award that would in due course incorporate the Rulings.

200. I see no basis for the proposition that a subsequent disavowal of corruption as a ground for a jurisdiction challenge is irrelevant: the parties did not provide in the October/November 2014 exchange for something that they might yet do of that nature.

Stage 6: Following the October/November 2014 exchange

201. The Province of Balochistan says that the events next considered must each be considered in the context of the October/November 2014 exchange. I accept that, but have set out above, so far as material, what that exchange did and did not amount to.

202. Shortly before 31 August 2015 Allen & Overy LLP, with a team led by Judith Gill QC, replaced Omnia Strategy LLP as Counsel for the Government of Balochistan in the ICC proceedings. Allen & Overy wrote to the ICC tribunal on 31 August 2015 to inform it of this change.

203. In that letter the firm wrote:

> "The [Government of Balochistan] has recently uncovered cogent new evidence of extensive corruption by TCC in relation to the Reko Diq project, including bribery of a broad range of [Government] officials. The issue of corruption has long been suspected and the Tribunal will recall that during the preliminary phase the [Government of Balochistan] referred to the Supreme Court's identification of *"extensive irregularities and corruption"* in respect of Reko Diq. However, the Supreme Court made no finding on this and the Tribunal noted in its Decision on Preliminary Issues that *"no separate arguments have been put before the Tribunal, and therefore the Tribunal makes no ruling on this question."*
>
> …
>
> … [T]his new evidence will have significant consequences including for the procedure going forward. It goes to important issues which have not been dealt with in the arbitration to date and will not require a re-opening of the proceedings as a whole. …"

204. On 10 November 2015 the Province of Balochistan submitted a Reply to submissions that TCCA filed in opposition to the Province's application for leave to submit what it termed "new evidence". The Reply included this passage:

> "10. Balochistan's position in these proceedings has been that it was not challenging the CHEJVA on grounds of corruption notwithstanding suspicions of corruption, in light of difficulties in evidencing corruption. While the Tribunal intended to address "all issues relating to the validity and binding nature of the CHEJVA" at the June 2014 hearing, the Tribunal made no ruling on the question of corruption in its Ruling on Preliminary Issues, there being "no separate arguments or evidence … put before [the] Tribunal"."

205. On 9 December 2015 the ICC tribunal responded with a ruling including these terms under the heading "Tribunal's analysis":

> "7. The tribunal has considered the submissions. The allegations, or similar allegations have been made from an early stage in the proceedings in the Pakistani courts, and the respondent did not adduce any positive material in

this arbitration until the present application. The tribunal is not convinced that the evidence could not have been presented and/or obtained much earlier. But without in any way suggesting that the allegations have merit, the tribunal considers that it is important that allegations of this kind be dealt with, and, although they should have been detailed much earlier, the claimant will not be substantially prejudiced by having to deal with them at this stage.

8. As to procedure, the respondent is in effect asking for another preliminary issue to be determined in the form of an application to dismiss.

9. The tribunal is not satisfied at this stage that the hearing of such a further preliminary issue would be efficient or appropriate, and therefore orders that:

(1) The corruption allegations be set out in the Supplemental Counter-Memorial to be served pursuant to the tribunal's previous order in its email dated April 28, 2015;

(2) pending service of the Supplemental Counter-Memorial, the respondent should serve by January 11, 2016 in final form the section dealing with the corruption allegations supported by all witness statements and relevant documents in its possession;

(3) the parties should report to the tribunal by January 25, 2016 what progress has been made on agreeing a timetable for service of the Supplemental Counter-Memorial and for other procedural steps leading to the scheduled hearing, as requested in the tribunal's email of August 17, 2015."

206. On 11 January 2016 the Province of Balochistan submitted a "Supplemental Counter-Memorial" on "TCC's Corruption and its Legal Consequences"". This included the following passage:

> "207. There is well known precedent, in the form of Judge Lagergren's 1963 award [ICC Case No. 1110 of 1963, 3 Arbitration International (1994, no.3) at pp. 282-294.], for an ICC tribunal to hold that the existence of bribery can lead to a finding that a tribunal does not have jurisdiction. Nevertheless, contemporary arbitral practice has moved away from finding that corruption has an impact on the jurisdiction of a tribunal and has instead given effect to the doctrine of separability. This doctrine is enshrined in the laws and rules applicable to these proceedings."

207. The last sentence was followed by a footnote 416 in these terms:

> "RLA-232, English Arbitration Act, section 7; RLA-100, ICC Rules Article 6(4). See also the Tribunal's Rulings on Preliminary Issues dated 21 October 2014, paras. 218-219. The principle is also contained within Pakistani law (see Respondent's Reply on Preliminary Issues, para. 314(b))".

208. From paragraph 208 the Province continued:

> "208. An exception to this practice exists, as a matter of English law, where "bribery impeaches the arbitration clause in particular" [footnote 417: see below]. The [Government of Balochistan] does not seek to pursue the argument that the arbitration agreement in the CHEJVA is vitiated by TCC's

corruption. Accordingly, the [Government of Balochistan] accepts that the Tribunal has jurisdiction to determine TCC's claims.

…

216.The principle of issue estoppel and the rule in Henderson v. Henderson have no application to the [Government of Balochistan]'s submissions on corruption. In respect of the former, it is clear from the chronology above that the issue of corruption was not put to the Tribunal for determination at the June 2014 hearing. As such, the Tribunal did not decide that issue. In respect of the latter, the [Government of Balochistan] could not and should not have put the issue to the Tribunal during the June 2014 hearing as, at that stage, it had insufficient evidence to substantiate the argument. While the Tribunal has suggested that the evidence could have been presented earlier, it is the [Government of Balochistan's] case that this was not possible. The obtaining of this evidence required a detailed investigation with the cooperation of third parties who had not to that date been involved. Had such an investigation been conducted earlier, there is no guarantee that the individuals that now provide evidence would have cooperated before the passage of time loosened TCC's corrupt influence in Pakistan. In any event, even if the [Government of Balochistan] could have obtained this evidence earlier, it is not an abuse of process for the Tribunal to address these matters now. The delay is primarily attributable to the fact that TCC has concealed and denied its wrongdoing.

…

313. At the outset, the [Government of Balochistan] notes that corruption was not invoked as a basis for rejecting TCC's Mining Lease Application. The reason for this is obvious – evidence of that illegality has only recently come to light. The [Government of Balochistan] submits, however, that TCC's corruption is still highly relevant to a consideration of the merits of the Claimant's Mining Lease Application and its rejection.

…

317. TCC claims that the [Government of Balochistan] breached Clause 11.8.2 of the CHEJVA, BM Rule 48(1), Pakistani and international law when the MMDD denied the Claimant's Mining Lease Application. Specifically, TCC argues that: (i) the [Government of Balochistan] agreed to grant TCCA the right to mine Reko Diq upon satisfaction of routine requirements; (ii) TCCA met or exceeded all requirements for the grant of a mining lease; and (iii) the [Government of Balochistan] wrongfully denied the mining lease.

318. The [Government of Balochistan] presented numerous reasons why these arguments were wrong in its Counter-Memorial. It does not repeat those arguments here (although it will address these in due course in Section 2 of this Supplemental Counter-Memorial). Rather, this Subsection addresses the numerous reasons why TCC's corruption provides a further, separate basis for rejecting the Claimant's claims on the merits. In short, in addition to the grounds set out in the 21 September 2011 Notice rejecting the Mining Lease Application, the Licensing Authority had every right to reject that application in light of TCC's corruption.

209. Footnote 417 was in these terms:

> "RLA-261, Fiona Trust and Holding Corporation and others v. Privalov and others [2007] EWCA Civ 20 at para. 29. In this respect, it is noteworthy that the Supreme Court Judgment found that "[a]s all the key provisions of CHEJVA were made subject to a reliance on relaxations that were illegal and void ab initio, the illegality of the agreement seeps to its root. As such, no operative part of the agreement survives to be independently enforceable and the principle of severability cannot be applied to save any part thereof. The agreement is, therefore, void and unenforceable in its entirety under the law" (at para. 24). The [Government of Balochistan] does not pursue this point in light of the Tribunal's decision in its Rulings on Preliminary Issues.

210. As regards footnote 416, the Province says that its submissions on corruption were premised on the ICC tribunal's findings, including that English law governed the arbitration agreement (it draws attention to the reference to section 7 of the 1996 Act). However, it says, that finding was subject to review as a result of the October/November exchange.

211. As regards footnote 417, the Province says it stated that it was not pursuing a jurisdictional objection based on corruption "in light of the Tribunal's decision in its Rulings on Preliminary Issues". The Province says that is why it stated in paragraph 208 that "[the Government of Balochistan] does not seek to pursue the argument that the arbitration agreement in the CHEJVA is vitiated by TCC's corruption" and "[a]ccordingly, the [Government of Balochistan] accepts that the Tribunal has jurisdiction to determine TCC's claims". That submission, says the Province, was made and understood in the light of the October/November 2014 exchange (an exchange that, as discussed above, it sees as a "standstill agreement"), pursuant to which the ICC tribunal's jurisdiction could be challenged.

212. On the Province's argument, when it stated that it did not 'pursue' the argument that "the arbitration agreement in the CHEJVA is vitiated by TCC's corruption" it was highlighting the fact that the Province had raised corruption as a ground of objection at the correct time – i.e. it had raised corruption but was not 'pursuing' the point from 2016 onwards. Secondly, the Province was not 'pursuing' the point "in light of the Tribunal's decision in its Rulings on Preliminary Issues".

213. That was an unsurprising stance, says the Province: it did not have any alternative given the ICC tribunal's decision, including its decision that the arbitration agreement is governed by English law (a decision which is the subject of this Arbitration Claim), the affects of which English law or Pakistan law is of primary relevance when considering the consequences of bribery and corruption. By footnote 417, the Province says it expressly linked its position on corruption to the ICC tribunal's Rulings on Preliminary Issues, which Rulings were then subject to challenge by the Province. The Province did not need to refer to the October/November 2014 exchange continuously as the parties had already reached an agreement that the Province's participation on the merits was subject to a jurisdiction challenge.

214. In his oral argument for the Province, Mr Hancock QC said that reading paragraphs 207-208 and footnote 417 fairly what the Province of Balochistan was clearly saying was that in the light of the fact that the ICC tribunal had already determined that it had jurisdiction, no jurisdictional complaint was made in this second stage of

the arbitration. That in turn, said Mr Hancock QC, has to be read against the background of the agreement (the October/November 2014 exchange) that it remained open to the Province to make a challenge to the jurisdictional ruling of the tribunal by virtue of the agreement that the parties had reached, following the ICC tribunal's decision not to incorporate or not to issue that decision in the form of an award.

215. Mr Hancock QC very fairly and frankly acknowledged that there was no reference, in those particular paragraphs, to the postponement of the period of bringing a challenge before the Court, but he urged that one has to read the paragraphs against the background of the fact that the parties had agreed that there would be such a postponement, and that there was, until the award was rendered, no final decision on jurisdiction by the tribunal, because that was (he contended) the nature of the agreement that the parties reached in response to the invitation made by the ICC tribunal. So, as he summarised, although there was no express reference back to the existence of the October/November 2014 exchange, the whole of the relevant submissions on 11 January 2016 were put forward against the background of the exchange, of which, of course, both parties had knowledge.

216. TCCA contends that the Province of Balochistan expressly disavowed any objection to jurisdiction based on corruption allegations. The Province did not refer to the October/November 2014 exchange to explain why it was not raising a jurisdictional objection based on corruption. Instead, it explained that it was not raising a jurisdictional objection based on corruption because of the "doctrine of separability."

217. TCCA underlines the following statements by the Province:

    (a) at paragraph 216: "the issue of corruption was not put to the Tribunal for determination at the June 2014 hearing. As such, the Tribunal did not decide the issue.";

    (b) at paragraph 313: "TCC's corruption is still highly relevant to a consideration of the merits of the Claimant's Mining Lease Application and its rejection";

    (c) at paragraph 318: "Rather, this Subsection addresses the numerous reasons why TCC's corruption provides a further, separate basis for rejecting the Claimant's claims on the merits."

218. In my judgment, Stage 6 involves these essential points:

    (1) The Province of Balochistan had what it considered to be "recently uncovered cogent new evidence of extensive corruption by TCC in relation to the Reko Diq project, including bribery of a broad range of [Government] officials".

    (2) It was the Province's position that it was not too late to raise the issue of corruption, for reasons summarised below.

    (3) Given its position, it was open to the Province to request the ICC tribunal to look at the issue of corruption as an issue going to jurisdiction, and not only as an issue going to the merits of the claims in the arbitration.

(4) The Province did not to do so, for reasons it explained and which are summarised below.

(5) Instead the Province confined its request of the ICC tribunal to look at the issue of corruption as an issue going to the merits of the claims in the arbitration ("a consideration of the merits of the Claimant's Mining Lease Application and its rejection" and particularly "in addition to the grounds set out in the 21 September 2011 Notice rejecting the Mining Lease Application, [that] the Licensing Authority had every right to reject that application in light of TCC's corruption.").

(6) The Province, advised and represented by a leading and expert international law firm, appreciated what it was doing.

(7) Both the Province and TCCA must be taken to have understood the October/November 2014 exchange to have had the meaning and effect held at Stage 5 above.

219. The reasons given by the Province for its position that it was not too late to raise the issue of corruption, were:

(a) "the issue of corruption was not put to the Tribunal for determination at the June 2014 hearing … [and] [a]s such, the Tribunal did not decide that issue.";

(b) "the [Government of Balochistan] could not and should not have put the issue to the Tribunal during the June 2014 hearing as, at that stage, it had insufficient evidence to substantiate the argument.";

(c) it "was not possible" to have presented earlier the evidence it now had, because a detailed investigation had been required "with the cooperation of third parties who had not to that date been involved";

(d) "[i]n any event, even if the [Government of Balochistan] could have obtained this evidence earlier, it is not an abuse of process for the Tribunal to address these matters now";

(e) the delay was "primarily attributable to the fact that TCC has concealed and denied its wrongdoing".

220. The Province explained openly its position on the law and practice involved, as (a) that "contemporary arbitral practice has moved away from finding that corruption has an impact on the jurisdiction of a tribunal" and (b) the "doctrine of separability … is enshrined in the laws and rules applicable to these proceedings."

221. In this connection the Province referenced English law and the ICC tribunal's Rulings dated 21 October 2014, but it also referenced the ICC Rules and stated that "the principle is also contained within Pakistani law".

222. The Province explained that its position was that an exception existed "as a matter of English law", where "bribery impeaches the arbitration clause in particular" but made clear it did not seek to invoke this ("the [Government of Balochistan] does not seek to pursue the argument that the arbitration agreement in the CHEJVA is vitiated by TCC's corruption"). The Province summarised its position in these

terms: "Accordingly, the [Government of Balochistan] accepts that the Tribunal has jurisdiction to determine TCC's claims."

223. It is not possible for me to accept that the Province was limiting this acceptance to the position arrived at by the ICC's Tribunal's Rulings dated 21 October 2014 and thus open to review and change should there be a challenge to the Ruling on jurisdiction once the Rulings had been incorporated into an award. The acceptance was based on what the Province itself said was contemporary arbitration practice and a doctrine found in English law and the laws of Pakistan. It identified an exception under English law but made clear that it did not pursue that.

224. The sentence in footnote 417 to paragraph 208 of the Province's "Supplemental Counter-Memorial" ("[Government of Balochistan] does not pursue this point in light of the Tribunal's decision in its Rulings on Preliminary Issues.") was in my judgment simply completing the Province's explanation of why it did not pursue what it identified as an exception under English law.

225. The sentence in terms and in context accepts the Tribunal's decision as something that led to the Province's decision not to request the ICC tribunal to look at the issue of corruption as an issue going to jurisdiction as well as an issue going to the merits of the claims in the arbitration. The Province did not qualify the sentence to the effect that the Province might reopen its decision should the ICC tribunal's decision be challenged. It was in my judgment essential that it qualify the sentence if that was to be its position.

226. Nor do I accept that the context, especially the fact that the Province was saying to the ICC tribunal that there was new evidence, allows the interpretation that in its reference to "not pursu[ing] this point" the Province was saying that it was raising or maintaining corruption as a jurisdictional objection but that the time for its further pursuit lay ahead, in particular at the time of any challenge to the ICC tribunal's 2014 Rulings.

227. The Province disavowed corruption as a ground for a jurisdiction challenge. As I stated above when dealing with Stage 5, the parties did not provide in the October/November 2014 exchange for something that they might yet do of that nature. The October/November 2014 exchange does not protect the Province from the consequences of what it did at Stage 6. In saying that I do not wish to be taken to suggest that the Province made any error at Stage 6. It made what strikes me as a sensible and realistic decision from among the possible decisions open to it.

228. I respectfully disagree with the Province's contention that it did not have any alternative given the ICC tribunal's decision on jurisdiction. The Province could at least have reserved its position.

229. But it is possible to take the point a little further. The Province explained its position that an exception existed "as a matter of English law", where "bribery impeaches the arbitration clause in particular". It did not have to accept that if the arbitration agreement is governed by English law (as the ICC tribunal had held) then what it termed the "exception" did not apply on the facts, with the consequence that corruption could not impeach the arbitration clause. And if the arbitration agreement is governed by the law of Pakistan, the Province had chosen to accept that the doctrine of separability "is enshrined in the laws and rules applicable to these proceedings" and that "the principle is … contained within Pakistani law", without

suggesting there was an "exception" akin to that existing "as a matter of English law".

Remaining analysis and conclusions

230. I have paused in the course of and at the end of reviewing each of the 6 Stages where it was convenient to draw attention to points as they arose. I now attempt simply to complete the analysis and state my conclusions. What follows should be taken together with what I have already addressed above.

231. The question for this Court is whether the Corruption Allegation is precluded by section 73(1) of the 1996 Act.

232. The Corruption Allegation is defined to mean the allegation by the Province of Balochistan that the ICC tribunal lacked jurisdiction because the CHEJVA and related agreements were void due to the existence of corruption.

233. In my judgment, the jurisdictional issue (relevant for present purposes) that was raised before the ICC tribunal by the Province was whether the Supreme Court of Pakistan had decided that the arbitration agreement was void, including on the basis of corruption, and if so whether the ICC tribunal should give effect to that decision.

234. The Corruption Allegation as defined is a wider and different allegation to the jurisdictional issue that was raised.

235. This can be illustrated by an example: when at paragraph 43 of their written argument the Province's advocates say that as at 2014 it "plainly raised corruption as a jurisdictional 'ground of objection'" they are constrained (very responsibly) to add "(in terms and/or by reference to the [Judgment of the Supreme Court of Balochistan])". Another example is when at paragraph 132 of their written argument the Province's advocates say that the Province "raised corruption as a ground on which it challenged jurisdiction in the Arbitration Claim Form as a stand-alone ground" they are constrained (again very responsibly) to add "(even if by reference to the [Judgment of the Supreme Court of Pakistan]".

236. The difference might be expressed in basic terms as the difference between a party saying to an arbitral tribunal: "You have no jurisdiction because the Supreme Court of Pakistan has decided that the arbitration agreement was void including on the basis of corruption", and a party saying to the arbitral tribunal: "You have no jurisdiction because the arbitration agreement is void due to the existence of corruption".

237. Although each mentions corruption, these are different grounds. They are not differences of argument or evidence. The former requires examination of what the Supreme Court decided. The latter requires examination of whether there was corruption such as to avoid the arbitration agreement.

238. At times when the Province emphasised that corruption was raised and TCCA emphasised that a jurisdictional objection based on corruption was not raised, the difference can seemed blurred. An example is, with respect, where the advocates for the Province contend (at paragraph 46 of its written argument) that "the fact of the

allegation of corruption before the ICC tribunal is all that matters for present purposes". So too, and again with respect, is when in oral argument Mr Hancock QC said that what has to have been raised is the ground, broadly construed "in this instance, corruption", and not specific evidence or specific arguments in relation to that ground. "Corruption" does not, in my judgment, sufficiently closely define the ground.

239. The essentials are that raising the contention that there was corruption is not enough to raise it as a jurisdictional objection; and raising the contention as a jurisdictional objection that the Supreme Court of Pakistan had decided that the arbitration agreement was void including on the basis of corruption is not the same as raising corruption as a jurisdictional objection.

240. In the result, the Corruption Allegation is precluded by section 73(1) of the 1996 Act because the Province did not make the jurisdictional objection to the ICC tribunal that the CHEJVA and related agreements were void due to the existence of corruption.

241. As to the jurisdictional objection that was raised before the ICC tribunal, I have explained earlier why the Judgment of the Supreme Court of Balochistan did not, in my judgment, decide that the CHEJVA and related agreements were void due to the existence of corruption.

242. The latter is a technical conclusion reached from examination of the Judgment itself, but it does not sit distant from the merits. As will have been clear from earlier in this judgment, in its "Supplemental Counter-Memorial" of 11 January 2016, the Province of Balochistan itself said that its Government "had insufficient evidence to substantiate" "the issue of corruption". The Province was referring to June 2014, that is more than a year after the Judgment of the Supreme Court of Pakistan.

The Province's knowledge, and reasonable diligence

243. Section 73 would not prevent the making of an objection that the ICC tribunal lacks substantive jurisdiction if the Province:

> "… shows that, at the time [it] took part or continued to take part in the proceedings, [it] did not know and could not with reasonable diligence have discovered the grounds for the objection".

244. The Province contends that the question of knowledge and ability to discover the corruption must be tested by reference to the period up to the ICC tribunal's jurisdiction ruling on 21 October 2014. It argues that after November 2014 the Province was not taking part in proceedings for the purposes of section 73(1) and a jurisdiction challenge; the proceedings had moved to the merits phase and the effect of the October/November 2014 exchange was that the Province did not need to make a jurisdiction challenge for the time being.

245. In terms of steps taken to investigate the alleged corruption, the Province offers a chronology summarised in the next paragraphs.

246. The Province says its knowledge developed from 2011 onwards, including in the context of the proceedings before the Supreme Court of Pakistan. That led the Government of Balochistan to form a "Chief Ministers Inspection Team" ("CMIT") to commence an inquiry into suspicions of corrupt practices on the part of BHP in respect of its Reko Diq project.

247. The CMIT inquiry was progressed in tandem with developments in the Supreme Court of Pakistan. At the conclusion of the CMIT's inquiry in January 2012, the CMIT reported that there were serious irregularities in the granting of exceptions and permissions to BHP and "TCC" by the Government of Balochistan in violation of the National Mineral Policy 1995 ("NMP"), BMCR 1970 and the Balochistan Mineral Rules.

248. Mr Gosis (of the law firm GST LLP, which now represents the Province of Balochistan in the ICC arbitration) states in his second witness statement dated 11 September 2020:

> "56. The issue of TCC's wrongdoing and irregularities associated with Reko Diq was […] kept under review by the Government of Balochistan in the course of the Arbitration (in respect of which there is some overlap in the chronology with the Supreme Court proceedings), but as is to be expected when faced with issues of fraud and corruption the evidential picture emerged over time. There is an important distinction to be drawn between suspecting fraud in the first instance and being able to plead a positive case in that regard (i.e. specifically setting out individual allegations of wrongdoing).".
>
> …
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> 57. The question of whether to revisit the CMIT's findings was assessed by the [Province of Balochistan] periodically over the course of 2013/14 and following the Supreme Court's finding of serious procedural and other irregularities in respect of the Reko Diq project".

249. Subsequently, in April 2015, the Province appointed a "Group of Experts" (the "LEG Group") "to re-examine, among other things, the record and allegations of corruption relating to the Reko Diq project […]". That culminated in a 57-page Briefing Note ("the LEG Briefing Note") dated 4 June 2015.

250. The work of the LEG Group was, says the Province, crucial in helping it to discover key evidence of fraud. The LEG Group proposed that a formal investigation be established by the National Accountability Bureau ("NAB") as well as a law firm being instructed to advise on the issues, including vis-à-vis the ICC and ICSID Arbitrations. That led to the Province of Balochistan instructing Allen & Overy LLP.

251. The Province says that Allen & Overy then took over the investigations, meeting individuals in Pakistan, and that in turn led to the Home Secretary of the Government of Balochistan writing formally to the Chairman of the NAB requesting that it initiate a formal inquiry into allegations of corruption by Balochistan officials in respect of the Reko Diq project.

252. On 22 June 2015, Allen & Overy informed the ICSID Tribunal that cogent new evidence of corruption had very recently been brought to their attention by Pakistan. Mr Gosis explains that the Province's knowledge of corruption continued to evolve at this time (from April 2015 onwards) and "particularly so far as information was obtained from witnesses who were not originally interviewed by [the LEG Group]".

253. According to the Province one of the central figures involved in the alleged bribery and corruption scheme is a former long-time "TCC" employee who worked in "TCC's" Quetta office facilitating and making unlawful payments. It was not until the production of this employee's evidence on 18 August 2015 (in the ICSID proceedings), says the Province, "that further details emerged in relation to his involvement in TCC's scheme of bribery and corruption […]".

254. The investigations also led directly to steps being taken against specific individuals the Province explains. It says that since 2016, its knowledge of corruption has continued to develop. Mr Gosis comments that the ICSID proceedings and confidentiality restrictions:

> "… resulted in an effective stay of the NAB's investigation as it had a chilling effect on Pakistan's ability to provide relevant materials to the NAB until 12 July 2019 (upon the issuance of the ICSID Award) when those procedural orders ceased to have effect, as they were stated to remain in place 'until the final conclusion of this arbitration (whether by final award or otherwise)'".

255. NAB's investigations have since, indicates the Province, "recommenced" and there were further developments in late 2020. A Third Witness Statement of Mr Marcus McConnell, served recently, deals with ongoing investigations. The Province says there is every reason to think that "allegations based on evidence that is presently unknown to the Province" exist. The Province has issued an application for specific disclosure against TCCA but TCCA has, in the Province's view, refused to engage with the application.

256. The Province summarises its position as (a) it did not have the evidence concerning corruption upon which it is now able to advance a case prior to 2015, (b) instead, it was the work of the LEG Group in 2015 that resulted in the discovery of the main evidence of corruption and led to other entities becoming involved in the ongoing investigation, and (c) it was not in a position to obtain the evidence prior to 2015 and therefore there is no question of it failing to overcome the threshold in section 73(1).

257. As mentioned above, a "Schedule of Known Corruption Allegations" was served by the Province of Balochistan in response to an order in the proceedings started by the Arbitration Claim and made by Henshaw J. As noted above the Province has also recently served the Third Witness Statement of Marcus McConnell dealing with ongoing investigations. The Province also sets out its case on corruption at paragraph 52 of Draft Particulars of Claim in the Arbitration Claim.

258. The Province of Balochistan highlights, with reference to the question of what would amount to "reasonable diligence", its circumstances as a poor region, a province of a developing South Asian state, with significant demands on its resources and challenged by natural disasters. In this case, an assessment of what would amount to reasonable diligence requires, argues the Province, the Court to

assess the position of the Province, as a province of a developing South Asian state, in all the relevant circumstances.

259. In considering this and timing generally, the Province argues the following are important: (a) the Judgment of the Supreme Court of Pakistan held that the CHEJVA and arbitration agreement were void and (on the Province's case) made findings of corruption; (b) it only became clear, says the Province, that the ICC tribunal would take a different view on that point in 2014; (c) until it became clear that the ICC tribunal would not follow the Judgment of the Supreme Court of Pakistan, the Province could not justify spending funds on any investigation, not least as an 'extremely poor' province and in circumstances where the Supreme Court had largely dealt with the relevant issues; and (d) the Province then acted quickly taking into account its status as a regional state body to convene the Group of Experts and the nature of an investigation into corruption in a multibillion dollar mining project.

260. Lord Goldsmith QC strongly criticises the Province for not adducing evidence from those within the Province involved at the time, and instead choosing to rely on Mr Gosis to provide evidence from a period that pre-dates his firm being instructed. The following passage from the judgment of Cockerill J in ZCCM Investments Holdings plc v Kansanshi Holdings plc and Another [2019] EWHC 1285 (Comm) at [218] was commended as reflecting sound general principle:

> "It is incumbent on a party seeking to bring a claim based on new materials to condescend to real particularity. As noted in Terna in seeking relief from the Court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. Thus if an applicant does not do this, the court is entitled to count any periods where no good excuse is established as being periods lacking in good reason. So too may it draw an inference when issues go un-dealt with."

261. In the course of his oral argument Lord Goldsmith QC was able to demonstrate convincingly that the Third Witness Statement of Marcus McConnell added little that was new.

262. In my judgment, by June 2015 (when Allen & Overy wrote to the ICSID tribunal) or August 2015 (when Allen & Overy wrote to the ICC tribunal) the Province had the knowledge it needed to raise the objection, based on corruption, that the ICC tribunal lacked substantive jurisdiction. It said as much at the time. And in its written argument for the present hearing the Province states (at paragraph 67):

> "[The Province of Balochistan] did not have the evidence concerning corruption upon which it is now able to advance a case prior to 2015. … it was the work of the LEG Group in 2015 that resulted in the discovery of the main evidence of corruption …".

263. The LEG Group was appointed in April 2015, it produced the LEG Briefing Note on 4 June 2015 and Allen & Overy wrote to the ICSID Tribunal on 22 June 2015. The Province has not satisfied me why, if that appointment could be made then, with the results that quickly followed, it could not with reasonable diligence have been made at any earlier point between the Judgment of the Supreme Court of Pakistan in May 2013 and the ICC Tribunal's Rulings on Preliminary Issues in late 2014. Whatever the position before, it knew by February 2014, when the ICC

tribunal refused its disclosure request 8, that the ICC tribunal was of the view that the Supreme Court referred to corruption but did not invalidate the contracts on that basis, and that the Province had not sought to make out an independent case on that basis. The Province simply does not provide the particularity required in its explanations, sufficient to address this specific period of delay in taking steps that it showed it could take.

264. The Province has, on its case, accumulated further evidence of corruption since then but that is a separate point. What matters is whether and when the jurisdictional ground could have been raised as a jurisdictional ground, not whether the evidence and argument to support it might be added to. This is a corollary of the principles and approach identified above when section 73(1) and the authorities on section 73(1) were examined. If something altogether new and of major significance emerged, perhaps deserving the description (applying the principles and approach just mentioned) of a new ground based on corruption, the position may be different, but that is not this case.

265. I fully appreciate, and respect, the economic and other challenges facing the Province of Balochistan. However, those challenges do not account for the Province not raising the objection when, in 2015, it had (on its own acknowledgement) the knowledge to do so, and the advice and assistance of Allen & Overy. Instead, the reason for the Province not raising the ground as a jurisdictional objection in 2015 was, as it explained at the time, because it had made the choice not to, and instead to focus on the argument before the ICC tribunal on the merits. That was an informed choice and a perfectly sensible one.

266. For completeness, in circumstances where, as I have sought to explain above, the Province had not raised the ground before, the October/November 2014 exchange does not entitle the Province to delay raising the ground as a jurisdictional objection until after the Partial Award in 2019.

Issue (2): the Corruption Allegation: waiver by election

267. Is the Corruption Allegation precluded by the doctrine of waiver by election?

268. The issue is framed by reference to the doctrine of waiver by election. In its written argument, TCCA added reference to the doctrine of abuse of process. The Province was entitled to and did challenge that reframing of the issue.

269. Of course, the doctrine of waiver by election is concerned with abuse of process. So too is section 73 of the 1996 Act as the examination of approach and principles undertaken earlier in this judgment shows. However, I confine myself to the issues that were framed for this hearing and therefore address the doctrine of waiver by election but do not reach decisions on the freestanding application of the doctrine of abuse of process to the facts of the case.

270. On behalf of the Province of Balochistan the principles applicable to election are summarised as follows. Election is a doctrine which applies where a choice has to be made between two inconsistent courses of action. In order to show an election, the party seeking to assert that such an election has been made has, first, to show that the other party knew the facts that led to the need to elect; second, that that

other party knew of its legal right to elect; and third, that in the light of that knowledge, both of fact and law, that party made an unequivocal choice to elect to go down one road rather than the other. The question of whether such unequivocal choice has been made is to be viewed from the standpoint of a reasonable person in the position of the other party. Insurance Corporation of the Channel Islands v The Royal Hotel Ltd [1998] Lloyds Rep IR 151 at [162-163] was cited.

271. That summary of principles is sufficient for present purposes, taken with TCCA's citation of the formulation of the doctrine of waiver by election from Lord Diplock's speech in Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850 at 882-883:

> "[…] a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did."

272. In the present case, says TCCA, the Province of Balochistan had knowledge of the relevant facts and was faced with a decision as to whether or not to raise a jurisdictional objection based on corruption. It contends that the Province expressly decided not to raise a jurisdictional issue based on corruption. On that basis, it contends that the Province is barred from reneging on that choice and raising a jurisdictional objection based on corruption in these proceedings. In its written argument (at paragraph 72), the Province suggested that the only statements relied on by TCCA were the two sentences from the Province's Reply of May 2014, but in TCCA's written argument (at paragraph 123) TCCA made clear it relied on a period extending to 11 January 2016.

273. The Province denies that waiver is made out. In the course of its argument it refers to this passage in Bryan J's decision in GPF GP Sarl v Poland [2018] EWHC 409 (Comm) at [72] reflecting the nature of a challenge under section 67:

> "The requirements for a waiver have not been met (and it is difficult to see how a waiver could arise in circumstances where it is well established that there can be a rehearing under section 67, a fact parties are taken to know), and in the context of no restriction being set out in section 67 itself restricting what arguments may be re-run, no question of any loss of a right to advance particular arguments on a rehearing under section 67 can arise."

274. The Province adds that, insofar as the Court concludes that the Province has waived its right to rely on the Corruption Allegation as a jurisdictional objection, that finding can only extend to allegations of bribery and corruption that the Province knows about (whether actually or constructively). It cannot extend to allegations of bribery and corruption that the Province does not know about (whether actually or constructively) because a party cannot waive a right without knowledge of that right (citing Peyman v Lanjani, [1985] 1 Ch 457, 500G per Slade LJ).

275. In the Province's Reply of May 2014 in the ICC arbitration it said, first, "Balochistan does not presently allege that the CHEJVA was obtained by corruption" (paragraph 137) and, second, "[w]hether or not there was actually corruption is irrelevant to the binding force of the Supreme Court's conclusions" (paragraph 142).

276. In my judgment the statements made in the Province's Reply of May 2014 go no further than they say. The first includes a choice but only on whether to allege at that point in time, as an independent allegation, that the CHEJVA was obtained by corruption. The second references the Province's case on the effect of the Judgment of the Supreme Court of Pakistan (the Province's case including the contention that the Supreme Court did decide that the CHEJVA was obtained by corruption).

277. The statements made on 11 January 2016 by the Province in its Reply of that day go as far as they say. The Province said (see paragraphs 208 and footnote 417 of its Reply of that date, quoted above):

> "The [Government of Balochistan] does not seek to pursue the argument that the arbitration agreement in the CHEJVA is vitiated by TCC's corruption. Accordingly, the [Government of Balochistan] accepts that the Tribunal has jurisdiction to determine TCCA's claims."

278. A clear choice was made and the law must hold the Province to this choice. The October/November 2014 exchange does not affect that choice, when that exchange is understood in the way explained above.

279. As to the Province's citation of GPF, the passage from that decision refers to arguments rather than entire jurisdictional grounds. Although on 11 January 2016 the Province described the question whether the arbitration agreement in the CHEJVA is vitiated by corruption as an argument rather than a ground, the question is a ground, as discussed above. As Aikens J summarised the position at [112] in Primetrade (above) the entitlement is to "argue any point coming within the existing 'grounds of objection' to the jurisdiction that were raised before the arbitrators". But in any event, the statement that followed in the present case, that the Government of Balochistan accepted that the Tribunal has jurisdiction to determine TCC's claims, is likely to be outside the range of situations that Bryan J was referring to.

280. As to the Province's citation of Peyman, the right in question is the right to rely on the allegation that the ICC tribunal lacked jurisdiction because the CHEJVA and related agreements were void due to the existence of corruption. From the time of the Judgment of the Supreme Court the Province contended that the Supreme Court had reached that decision. But the position is clearest by 2015/2016 when Allen & Overy LLP informed the ICC tribunal that the Government of Balochistan had "recently uncovered cogent new evidence of extensive corruption by TCC in relation to the Reko Diq project, including bribery of a broad range of [Government] officials", and advised the ICC tribunal of the Government of Balochistan's decision not to "seek to pursue the argument that the arbitration agreement in the CHEJVA [i]s vitiated by TCC's corruption."

281. The fact that further evidence and argument to support the allegation might be added to at an even later date does not relieve the Government of the consequences of its informed election, when at the point of that informed election it believed it had sufficient evidence to make the allegation and where it does not suggest that it believed it had all the evidence that might be available.

282. Although in any event precluded by section 73 (in effect, by statutory waiver), in my judgment the Corruption Allegation is additionally precluded by the doctrine of waiver by election.

Separability

283. As a matter of English law, separability is the concept or principle (sometimes the term 'doctrine' is used) that an arbitration agreement in an arbitration clause in a contract is a distinct agreement "for the purpose of determining its validity or enforceability": see Enka v Chubb [2020] UKSC 38; [2020] 1 WLR 4117; [2020] 2 Lloyd's Rep 449, at [41].

284. Section 7 of the 1996 Act provides:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

285. It was accepted by the Province that it appears to have been common ground before the ICC tribunal that section 7 of the 1996 Act applied to this case (see the Province's 14 May 2014 Reply on Preliminary Issues at paragraph 290).

286. The Province says this was erroneous common ground, reached before the decision in Enka v Chubb and that the law of Pakistan applies. It argues that the parties cannot extend the applicability of a statutory provision such as section 7 by agreement - either the statute applies or it does not. Ultimately the Province says that the relevant issues are not about section 7 but about "separability" generally. I will deal with them on that basis.

287. The Province's case is that there are important differences between English law and the law of Pakistan, particularly as regards the effect of fraud on an arbitration agreement contained in a contract. That case does not fall to be determined at this stage. Issues of the law of Pakistan do not fall to be resolved at this stage and would require foreign law evidence.

Issue (3): Issue estoppel against TCCA: separability of the arbitration agreement

288. What is for decision at this hearing is whether TCCA is precluded from alleging separability of the arbitration agreement by an issue estoppel arising from the Judgment of the Supreme Court of Pakistan.

289. There was no dispute between the parties that the Judgment of the Supreme Court of Pakistan was final and conclusive and a judgment on the merits. A judgment of a court of another jurisdiction is capable of giving rise to an issue estoppel in proceedings before the English Court: see Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2) [1967] 1 A.C. 853, 918B, 927G, 967B.

290. For an issue estoppel to exist, the issue in the later proceedings must be the same as the issue decided by the judgment in the earlier proceedings: see The Sennar (No. 2) [1985] 1 W.L.R. 490, 499 (H.L.). Spencer Bower and Handley, Res Judicata 5th ed. at para 8.08 elaborates that where:

> "… [a] decision necessarily involves a judicial determination of some issue of law or fact, because it could not have been legitimately or rationally pronounced without determining or assuming a particular answer, that determination, though not expressed, is an integral part of that decision".

Did the Supreme Court of Pakistan decide that the arbitration agreement was not separable from the CHEJVA, or otherwise saved by the concept or principle of separability?

291. TCCA's position is (a) that the Supreme Court of Pakistan made no clear finding that the arbitration agreement was not separable from the CHEJVA, (b) even if the Supreme Court of Pakistan did make a clear finding on separability that finding was not necessary for its decision, (c) that the Supreme Court of Pakistan did not have jurisdiction to decide the question of separability; the English Court should recognise this as a question for the ICC tribunal first and then for the court of the seat of the arbitration, and (d) TCCA was not a party before the Supreme Court.

292. The Province of Balochistan argues that the Supreme Court of Pakistan addressed the separability of the arbitration agreement at paragraph [24] of its Judgment, when it said:

> "As all the key provisions of CHEJVA were made subject to a reliance on relaxations that were illegal and void ab initio, the illegality of the agreement seeps to its root. As such, no operative part of the agreement survives to be independently enforceable and the principle of severability [sic] cannot be applied to save any part thereof. The agreement is, therefore, void and unenforceable in its entirety under the law."

293. Before this Court the Province argues that the conclusion of the Supreme Court that "no operative part of the agreement survives to be independently enforceable" cannot be taken to mean that in fact one operative part (namely the arbitration agreement) did survive.

294. In terms, at paragraph [24] of its Judgment the Supreme Court referred to "severability" not "separability". TCCA argues that this shows it is dealing with clause 24.5 of the CHEJVA which is headed "Severance". That clause states that the:

> "invalidity, illegality or unenforceability for any reason of any provision of this Agreement shall not in any way prejudice or affect the validity, legality and enforceability of the remaining provisions".

Lord Goldsmith QC put it in this way in argument: the reference is to the contract principle, not the arbitration principle.

295. The Province disagrees, pointing out that clause 24.5 is a specific contractual term not a "principle" (the word used by the Supreme Court at paragraph [24] of the Judgment) and that the Supreme Court did not identify clause 24.5 in its Judgment or record any argument about it. The Province says that its position is also supported by the Supreme Court's Order.

296. The Province seeks further support for its argument by reference to other passages in its Judgment including passages that show what, it contends, the Supreme Court was asked to decide.

297. At paragraphs [58] – [60] of its Judgment (paragraphs not quoted earlier) the Supreme Court of Pakistan recorded the following argument, and which includes at one stage the use of the terms "severable" and "separable" interchangeably:

> "58. … judicial restraint is … called for given the specific facts and circumstances of the matter …
>
> 59. Learned counsel for BHP further submitted that without prejudice or otherwise affect [sic] the position adopted or advanced by any of the parties to the arbitration proceedings as BHP itself is not a party to the arbitration proceedings the ICC arbitration arises pursuant to the arbitration agreement contained in the CHEJVA, but under settled principles of law an arbitration agreement or even an arbitration clause as a part and parcel of a contractual agreement, is severable/separable/autonomous from the main agreement (CHEJVA) and would under these principles survive even if the CHEJVA is struck down. The underlying cause of action in the ICC arbitration appears primarily to be premised on an alleged breach of contractual obligations. In this regard, arbitration clause is treated as an independent agreement, freely entered into by the parties, and thus enforceable for determination of a dispute under the agreement. This will include even the validity of the main agreement.
>
> …
>
> 60. Learned counsel further argued that …Article 6(9) of the Rules of Arbitration of the International Chamber of Commerce (ICC Rules) provides that unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. And, the arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void. …"

298. The Province refers to the Supreme Court recording counsel for "TCC" as having submitted that "the Court should not rule upon the legality of the CHEJVA, which is subject matter of the proceedings before international forums" (paragraph [86]). It refers to the Supreme Court of Pakistan recording the further argument of Mr Khalid Anwar, Sr. ASC (Counsel for "TCC" and for Muslim Lakhani) as follows in paragraph [115] (a paragraph that it is convenient to set out in full although some is already quoted earlier in this judgment):

> "Mr. Khalid Anwar, Sr. ASC argued that if TCC were granted the mining lease, the instant petition would still be maintainable because this Court could then declare that everything including relaxation was illegal and strike it down, for which this Court had jurisdiction. However, if they had refused to grant it, there would be no complaint against them to be agitated before this Court unless this Court had given the findings that the international arbitration clause of CHEJVA was illegal and unconstitutional; ICSID and

> ICC Arbitration should not have taken place; and the verdict, if any, given by the Arbitrators would be null and void. He requested the Court not to give such a finding and suggested that proper course for the Court would be to stay its hands off and wait for the outcome of those proceedings being carried out under the laws of Pakistan, namely, the Arbitration (International Investment Disputes) Act, 2011, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, and the Fourth Schedule to the Constitution of Pakistan under which the International Arbitration Treaties are binding upon the Government of Pakistan. According to the learned counsel, that would be the best, clearest, fairest and most transparent approach, which would restore the confidence of foreign investors in Pakistan as a safe environment for their investments and there would be no conceivable allegations that the agreement was struck down after the discovery had been made. He urged that Pakistan should stand up for its commitments under the bilateral treaty read with ICSID clause, which the State of Pakistan has accepted voluntarily and freely, and that this Court should not put its prestige on the line."

299. The Province of Balochistan also points out that Section 4(1) of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, one of the statutes of Pakistan referred to by the Supreme Court in the passage from argument just cited, provides that a party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter covered by the arbitration agreement may apply to court "to stay the proceedings". Section 4(2) of the 2011 statute then provides that:

> "On an application under sub-section (1), the court shall refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed".

Given that the Supreme Court of Pakistan did not grant "TCC" any stay, it must, argues the Province, therefore have decided that the arbitration agreement was "null and void, inoperative or incapable of being performed" under section 4(2) of the 2011 statute.

300. In this connection the Province places emphasis on paragraph [106] of the Judgment of the Supreme Court. This has been set out in full earlier in this judgment. The paragraph reiterated the conclusion of the Supreme Court that the law of Pakistan being the law applicable to the CHEJVA, the Courts of Pakistan were the appropriate forum to decide the legality of CHEJVA. It recorded that the Governments of Pakistan and Balochistan had put the ICSID and ICC tribunals on notice of the proceedings before the Supreme Court and said to each of the tribunals that they should "suspend any further proceedings in this arbitration until such time the Supreme Court of Pakistan determines the validity, legality and vires of CHEJVA".

301. In the paragraph the Supreme Court of Pakistan referred to Article II of the New York Convention (the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)), which is in these terms:

> "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined

> legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

302. The Province says that paragraph [106] of the Judgment of the Supreme Court of Pakistan conveys a further finding by the Supreme Court that the arbitration agreement was not separable. The reasoning of the Province is that there were no separate grounds of invalidity directed specifically at the arbitration agreement in the CHEJVA, such that the invalidity found can only have been the result of a finding that the CHEJVA was invalid and the arbitration agreement was not separable from it or was not saved by the doctrine of separability.

303. The Province adds that English law also recognises a similar principle that where no contract comes into existence, an arbitration clause will not be binding, referring to May and Butcher Ltd v the King [1934] 2 K.B. 17 at page 22:

> "With regard to the application of the arbitration clause, the same considerations apply. ... If I am right in the view I take in the events which have happened there is no binding contract, the arbitration clause is not binding, and there is no contract out of which or in reference to which any dispute can arise."

See further, very recently, the decision in Black Sea Commodities Ltd v Lemarc Agromond Pte Ltd [2021] EWHC 287 (Comm) reached by Sir Michael Burton GBE. May and Butcher, cited by the Province, of course pre-dates the 1996 Act. Section 7 of the 1996 Act extends in terms to the question whether an arbitration agreement is treated as "non-existent" where an agreement "did not come into existence".

304. At the centre of the Province's argument on the question whether the Supreme Court of Pakistan made a clear finding that the arbitration agreement was not separable from the CHEJVA remains paragraph [24] of the Judgment and the conclusion that "no operative part of the agreement survives to be independently enforceable".

305. I was initially cautious whether the Province was correct when it said that this cannot be taken to mean that in fact one operative part (namely the arbitration agreement) did survive. My caution was in the context of a discussion of whether a separable arbitration agreement would fall within the description an "operative part of the agreement" (here, the CHEJVA). However, ultimately, I accept that this is how the matter is often discussed. It is of note that section 7 of the 1996 Act refers to separability in terms of the arbitration agreement "which forms or was intended to form part of another agreement".

306. I pay close attention to TCCA's points, including that paragraph [24] of the Judgment does not mention the arbitration agreement in terms; it refers to

"severability" not "separability"; the surrounding paragraphs to paragraph [24] do not refer to separability of arbitration agreements and no authorities on separability were there cited. But I do not accept TCCA's argument that the paragraph was dealing with clause 24.5 of the CHEJVA. That clause too was not mentioned. "Severability" was, but in my judgment the Supreme Court's reference to the argument of Counsel for BHP showed that "severable" and "separable" were used interchangeably when discussing the arbitration agreement in the CHEJVA.

307. Whilst I would perhaps have valued a closer insight into the concept of separability under the law of Pakistan, in the result in my judgment the Supreme Court of Pakistan decided within paragraph [24] of its Judgment that the arbitration agreement was not separable from the CHEJVA, or otherwise saved by a doctrine of separability. I do not accept TCCA's first argument, that the Supreme Court of Pakistan made no clear finding that the arbitration agreement was not separable from the CHEJVA.

308. This does not mean I accept every point made by the Province on this question. My acceptance is simply that, especially when seen in the context of the Judgment as a whole, Paragraph [24] of the Judgment of the Supreme Court embraces separability despite its use of the term severability. I do not see it as realistic to conclude that the Supreme Court was there dealing with clause 24.5 of the CHEJVA when it used the term severability. It must have been dealing with separability. Separability of the arbitration agreement was the subject of argument before it. Approaching the matter cautiously (Mad Atelier International BV v Mr Axel Manes [2020] EWHC 1014 (Comm) at [72]) I consider the decision is, ultimately, clear (Good Challenger Navegante SA v Mineralexportimport SA [2003] EWCA Civ 1668 at [54]).

309. I should say specifically that I do not think the point made by the Province about the question of a stay takes its overall argument very far, save to show that the question of separability must have been in the mind of all. I accept that the provisions of the 2011 statute appear comparable to section 9 of the 1996 Act, although they are not identical. It is not however clear to me that the Supreme Court was deciding an application for stay of proceedings under section 4(1), rather than bringing that provision into account in reaching a broader decision on what the Supreme Court should and should not decide. Rather, the argument of Mr Anwar Sr. ASC offered an analysis set in a broader context of policy and principle to guide approach. But in the present case, in my judgment the Province does not need the further support it claims from that part of the Judgment of the Supreme Court.

310. TCCA argues next that even if the Supreme Court of Pakistan did make a clear finding on separability, that finding was not fully contested (Good Challenger at [54]). However the Supreme Court recorded that the argument that it was a "settled principle … of law" "that an arbitration agreement or even an arbitration clause as a part and parcel of a contractual agreement, is severable/separable/autonomous from the main agreement (CHEJVA) and would under these principles survive even if the CHEJVA is struck down" was put to it. Even if that argument was, as TCCA say, directed to urging judicial restraint, it is the point that also squarely contests the finding at paragraph [24].

311. TCCA argues that even if the Supreme Court of Pakistan made a clear finding on separability that was not necessary for its decision. This argument too, I cannot accept. The Supreme Court addressed and decided whether the CHEJVA was

"illegal", "void ab initio" or "void and unenforceable". It held that it was, and made clear that no part of the CHEJVA escaped the conclusion.

312. TCCA's next argument is that the Supreme Court of Pakistan did not have jurisdiction to decide the question of separability. This argument is based on the proposition that the English Court should recognise that the question was one for the ICC tribunal first and then for the English Court, and was not for the Supreme Court at all. TCCA refers to Fiona Trust Holding Corporation and Others v Privalov and others, in the Court of Appeal, at [2007] EWCA Civ 20, [2007] Bus LR 686 at [33]-[34]; Enka (above) at [121]; C v D [2007] EWCA 1282, [2008] Bus LR 843 at [17]; Minister of Finance (Inc) v International Petroleum Investment Co [2019] EWCA Civ 2020, [2020] Bus LR 45 at [36]-[49].

313. The Supreme Court of Pakistan addressed and decided the question whether there were any valid contracts at all. To accept that in its undertaking that task one particular contract fell outside the jurisdiction of the Supreme Court of Pakistan, namely the arbitration agreement, would be to look at the question of jurisdiction through the eyes of English law and practice only. To allow a conclusion that the Supreme Court had jurisdiction is not to say that the same would be the approach or conclusion of an English Court, or even that it was desirable for the Supreme Court to have dealt with the arbitration agreement (to the extent that it did), rather than to have left that for the ICC tribunal first and then for the English Court.

314. But that is not the end of this issue. To establish the issue estoppel as against TCCA for which it contends, the Province of Balochistan must show that the parties (or their privies) are the same in both sets of proceedings.

315. The Province says that TCCA was a party before the Supreme Court of Pakistan. TCCA says its wholly owned Pakistani subsidiary, TCCP, incorporated in 2000 but not subject to the Scheme of Arrangement until 2008, was the relevant party.

316. If TCCA was not a party before the Supreme Court, it is then not in dispute that Antofagasta and Barrick Gold (TCCA's indirect parent companies) were parties before the Supreme Court of Pakistan, but the question then in dispute is whether TCCP, Antofagasta and Barrick Gold were privies of TCCA?

317. The Supreme Court noted that the Government of Balochistan and the Government of Pakistan had "respectively put both the ICC and ICSID on notice" in the following words: "The Claimant [a reference to TCCA, as claimant in the arbitrations], its Pakistani subsidiary and its parent companies are before the Supreme Court of Pakistan and before were present before the Balochistan High Court."

318. The Supreme Court of Pakistan said at paragraph [112] of its judgment:

> "We find force in the submission of learned counsel for [the Government of Balochistan] that the respondent company has been changing its position and has not been forthcoming before the Court. For example, it was described as TCCA before the Balochistan High Court (as described in the impugned judgment at page 27 …). Thus, in the appeal, it is TCCA that would continue to be present before this Court. However, it was later stated that it is not TCCA, but TCCP that is before this Court without making any application for the change of parties. The Court accordingly issued notices to TCCA."

The Province accepts that no issue estoppel arises from this passage but argues that the Commercial Court in London would need strong reasons "to depart from the view of the [Supreme Court] in Islamabad as to who was a party before the [Supreme Court] in Islamabad".

319. In support of its position, the Province points first to a number of features of the petition in 2006 commencing the proceedings that led to the Judgment of the Supreme Court of Pakistan. The petition identifies "respondent number 4" as "Tethyan Copper Company".

    (a) Paragraph 4 of the petition states that respondent number 4 is referred to in a specific 2006 news article. The article refers, says the Province, to TCCA not TCCP.

    (b) Paragraph 5 of the petition refers to respondent number 4 having been involved in transactions "acquiring…rights" to Reko Diq. The Province points out this cannot be TCCP as the Scheme of Arrangement involving TCCP did not occur until 2008.

    (c) Paragraph 7(vi) of the petition states that respondent number 4 entered into the CHEJVA, which TCCA did by the Novation Agreement, and that it raised "$1.6 million seed capital", which is what TCCA says that it did.

    (d) Paragraph 8 of the petition refers to respondent number 4's website being annexed at Annex C. Annex C contains TCCA's website.

    (e) Paragraph 9(i) of the petition states that respondent number 4 floated "on the Australian stock exchange", which is what TCCA did.

320. In my judgment it is not enough to use allegations in the petition to identify the party to the petition. The Province refers then to the fact that respondent number 4 responded to the petition with evidence (the "Flores Counter Affidavit") from TCCA's then CEO in which submissions were made on behalf of TCCA and which proceeded on the basis that TCCA was the relevant party. Other respondents also filed submissions in response to the petition which proceeded on the basis that respondent number 4 was TCCA. The question remains who was respondent number 4.

321. According to the Province, the first date on which TCCA objected to the jurisdiction of the Pakistani Courts was in 2010, 3 years after a judgment of the Balochistan High Court. Referring further to the High Court proceedings, the Province also notes that the 2007 judgment of the Balochistan High Court referred to respondent number 4 as "Tethyan Copper Company", indicating TCCA, says the Province, by stating that respondent number 4 was "an Australian company" and describing how respondent number 4 acquired a stake in the CHEJVA project. As TCCA notes, however, the same judgment of the High Court refers to Respondent No. 5 as a "*company from Chile*," although the list of parties clearly shows that Respondent No. 5 was Antofagasta plc, an English company with its registered address in London. It refers to Respondent No. 8 as BHP Minerals International Exploration Inc., a Delaware company, although the list of parties shows that Respondent No. 8 was BHP Intermediate Exploration Inc., a Pakistani company located in Islamabad. It must be added that the list of parties in the Balochistan High Court's Judgment provides TCCP's address, even if also used by TCCA, for the address of Respondent No. 4.

322. The Province added two more points. The first was that the Pakistan address in the headnote for respondent number 4 was the address of TCCA's offices in Pakistan, but the Province accepts the address appears to have been used by TCCP too. The second was that a disclosure application was made seeking documents from both TCCP and TCCA. The Province says this "only makes sense if directed at the parent", but I do not agree.

323. Against the points advanced by the Province, the Order of the Pakistan Supreme Court dated 7 January 2013 and the Judgment dated 10 May 2013 describe the Fourth Respondent as "Tethyan Copper Co. Pakistan,". That in my judgment is a reference to TCCP.

324. The Province counters by reference to what the Supreme Court said, and argues that the very essence of what the Supreme Court said ("thus, in the appeal, it is TCCA that would continue to be present before this Court") is premised on their realisation that TCCA was not being presented as the relevant party on the court record. Respectfully, I consider this reveals the fact, that TCCA was not before the court. The view of the Supreme Court cannot alter the fact.

325. TCCP emphasized to the Pakistani courts that its "appearance in this Constitutional Petition Bo. 69/2010 does not constitute a submission to the jurisdiction of this Honorable Court by TCCA, its shareholders or affiliates and does not in any way affect TCCA's rights of arbitration." The Pakistan Supreme Court, in its Order dated 7 February 2012, recognised that counsel for TCCP had declared that "'TCCA' is an independent body corporate, having no concern with instant proceedings" and is "not represented by any" of the counsel and did not enjoin TCCA.

326. In my judgment, TCCP, not TCCA, was the party before the Supreme Court. This leaves the question whether TCCP, Antofagasta and Barrick Gold were privies of TCCA?

327. In Gleeson v J Whipple & Co Ltd [1977] 1 WLR 510 at 515 Megarry VC said:

> "Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest." Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa."

328. In Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd [2016] EWCA Civ 411 at [31] Longmore LJ said:

"It is obvious that the defendant in the New York proceedings is not the same as the claimants in the English proceedings; the question therefore is whether SCBHK is a privy are privies in the sense used in the quotation from The Sennar. For this purpose it is sufficient to cite Resolution Chemicals v Lundbeck A/S [2014] RPC 5 in which Floyd LJ at para 32 said:-

> "…a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation."

It may be that SCBHK and SCBMB had a general commercial interest in the outcome of the New York proceedings but that, on its own, is insufficient to make them privies to SCB. If one asks whether they were "in reality the party to the original proceedings", the only answer can be a negative one. Unlike SCB, SCBHK was not itself present in New York and were thus, in principle, not available to be sued in New York; but, whether or not, if sued, they could have been made subject to New York's jurisdiction, the fact is that they were not sued. That was a decision made by VIP for whatever reason; it hardly lies in VIP's mouth now to assert that they were in reality parties to the original proceedings."

See also Johnson v Gore-Wood [2002] A.C. 1 at 60D per Lord Millett.

329. The Province of Balochistan recognises that a mere corporate affiliation does not of itself establish privity, that the fact that X is a shareholder of Y or under common control is not itself enough to establish privity. However the Province says that it is just for the Court to treat TCCA as the privy of TCCP, Antofagasta and Barrick Gold. To do so, it argues, would avoid unnecessary and wasteful re-litigation of issues which have been decided after extensive submissions in another well-respected forum.

330. In this regard the Province asks this Court to take into account the facts that: (a) a large part of "TCCA's corporate group" was before the Supreme Court; (b) the Supreme Court evidently concluded, says the Province, that TCCA had been guilty of not being straightforward about whether it was a party; (c) submissions were made to the Supreme Court in respect of the arbitration agreement in the CHEJVA; and (d) TCCA maintained an office in Pakistan "such that it could have been a party to the proceedings".

331. I do not regard these points as sufficient to make it just to treat TCCA as the privy of TCCP, Antofagasta, Barrick Gold or any of those. The shared general commercial interest of TCCP, Antofagasta and Barrick Gold is insufficient to make them privies to TCCA. If, as in the Standard Chartered Bank case, one asks whether TCCA were "in reality the party to the original proceedings", the only answer, here as there, can be a negative one. TCCA was not sued; TCCP was. The flexibility urged by the Province is not available.

332. On the issue before this Court, my conclusion is that TCCA is not precluded from alleging separability of the arbitration agreement by an issue estoppel arising from the Judgment of the Supreme Court of Pakistan.

Issue (4): Issue estoppel against TCCA: the governing law of the arbitration agreement

333. In paragraph [106] of the Judgment of the Supreme Court of Pakistan, in the context of a discussion about the possible effect of the arbitration agreement in the CHEJVA, the Supreme Court held that "the law of Pakistan being the law applicable to the agreement, the Courts of Pakistan are the appropriate forum to decide the legality of the CHEJVA".

334. Is TCCA precluded by an issue estoppel arising from the judgment of the Supreme Court of Pakistan from denying that the arbitration agreement is governed by the law of Pakistan?

335. The answer in my judgment is that it is not. This answer follows from the reason for my conclusion that TCCA is not precluded by an issue estoppel from alleging separability of the arbitration agreement.

Issue (5): Separability: section 73 of the 1996 Act

336. Is the Province of Balochistan precluded by section 73 of the 1996 Act from denying separability of the arbitration agreement?

337. The Province says it is not. Mr Hancock QC characterises separability as "a legal fact". As such, separability may have consequences for the arbitration agreement and any grounds of challenge to the arbitration agreement. But that is different from separability being an issue capable of being an "objection that the tribunal lacks substantive jurisdiction", to use the language of section 73.

338. As the Province puts it, a party cannot object to jurisdiction on the grounds that the arbitration agreement is "separable" from the main contract. Indeed, it says that properly understood, "separability" when invoked is invoked as a defence to a jurisdictional objection.

339. I do not disagree that separability is a legal fact, but I do not think that takes the analysis far enough. In context, where the Province raises an objection that the ICC tribunal lacks substantive jurisdiction its grounds for that objection could include that the arbitration agreement is not separable and the invalidity of the CHEJVA brings with it the invalidity of the arbitration agreement in the CHEJVA.

340. If the Province raised that objection then TCCA would answer it by saying that even if the CHEJVA is invalid, the arbitration agreement is separable. Thus, whether it is making out its own objection, or meeting that answer from TCCA, the Province of Balochistan has to say that the arbitration agreement is not separable.

341. And yet in the ICC arbitration the Province did not say that; it said the opposite. Thus in its Supplementary Counter Memorial of 11 January 2016 the Province elected to say (at paragraph 207, quoted in full earlier in this judgment) that "the doctrine [of separability] is enshrined in the laws and rules applicable to these proceedings." In the footnote to that paragraph the Province referred to section 7 of the 1996 Act, but - materially - went on to say that "[t]he principle is also contained within Pakistani law (see Respondent's Reply on Preliminary Issues, para. 314(b))".

342. The element of the Province's argument that says of "separability" that when invoked, it is invoked not as an objection to jurisdiction but as a defence to a jurisdictional objection, speaks only in my view to the point at which "separability" may feature in the sequence of argument in a particular case. Where separability is relevant, the party raising an objection to jurisdiction must deal with it if they are to prevail.

343. In the circumstances the Province of Balochistan is, in my judgment, precluded by section 73 of the 1996 Act from now denying separability of the arbitration agreement.

344. For the avoidance of doubt and to the extent relevant, in reaching this conclusion I am not making any finding of how separability applies under the law of Pakistan (if and where that law governs) where (as the Province is precluded from denying) there is separability of the arbitration agreement (see paragraph 33 above). I have not had expert evidence of the law of Pakistan on that point. Thus I have determined that the Province of Balochistan is precluded from denying separability of the arbitration agreement, but I have not determined what the consequence is for the arbitration agreement under the law of Pakistan, nor whether the Province of Balochistan is precluded from arguing for a particular consequence or denying a particular consequence.

345. TCCA also contends that the arbitration agreement is not separable from the CHEJVA on two further bases. First, the doctrine of abuse of process, applying the principle in Henderson v Henderson. Second, the doctrine of approbation and reprobation, as explained in Express Newspapers plc v News (UK) Ltd v Others [1990] 1 WLR 1320 at 1329F per Sir Nicholas Browne-Wilkinson VC (as he then was).

346. For the Province of Balochistan, Mr Hancock QC pointed out that Issue (5) did not include these two further bases and that they were not for decision now.

347. In my view, the Province was entitled to take that position. Of course, section 73 of the 1996 Act (which is for decision, but in its own right) is concerned with abuse of process as the examination of principles and approach earlier in this judgment shows. However, I confine myself to the issues that were framed for this hearing and therefore do not reach decisions on the freestanding application of either of the two bases mentioned to the facts of the case.

348. Mr Hancock QC also indicated that it is the Province's position that the second of the two further bases was abandoned or conceded by TCCA in correspondence. In my view, that too is not a question for now.

Issue (6): Challenge on the merits

349. Does the Corruption Allegation seek impermissibly to challenge the ICC tribunal's decision on the merits of the claim before it?

350. As I have held, the Corruption Allegation was not raised as a jurisdictional objection before the ICC tribunal by the Province of Balochistan.

351. Corruption was however raised by the Province as part of its defence on the merits. In that regard, the ICC tribunal found in the Partial Award that the ICSID tribunal's dismissal of corruption allegations on the merits had "preclusive effect" in the ICC arbitration.

352. TCCA contends that for the Province to raise the Corruption Allegation as a jurisdictional objection before this Court is, in reality, to challenge the ICC tribunal's decision on the merits; it amounts to re-litigating a merits point under the guise of a section 67 jurisdictional challenge and that is impermissible.

353. The Province responds that it has brought this Arbitration Claim under the 1996 Act as a jurisdiction challenge and the challenge properly takes the form of a full re-hearing. It contends that if TCCA was correct, to the effect that factual findings in the ICC Partial Award that are relevant to jurisdiction had preclusive effect, it would be impossible to hold a full re-hearing as required by section 67 of the 1996 Act. It argues that even where an arbitral tribunal had held a full hearing, involving a substantial issue of fact, the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining that challenge: see Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763 at [96] per Lord Collins.

354. The Province adds that in this Arbitration Claim it relies on evidence relating to corruption that was not before the ICC tribunal. It argues further that there is a need for greater disclosure in these proceedings regarding the Corruption Allegation, and that the corruption allegations before the ICC tribunal and those in this jurisdiction challenge are not identical to those before the ICSID tribunal.

355. The Province also emphasises that the ICC tribunal has not determined any underlying issues on the merits. At the most it has reached the conclusion that certain findings by the ICSID tribunal had preclusive effect in the ICC arbitration. It reminds the Court that the Province is not, on its case, a party to the ICSID arbitration and the findings of the ICSID tribunal are themselves challenged in ICSID annulment proceedings.

356. I accept that generally and in principle a party bringing a jurisdiction challenge under section 67 of the Act may challenge the arbitral tribunal's findings of fact that are relevant to that jurisdiction challenge. I also accept that where, as here, the arbitral tribunal has treated findings of fact made by another arbitral tribunal as of preclusive effect then in principle that treatment may be challenged if the findings of fact are relevant to the jurisdiction challenge.

357. But in the present case, for reasons and in the way I have explained earlier in this judgment, it is not open to the Province to bring the aspects of the jurisdiction challenge to this Court to which the findings of fact would be relevant.

358. The ICC tribunal itself addressed the findings of fact (and the question of preclusion) because it was invited by the Province to consider them as part of its consideration on the merits. As discussed in more detail earlier in this judgment, on 11 January 2016 the Province had submitted its "Supplemental Counter-Memorial" on "TCC's Corruption and its Legal Consequences" and had said that the Government of Balochistan did "not seek to pursue the argument that the arbitration agreement in the CHEJVA was vitiated by TCC's corruption. Accordingly, the [Government of Balochistan] accepts that the Tribunal has jurisdiction to determine TCC's claims".

359. In these circumstances, the effect of allowing the Province to advance the Corruption Allegation (as defined) within its section 67 challenge would in the present case to be to allow the Province to advance a challenge to the ICC tribunal's treatment of the merits of the dispute.

360. If the Province has evidence relating to corruption that was not before the ICC tribunal, or is additional to that before the ICSID tribunal, then it is for the Province to seek to address those matters with the arbitral tribunal; it does not make it legitimate for the Province to raise them with the Court as a challenge to the jurisdiction of the arbitral tribunal. If the ICC tribunal has not determined underlying issues on the merits or should not have determined that findings by the ICSID tribunal had preclusive effect in the ICC arbitration, those are not matters that are properly addressed by challenging the jurisdiction of the ICC tribunal, however else they might be addressed.

361. The parties discussed in argument the decision of Carr J (as she then was) in C v D1 and Others [2015] EWHC 2126 (Comm) at [79] and [84]. There the Judge refused to accede to an argument that would re-open a finding that the tribunal had made. But the circumstances were different: the Province points out that the Judge identified that, in that particular case, there was no challenge to the tribunal's jurisdiction for the purpose of the particular finding. However, this does not help the Province. Although in the present case there is a challenge to jurisdiction that the Province seeks to pursue, it is one that the Province is not entitled to pursue.

362. The answer to issue (6) is that the Corruption Allegation does seek impermissibly to challenge the ICC tribunal's decision on the merits of the claim before it.

363. The Province adds reference to the fact that it is challenging the ICC tribunal's decision under section 68 of the 1996 Act too. Issue (6) is framed with reference to the Corruption Allegation, an allegation as to jurisdiction. For present purposes I confine myself to the issue as framed.

Issue (7): The Arbitration Claim Form

364. The Province issued the Arbitration Claim within 28 days of the Partial Award. To what extent was the Corruption Allegation included in the Arbitration Claim Form?

365. The Arbitration Claim Form contains these passages:

> "4. On 7 January 2013, the Supreme Court of Pakistan issued an Order declaring that the CHEJVA and related agreements are "illegal, void and non est". Full

reasons were reserved and were given on 10 May 2013 (together "the Supreme Court Judgment").

5. In summary (and without limitation) the Supreme Court Judgment declared that the CHEJVA was void due to (i) the existence of corruption; (ii) the fact that CHEJVA's object was unlawful; (iii) the fact that TCCA had made a mistake of fact when entering into CHEJVA; (iv) the fact that CHEJVA represented an effort to interfere with a public body in Pakistan; (v) fundamental uncertainty; (vi) the fact that certain relaxations of mining rules were granted in excess of authority and ultra vires and void; (vii) the fact that Clauses of CHEJVA violated mining rules or were inconsistent with them; (viii) the CHEJVA was contrary to public policy and/or illegal; (ix) the CHEJVA was entered into for inadequate consideration; (x) the fact that TCCA's licences stood transferred to another company; (xi) the fact that relaxations of mining rules were unjustifiably granted without any explanation; and (xxii) the CHEJVA contravened section 23 of the Pakistan Contract Act.

…

9. The Court should now set the Award aside and/or declare it has no effect. The ICC tribunal has no jurisdiction for the following reasons:

a. In the Supreme Court Judgment, the Supreme Court of Pakistan has determined (i) that the CHEJVA is void; and (ii) that the arbitration agreement is not separable from it, and an issue estoppel arises out of both of those determinations.

b. Further or alternatively, whether or not any issue estoppel arises out of the Supreme Court Judgment, as a matter of the law of Pakistan the CHEJVA is void for the reasons set out in the Supreme Court Judgment and the arbitration agreement is not separable from it.

c. Further or alternatively, if the arbitration agreement is separable from the CHEJVA then it is governed by the law of Pakistan (either because (i) the parties have made an express choice; or (ii) the parties have made an implied choice; or (iii) the arbitration agreement has its closest connection with Pakistan) and the arbitration agreement is void for the reasons set out in the Supreme Court Judgment.

d. Further or alternatively, if the arbitration agreement is separable from the CHEJVA and it is governed by the law of England and Wales, then it is void because the Government of Balochistan was not a party to the CHEJVA and the Balochistan Development Authority did not have capacity to enter into the CHEJVA.

e. Further or alternatively, if the arbitration agreement is separable from the CHEJVA and it is governed by the law of England and Wales, then TCCA is not a party to the CHEJVA or the arbitration agreement and is not entitled to exercise any rights under the CHEJVA or the arbitration agreement (whether because of the Supreme Court Judgment or a scheme of arrangement or otherwise).

f. Further or alternatively, if the arbitration agreement is separable from the CHEJVA and it is governed by the law of England and Wales, then it is void/unenforceable because it is contrary to the public policy of England and Wales, by virtue of the fact that it is contrary to the public policy of Pakistan, a friendly state."

366. In the Province's contention, there is no scope for debate about the fact that corruption was included as one of those grounds. Corruption is expressly referred to. Further, argues the Province, paragraph 9f. alleges that the arbitration agreement in the CHEJVA is contrary to the public policy of Pakistan, which is broad enough to and does cover bribery and corruption. Section 23 of the Pakistan Contract Act is referred to, and, the Province says, "expressly provides that vitiating grounds extend to any conduct that is 'fraudulent' or 'unlawful' and is proscriptive in this regard".

367. TCCA's position is of course that the allegation by the Province that the Supreme Court invalidated the CHEJVA based on corruption is contradicted by the Judgment of the Supreme Court of Pakistan (and submissions made by the Province). The Province brings jurisdictional objections based on the "reasons set out in the Supreme Court Judgment,"which did not include corruption.

368. The Province contends that whether or not the Supreme Court in fact found that the CHEJVA was void on grounds of corruption misses the point. All that matters (as with Issue (1) above) is the substance and nature of the Province's challenge to jurisdiction. In this regard, the Province continues, it raised corruption as a ground on which it challenged jurisdiction in the Arbitration Claim Form as a stand-alone ground, even if by reference to the Judgment of the Supreme Court of Pakistan. That, says the Province, is the end of this issue.

369. The Province of Balochistan continues in its written argument that if it is necessary to consider the Judgment of the Supreme Court of Pakistan, "a proper analysis of the decision illustrates that corruption and illegality were at the core of the decision" and were incorporated into the Arbitration Claim Form.

370. I cannot agree with the Province. Its references in the Arbitration Claim Form to corruption were to what, according to the Province, the Supreme Court had decided as the reason the CHEJVA was void. In my judgment a proper analysis of the Judgment of the Supreme Court of Pakistan shows that the reason for its decision that the CHEJVA was void was not corruption.

371. The reference in the Arbitration Claim Form to "the public policy of Pakistan" did not take matters further. If the reference extended to corruption it did not do so other than to refer again to what, according to the Province, the Supreme Court had decided as the reason the CHEJVA was void. Further as Lord Goldsmith QC pointed out, the Province's early "public policy" points were not by reference to corruption.

Issue (8): Amending the Arbitration Claim Form

372. The Province seeks permission to amend the Arbitration Claim Form. Its application notice is dated 21 January 2021, but was preceded by notice to TCCA in October 2020.

373. The Province says the amendments are intended simply to clarify the claim and assist case management. TCCA has not yet had to plead its defence and therefore the amendments will not, says the Province, cause delay or cost.

374. The proposed amendments would take the form shown below (amendments shown by underlining):

> "5. In summary (and without limitation), the CHEJVA and related agreements are [delete "Supreme Court Judgment declared that the CHEJVA was"] void due to (i) the existence of corruption; (ii) the fact that CHEJVA's object was unlawful; (iii) the fact that TCCA had made a mistake of fact when entering into CHEJVA; (iv) the fact that CHEJVA represented an effort to interfere with a public body in Pakistan; (v) fundamental uncertainty; (vi) the fact that certain relaxations of mining rules were granted in excess of authority and ultra vires and void; (vii) the fact that Clauses of CHEJVA violated mining rules or were inconsistent with them; (viii) the CHEJVA was contrary to public policy and/or illegal; (ix) the CHEJVA was entered into for inadequate consideration; (x) the fact that TCCA's licences stood transferred to another company; (xi) the fact that relaxations of mining rules were unjustifiably granted without any explanation; and (xii) the CHEJVA contravened section 23 of the Pakistan Contract Act. In the Supreme Court Judgment, the Supreme Court declared that the CHEJVA and related agreements are void for all these reasons.
>
> …
>
> 9. The Court should now set the Award aside and/or declare it has no effect. The ICC tribunal has no jurisdiction for the following reasons:
>
> …
>
> b. Further or alternatively, whether or not any issue estoppel arises out of the Supreme Court Judgment, as a matter of the law of Pakistan the CHEJVA is void for the reasons set out in the Supreme Court Judgment and/or paragraph 5 above and the arbitration agreement is not separable from it.
>
> c. Further or alternatively, if the arbitration agreement is separable from the CHEJVA then it is governed by the law of Pakistan (either because (i) the parties have made an express choice; or (ii) the parties have made an implied choice; or (iii) the arbitration agreement has its closest connection with Pakistan), alternatively English law, and the arbitration agreement is void for the reasons set out in the Supreme Court Judgment and/or paragraph 5 above.
>
> …"

375. The Province argues that the amendments will involve no expansion of its case. However, that point is on the footing that its argument about the compass of its existing case is correct. As I have sought to explain in this judgment, it is not.

376. In written argument the Province suggests that "a re-hearing of the allegations of corruption will involve the same evidence regardless of whether the allegations of corruption are parasitic on the [Judgment of the Supreme Court of Pakistan]". However, that point assumes that, without the amendments, there would be "a re-

hearing of the allegations of corruption". For the reasons examined in this judgment, there will not.

377. This shows that the amendments, although brief, would be of major consequence if allowed. They do not simply clarify the claim and assist case management. They would cause delay or cost but that is just the start. More fundamentally, they would, if allowed, undermine the finality in arbitration that section 73 is there to ensure. They would take the Court into a hearing of allegations that were not raised before the ICC tribunal, and not raised following an informed choice. It is clear to me that they must be refused.

378. I leave open the question of any application for permission to amend to refer to "related agreements" in a context other than the Corruption Allegation, as that question was not the focus of argument before me at this hearing.

Case management

379. What directions (if any) are appropriate in the Arbitration Claim? Should directions permit the Province to adduce further factual and/or expert evidence over and above the witness statement and exhibits served with the Arbitration Claim Form? When and how should the challenge under section 68 of the 1996 Act be heard?

380. These questions were framed as preliminary issues, although they are questions of case management rather than substantive questions. The Province argues that the Court should order an exchange of statements of case and then proceed to give directions for expert evidence, disclosure, the manner in which factual evidence should be dealt with at trial, and any other directions for trial.

381. Civil Procedure Rules Practice Direction 62 (PD 62) paragraph 6.1 and paragraph O6.1 of the Commercial Court Guide (10th edition) provide that the standard directions contained in PD 62 will apply to arbitration claims "unless the Court orders otherwise". The Court will order statements of case in section 67 applications where that is appropriate; in Azov Shipping Company v Baltic Shipping Company (No3) [1999] 2 Lloyd's Rep. 159 Colman J highlighted the value of their consideration where there is complexity.

382. As Henshaw J observed in this case ([2020] EWHC 938 (Comm) at [45]), PD 62 paragraph 6.1 permits the court to order a different timetable and, of course, when deciding whether or not to do so the court must have regard to the overriding objective of enabling the court to deal with the case justly and at proportionate cost, in the sense detailed in CPR 1.1(2). Section 1(a) of the 1996 Act states that the object of arbitration is to "obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense". Exactly what procedure is fair and how long it takes will of course depend upon the nature of the case.

383. The determination of issues by this judgment allows an up-to-date view to be taken on what is appropriate by way of directions and timetable for the balance of the dispute. The remaining issues have now narrowed, and it will be desirable to discuss with the parties what remains.

384. In my view some departure from 'standard directions' will still be required ahead, but the Court will wish to discuss this with the parties when they have considered this judgment. That discussion can include the question whether, in light of the determination of issues by this judgment, the Province's section 68 application should be determined after the section 67 application.

385. It may assist if I indicate now that (a) given the particular development of this particular case, and the stage it has now reached, provisionally I do not consider statements of case are likely to be necessary for the remaining stages, (b) I do however consider that it is important that the parties agree what issues remain and what facts and matters are common ground, (c) expert evidence on foreign law will require to be closely managed with bespoke directions and a focus on the precise issues that remain, and (d) documents for any hearing should be confined to those that are necessary for that hearing, and must be well-organised (their organisation in the present case was challenging).

Conclusions

386. Following this hearing, the Court's decisions are as follows:

(1) The Corruption Allegation (as defined, that is the allegation by the Province of Balochistan to the effect that the ICC tribunal lacked jurisdiction because the CHEJVA and related agreements were void due to the existence of corruption) is precluded by section 73(1) of the 1996 Act (Preliminary Issues Order paragraph 2.1, first part).

(2) The Corruption Allegation is additionally precluded pursuant to the doctrine of waiver by election (Preliminary Issues Order paragraph 2.1, second part).

(3) TCCA is not precluded by an issue estoppel arising from the Judgment of the Supreme Court of Pakistan from alleging separability of the arbitration agreement (Preliminary Issues Order, paragraph 2.2(a)).

(4) TCCA is not precluded by an issue estoppel arising from the Judgment of the Supreme Court of Pakistan from denying that the arbitration agreement is governed by the law of Pakistan (Preliminary Issues Order, paragraph 2.2(b)).

(5) The Province of Balochistan is precluded by section 73 of the 1996 Act from denying separability of the arbitration agreement (Preliminary Issues Order, paragraph 2.2(c)).

(6) The Corruption Allegation seeks impermissibly to challenge the ICC tribunal's decision on the merits of the claim before it (Preliminary Issues Order, paragraph 2.3).

(7) The Province of Balochistan cannot pursue the Corruption Allegation because it was not included in the Arbitration Claim Form (Preliminary Issues Order, paragraph 2.4).

(8) The application by the Province of Balochistan to amend the Arbitration Claim Form should be refused.

387. Issues (9) and (10) are, as mentioned above, deferred.

388. The Court will wish to discuss future case management with the parties when they have considered this judgment.

389. It has been a privilege to hear advocacy of the very highest standard from both sides.