

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

In the arbitration proceeding between

**TETHYAN COPPER COMPANY PTY LIMITED**

Claimant

and

**THE ISLAMIC REPUBLIC OF PAKISTAN**

Respondent

**ICSID Case No. ARB/12/1**

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**DECISION ON CLAIMANT'S REQUEST FOR  
PROVISIONAL MEASURES**

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*Members of the Tribunal*

Dr. Klaus Sachs, President

Lord Hoffmann, Arbitrator

Mr. Stanimir A. Alexandrov, Arbitrator

*Secretary of the Tribunal*

Mercedes Cordido-Freytes de Kurowski

*Date of dispatch to the Parties:* 13 December 2012

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**A. THE PARTIES**

**I. Claimant**

1. **Tethyan Copper Company Pty Limited**, a company constituted and registered under the laws of Australia and owned in equal shares by Antofagasta plc, a company incorporated in the United Kingdom with its headquarters in Chile, and Barrick Gold Corporation, a company incorporated in Canada, hereinafter referred to as “**Claimant**” or “**TCCA**”, represented in this arbitration by its duly authorized attorneys Debevoise & Plimpton LLP. Counsel for Claimant are Messrs. Donald Francis Donovan, Mark W. Friedman and Dietmar W. Prager and Ms. Natalie L. Reid of the New York office (919 Third Avenue, New York, NY 10022, U.S.A.) and Lord Goldsmith QC and Mr. Matthew H. Getz of the London office (Tower 42, Old Broad Street, London, EC2N 1HQ, United Kingdom).

**II. Respondent**

2. **The Islamic Republic of Pakistan**, hereinafter referred to as “**Respondent**” or “**Pakistan**”, represented in this arbitration by its duly authorized attorneys Mr. Ahmer Bilal Soofi, and Mr. Arthur Marriott QC of M/s ABS & Co. (12 Embassy Road (6th Avenue), Sector G-6/4, Islamabad, Pakistan); Ms. Mahnaz Malik and Mr. John Kingston of 12 Gray’s Inn Square (London WC 1R 5JP, United Kingdom); and Ms. Cherie Blair QC of Matrix Chambers (Griffin Building, Gray’s Inn, London WC 1R 5LN, United Kingdom).
3. Claimant and Respondent are hereinafter referred to individually as a “**Party**” and collectively as the “**Parties**”.

**B. PROCEDURAL HISTORY**

4. On 28 November 2011, Claimant filed its Request for Arbitration with the Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**”)

pursuant to Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”). In its Request for Arbitration, Claimant referenced Article 13(3)(a) of the Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments, signed 7 February 1998 and entered into force 14 October 1998 (“**Australia-Pakistan Treaty**”; **Exhibit CE-4**) as Respondent’s written consent to arbitration.

5. On 12 January 2012, the Secretary-General of ICSID registered Claimant’s Request for Arbitration.
6. By letter dated 18 May 2012, Claimant informed the Secretary-General of ICSID (“**Secretary-General**”) that it appointed Mr. John Beechey as an arbitrator pursuant to Article 37(2)(b) of the ICSID Convention. Mr. Beechey accepted his appointment on 1 June 2012 and made a declaration pursuant to Rule 6(2) of the Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”).
7. On 12 June 2012, Respondent appointed as arbitrator Lord Hoffmann, who accepted his appointment on the following day. In separate letters dated 9 July 2012, the Parties jointly consented to the appointment of Dr. Klaus Sachs as the President of the Tribunal, who accepted his appointment as presiding arbitrator on 12 July 2012.
8. On 12 July 2012, the Tribunal was constituted in accordance with Article 37(2)(b) of the ICSID Convention.
9. On 23 July 2012, Respondent filed a proposal to disqualify Mr. Beechey from the Arbitral Tribunal under Article 57 of the ICSID Convention (“**Disqualification Proposal**”). Subsequently, the ICSID Secretariat (the “**Secretariat**”) informed the Tribunal that the proceedings were suspended pursuant to Rule 9(6) of the Arbitration Rules.

10. On the same date but after the submission of Respondent's Disqualification Proposal, Claimant filed a Request for Provisional Measures (the "**Request**"). The Secretariat informed the Parties that, in light of the suspension of the proceedings, Claimant's submission would be sent to the Tribunal once the proceedings resumed.
11. Submissions were made on the Disqualification Proposal by Mr. Beechey and both Parties. In addition, the unchallenged Members of the Tribunal scheduled a hearing on the Disqualification Proposal, to be held at the International Dispute Resolution Centre in London on 8 September 2012.
12. By letter dated 6 September 2012, Claimant informed the unchallenged Members of the Tribunal that the Parties had jointly requested Mr. Beechey to resign from the Tribunal and that he had complied with this request. Claimant also expressed its consent to Mr. Beechey's resignation. By letter of the same date, Respondent informed the unchallenged Members of the Tribunal that it accepted Mr. Beechey's resignation from the Tribunal. Respondent stated that its consent was without prejudice to objections to the jurisdiction of the Tribunal, which it might raise at a later stage of the proceedings.
13. By letter dated 7 September 2012, the unchallenged Members of the Tribunal informed the Secretary-General of their consent to Mr. Beechey's resignation. By letter of the same date, the Secretariat informed the Parties hereof and invited Claimant to appoint an arbitrator pursuant to Article 37(2)(b) of the ICSID Convention in order to fill the vacancy resulting from Mr. Beechey's resignation.
14. By letter of 6 September 2012, Respondent informed the Secretary-General that it would consent to Claimant's appointment of Mr. Stanimir Alexandrov as an arbitrator if he confirmed the disclosure which he had provided to Respondent in advance.
15. By letter of 7 September 2012, Claimant informed the Secretary-General that it appointed Mr. Alexandrov as an arbitrator.

16. On 10 September 2012, Mr. Alexandrov accepted his appointment and confirmed the disclosure which he had previously made to Respondent.
17. By email of the same date, the Secretariat informed the Tribunal that the proceedings would resume pursuant to Rule 12 of the Arbitration Rules from the point which they had reached at the time the vacancy on the Tribunal had occurred. The Secretariat provided the reconstituted Tribunal with Claimant's Request and Exhibits CE-37 to CE-149 as well as the Witness Statements of Messrs. Timothy Livesey and Robert Krcmarov.
18. Under cover of a letter dated 11 September 2012, Claimant submitted corrected versions of Exhibits CE-99 and CE-128.
19. By letter dated 14 September 2012, the Secretariat, on behalf of the Tribunal, confirmed that the hearing on the Request (the "**Hearing**") would be held at the International Dispute Resolution Centre in London on 6 November 2012.
20. Under cover of a letter dated 1 October 2012, Respondent submitted its Response to Claimant's Request for Provisional Measures ("**Response**") with Exhibits RE-1 to RE-11 and Legal Authorities RLA-1 to RLA-6, as well as the Witness Statement of Dr. Samar Mubarakmand and its annexes.
21. On 15 October 2012, Claimant submitted its Reply on Provisional Measures ("**Reply**") together with the Second Witness Statement of Mr. Timothy Livesey. In the Reply, Claimant renewed its request that, given the imminent nature of the harm anticipated by Claimant, the Tribunal immediately grant the requested provisional measures as a temporary restraint pending disposition of the Request.
22. By letter dated 18 October 2012, the Secretariat informed the Parties of the Tribunal's decision that the Tribunal would not decide on the requested relief before having received Respondent's Rejoinder and having heard both Parties' arguments at the oral hearing.

23. Under cover of a letter dated 29 October 2012, Respondent submitted the Rejoinder (titled “*Respondent’s Answer to the Claimant’s Reply*”; “**Rejoinder**”), together with Exhibits RE-12 and RE-13 and Legal Authorities RLA-7 to RLA-10.
24. By letter dated 31 October 2012, the Secretariat, on behalf of the Tribunal, requested that Respondent inform the Tribunal and Counsel for Claimant whether Respondent intended to cross-examine Messrs. Livesey and Krcmarov during the Hearing. By letter of the same date, Respondent confirmed that it did not intend to do so.
25. Under cover of a letter dated 3 November 2012, Claimant submitted Exhibits CE-181 and CE-182.
26. By two separate emails of 5 November 2012, Respondent submitted Exhibit RE-15 and provided page 46 of its Exhibit RE-1.
27. The Hearing was held on 6 November 2012. Respondent’s witness Dr. Samar Mubarakmand was cross-examined during the Hearing.
28. Under cover of a letter dated 13 November 2012, Claimant submitted the Third Witness Statement of Mr. Timothy Livesey.
29. On 19 November 2012, Respondent submitted its comments on the Third Witness Statement of Mr. Timothy Livesey.
30. By letter dated 28 November 2012, Claimant, upon direction by the Tribunal, and in response to Respondent’s letter of 22 November 2012, stated its position on a cross-undertaking and security in the event that the Tribunal were inclined to grant the Request.
31. By letter dated 30 November 2012, Respondent replied to Claimant’s letter dated 28 November 2012.

### **C. BACKGROUND OF THE DISPUTE**

32. This section briefly sets out the background of the dispute as derived from the briefs and evidence submitted by the Parties at this preliminary stage of the arbitral proceedings. This factual summary should not, therefore, be taken as the Tribunal's prejudgment of any issues of fact or law to be resolved at a later stage of the proceedings.
33. On 29 July 1993, BHP Minerals International Exploration Inc. ("**BHP**") and the Balochistan Development Authority ("**BDA**"), a statutory corporation of the Province of Balochistan in Pakistan ("**Balochistan**"), entered into the Agreement for Chagai Hills Exploration Joint Venture ("**CHEJVA**"; **Exhibit CE-1**), which established the unincorporated contractual Chagai Hills Exploration Joint Venture (the "**Joint Venture**") with the purpose of exploring for deposits of gold, copper and other materials in the Chagai district of Balochistan. Pursuant to the terms of the CHEJVA, BDA held a 25% ownership interest in the Joint Venture, while BHP held a 75% interest in return for agreeing to fund the costs of exploration and any feasibility studies to be conducted under the CHEJVA.
34. The statutory legal regime which regulates the exploration and mining activities is contained in the 2002 Balochistan Mineral Rules ("**BM Rules**"; **Exhibit CE-5**). The BM Rules provide, *inter alia*, that the Technical Head of the Directorate General of Mines and Minerals (the "**Licensing Authority**") is the authority to which applications for mineral titles or mineral concessions should be submitted and which is empowered to grant mineral titles and mineral concessions pursuant to the BM Rules.
35. On 4 March 2000, the Government of Balochistan, BHP and BDA entered into the Addendum No. 1 to the CHEJVA ("**Addendum No. 1**"; **Exhibit CE-2**) pursuant to which the Government of Balochistan and BHP confirmed their intention that all references to BDA in the CHEJVA were deemed to refer to the Government of Balochistan. Based on two other contracts, an Option Agreement and an Alliance



Agreement with BHP (**Exhibits CE-12 and CE-15**), Claimant subsequently took over from BHP the exploration activities in the Chagai Hills exploration area.

36. On 30 November 2000, Claimant established Tethyan Copper Company Pakistan (Private) Limited (“**TCCP**”) as its wholly owned Pakistani subsidiary (Claimant and TCCP are collectively referred to as “**TCC**”).
37. In May 2002, the Licensing Authority granted “*M/S. BDA/BHP Chagai Hills Joint Venture*”, i.e., the Joint Venture, the Exploration License EL-5 (“**License EL-5**”; **Exhibit CE-16**), which originally covered 973.75 square kilometers in the Reko Diq area. License EL-5 was initially granted for a period of three years from 21 February 2002 to 20 February 2005 and was subsequently renewed on two occasions through 19 February 2011. The area covered by License EL-5 was reduced first to 482.72 square kilometers and then to 435.02 square kilometers (**Exhibits CE-17 and CE-20**).
38. On 1 April 2006, Claimant became a party to the CHEJVA pursuant to a Novation Agreement with the Government of Balochistan and BHP (the “**Novation Agreement**”, **Exhibit CE-3**), and replaced BHP as a party to the CHEJVA with a 75% interest in both the Joint Venture and its principal asset, License EL-5. Claimant then transferred its mining rights, including the 75% interest in License EL-5 and certain other assets and liabilities, to TCCP (**Exhibit CE-21**). The remaining 25% continued to be held by the Government of Balochistan.
39. From 2006, Claimant together with TCCP carried out an exploration program, as envisaged by Clause 7 of the CHEJVA, in the Exploration Area delineated in Schedule B of the CHEJVA, known as “*Reko Diq*”.<sup>1</sup> Part of Reko Diq is the deposits Tanjeel (H4) and the Western Porphyries (H13, H14 and H15).

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<sup>1</sup> Request, para. 38 *et passim*.

40. In early January 2009, the Chinese state-owned company China Metallurgical Group Corporation (“**MCC**”), which operates a mine close to Reko Diq, was invited to submit a financial and technical proposal for Reko Diq to the joint Government of Balochistan/Government of Pakistan Reko Diq Steering Committee (**Exhibit CE-69**). Beginning in May 2009, while Claimant was carrying out its exploration program, Balochistan and the Federal Government also began to consider an alternative proposal for Reko Diq submitted by Dr. Samar Mubarakmand (“**PC-1 Proposal**”), which provided, *inter alia*, for the construction of a smelter in the Reko Diq area.
  
41. On 26 August 2010, after completing a scoping study in October 2007 (analyzing fourteen project development paths and recommending four options), a pre-feasibility study in July 2009 (focusing on a base case configuration centered around the Western Porphyries but also including a significant amount of analysis regarding Tanjeel) and an expansion pre-feasibility study in July 2010 (envisaging an expansion to Tanjeel and H13 in the sixth year of the mining operation), TCC formally submitted the feasibility study envisaged in the CHEJVA (the “**Feasibility Study**”) to the Government of Balochistan. The Feasibility Study examined the technical and economic feasibility of a base case mining project centered on the Western Porphyries and also contemplated its future expansion to Tanjeel and other adjacent ore bodies.
  
42. On 6 November 2010, a Pakistani attorney, M. Tariq Asad, filed a constitutional petition (**Exhibit CE-172**) before the Supreme Court of Pakistan against the Federal Government, the Provincial Government and other respondents, including Dr. Samar Mubarakmand, requesting the Court to, *inter alia*: (i) direct the Federal Government through its Ministry of Petroleum and Natural Resources, the Chief Secretary of Balochistan, the Head of the Department of Mines and Mineral Development of Balochistan, the Steering Committee and the Board of Revenue of Balochistan to refrain from issuing a mining license in an arbitrary and unlawful manner and without the consultation of the Parliament of Balochistan; (ii) direct the Federal Government, the Chief Secretary of Balochistan and the Head of the Department of Mines and Mineral Development of Balochistan to explain why the mining process

could not have been carried out by the Ministry of Petroleum and Natural Resources and Mining Department, and why such efforts had not been made thus far; and (iii) further direct these three respondents to complete the whole process of gold mining, either independently or with the joint venture, within Pakistan territory and restrain them from taking the raw material out of Pakistan, so that the entire process could take place in Pakistan.

43. On 8 November 2010, a number of Pakistani politicians filed an additional petition with the Supreme Court of Pakistan (**Exhibit CE-173**).
44. Under Clause 11.3.1 of the CHEJVA, each party had 90 days after submission of the Feasibility Study to notify the Manager of the CHEJVA in writing “*whether it intend[ed] to participate in development of the (...) Mineral deposit as a Mining Area.*” On 8 November 2010, Claimant and TCCP provided notice to the Government of Balochistan of their election to participate in the development of Reko Diq (**Exhibit C-23**). The Government of Balochistan, for its part, did not make such an election within the mandated 90-day period. By letter to TCCP dated 28 March 2011 (**Exhibit CE-114**), the Government of Balochistan stated instead that it could not discuss participation in the mine development or consider a joint mining lease application due to third-party challenges to the CHEJVA pending before the Supreme Court of Pakistan.
45. On 3 December 2010, Dr. Samar Mubarakmand gave an interview to the Pakistani television station Duniya TV. When the two interviewers suggested that Balochistan should be giving mining contracts relating to Reko Diq to local companies rather than to outsiders so that the flow of money could remain within Pakistan rather than going to foreign companies, Dr. Mubarakmand stated in response that this was the reason he had developed a technical project and presented it to the Chief Minister of Balochistan (**Exhibit CE-105**).
46. The PC-1 Proposal to the Executive Committee of the National Economic Council was submitted by Balochistan on 10 December 2009 (**Exhibit CE-112**), and

approval of the proposal was granted by decision of 9 December 2010 (**Exhibit CE-106**), following which 8.812 billion rupees were allocated to the project. This project is also referred to as the “**Balochistan Copper/Gold Project**”.

47. On 15 December 2010, Dr. Samar Mubarakmand stated in a television interview that TCC had completed its exploration work and provided a feasibility report. Dr. Mubarakmand further noted that the decision on whether TCC would be granted a mining lease would be made by the Government of Balochistan “*as these deposits belong to them.*” (**Exhibit CE-108**).
48. On 15 February 2011, on Claimant’s instructions, TCCP submitted to the Licensing Authority an Application for a Mining Lease (“**Application**”) in respect of a portion of Reko Diq of just less than 100 square kilometers situated within the boundaries of License EL-5 (**Exhibit CE-6**). The Application was supported by the Feasibility Study and other documents required by the BM Rules.
49. On 3 March 2011, TCC notified the Government of Balochistan of Claimant’s intention to purchase the Government’s 25% interest in the Reko Diq project in order to pursue the project as the sole Participating Party pursuant to the CHEJVA.
50. On 15 September 2011, *The Wall Street Journal* reported that an unnamed Chinese company had approached the Government of Balochistan with a proposal for mine development at Reko Diq (**Exhibit CE-25**).
51. On 21 September 2011, the Licensing Authority issued a notice of its intent to reject Claimant’s Application (the “**Notice**”; **Exhibit CE-7**) as “*not satisfactory*” and granted Claimant 30 days to submit a response.
52. On 19 October 2011, Claimant submitted its Response to the Notice (**Exhibit CE-8**). On the same date, Claimant also submitted a Notice of Dispute under the CHEJVA to the Government of Balochistan (**Exhibit CE-9**), which invited the Government to enter into consultations to reach an amicable resolution of the dispute. In a letter sent

the following day, Claimant further informed Respondent that a denial of the Mining Lease would deprive Claimant of its investment in the Reko Diq project and constitute an expropriation within the meaning of Article 7 of the Australia-Pakistan Treaty.

53. By order of 15 November 2011, the Licensing Authority rejected Claimant's Application (**Exhibit CE-11**). On 28 November 2011, TCCP filed an administrative appeal against the order (**Exhibit CE-36**). On 23 February 2012, a day after the Balochistan Mines & Mineral Development Department of the Licensing Authority ("MMDD") submitted its reply to TCCP's administrative appeal (**Exhibit CE-129**), the Parties were informed that the appeal would be heard approximately two weeks later. The next day, however, the Supreme Court of Pakistan ordered the Licensing Authority to decide on the appeal on 3 March 2012 (**Exhibit CE-131**). Following a hearing on 2 and 3 March 2012, TCCP learned that its administrative appeal had been denied by order of 3 March 2012 (**Exhibit CE-137**).

#### **D. SUMMARY OF THE PARTIES' POSITIONS**

54. This section contains a short summary of the Parties' respective positions. As with the summary of the dispute set out in the preceding section, this summary should not be regarded as the Tribunal's prejudgment of any issues of fact or law that are to be resolved at a later stage of these proceedings.

##### **I. Summary of Claimant's Position**

55. Claimant contends that through exploration and feasibility activities which have consumed over ten years and hundreds of millions of dollars, Claimant and TCCP have done everything necessary to earn a legal entitlement to a mining lease for Reko Diq. Claimant claims that Balochistan has denied the mining lease and is now moving to either develop Reko Diq on its own, or to transfer some or all of it to third parties. Claimant asserts that Respondent and Balochistan have deprived Claimant of its right to a mining lease in breach of the Australia-Pakistan Treaty and that they

threaten to make this deprivation permanent unless the Tribunal grants the provisional measures Claimant seeks.<sup>2</sup>

## 1. Authority of the Tribunal to Grant Provisional Measures

56. Claimant submits that the Tribunal has jurisdiction to recommend provisional measures pursuant to Article 47 of the ICSID Convention and Rule 39 of the Arbitration Rules. Claimant submits that the Tribunal merely needs to have *prima facie* jurisdiction on the merits in order to recommend provisional measures. According to Claimant, such *prima facie* jurisdiction is established pursuant to Article 25 of the ICSID Convention and Article 13 of the Australia-Pakistan Treaty because (i) Claimant tried, but failed, to resolve the dispute with Respondent through negotiations pursuant to Article 13(1) of the Australia-Pakistan Treaty; (ii) Claimant is an Australian “investor” under Articles 1(1)(c) and (d) of the Australia-Pakistan Treaty; (iii) Claimant holds a protected “investment” within the meaning of Articles 1(1)(a) and 2(3) of the Australia-Pakistan Treaty, and the dispute relates to and arises directly out of this “investment” within the meaning of Article 25(1) of the ICSID Convention; and (iv) the Parties consented to the jurisdiction of ICSID in accordance with Article 25(1) of the ICSID Convention.<sup>3</sup>

57. Claimant states that it is a well-established principle laid down by the jurisprudence of ICSID tribunals that the provisional measures “recommended” by an ICSID tribunal are legally compulsory.<sup>4</sup>

## 2. Right to Mine Reko Diq

58. Claimant submits that the right that it requests the Tribunal to preserve through provisional measures is Claimant’s right to mine in Reko Diq and benefit from its

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<sup>2</sup> Request, paras. 112 *et seq.*

<sup>3</sup> Request, paras. 119 *et seq.*

<sup>4</sup> Request, para. 118.

alleged investments there.<sup>5</sup> Claimant contends that it not only satisfied but in fact exceeded the requirements for being granted a mining lease as set forth under the CHEJVA and the BM Rules.<sup>6</sup> Claimant submits that the Licensing Authority's discretion under the BM Rules is limited to determining whether the license applicant has satisfied what the CHEJVA describes as "*routine Government requirements*".<sup>7</sup>

59. Claimant asserts that Balochistan denied its Application on unsupportable grounds. Claimant states that the Licensing Authority manifestly failed to exercise its discretion appropriately. Claimant alleges that Balochistan and Respondent planned to obtain the expert feasibility work from Claimant and then oust it from Reko Diq.<sup>8</sup>
60. Claimant rejects as a mischaracterization Respondent's assertion that the Licensing Authority's rejection of Claimant's application was "*overseen*" by the Supreme Court of Pakistan, and argues that, instead, the Court suspended its own proceedings on the ground that this matter fell within the domain of the Government of Balochistan.<sup>9</sup>
61. Claimant submits that the BM Rules did not require TCC to undertake a full feasibility study of all the discovered deposits in the proposed Mining Area.<sup>10</sup> Further, Claimant asserts that neither the CHEJVA nor the BM Rules require an applicant to limit the scope of the mining lease to a single deposit.<sup>11</sup>
62. Claimant submits that, without the mining lease, it cannot further develop Reko Diq and therefore cannot earn any return on its considerable investments: its investments will be destroyed and its legitimate expectations denied.<sup>12</sup> Claimant also submits that

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<sup>5</sup> Request, para. 129.

<sup>6</sup> Request, paras. 129 *et seq.*; Reply, paras. 62 *et seq.*

<sup>7</sup> Reply, para. 67.

<sup>8</sup> Request, paras. 132 *et seq.*; Reply, paras. 68 *et seq.*

<sup>9</sup> Reply, paras. 72 *et seq.*

<sup>10</sup> Reply, para. 83.

<sup>11</sup> Reply, para. 87.

<sup>12</sup> Request, para. 133.

it has at this stage established at least a *prima facie* case that it has a right to mine Reko Diq and, accordingly, is entitled to specific performance enforcing that right.<sup>13</sup>

### 3. Right to Specific Performance

63. Claimant seeks provisional measures to preserve the right to specific performance as a remedy for Respondent's alleged breaches of the Australia-Pakistan Treaty.<sup>14</sup>
64. Claimant submits that nothing in the Australia-Pakistan Treaty or the ICSID Convention prevents an investor from seeking restitution in the form of specific performance instead of through monetary compensation. To hold otherwise would render meaningless the specific conditions under which an expropriation is permitted under Article 7 of the Australia-Pakistan Treaty.<sup>15</sup>
65. Claimant states that international law provides for "*restitution*", which includes specific performance, as a "*preferred*" remedy unless it is "*materially impossible or wholly disproportionate*". In support of this statement, Claimant relies on Article 35 of the ILC Articles on State Responsibility and the award in *CMS v. Argentina*<sup>16</sup> (**Exhibit CA-15**).
66. Claimant also looks to the Decision on Jurisdiction in *Enron*<sup>17</sup> (**Exhibit CA-16**), where the arbitral tribunal observed that "[a]n examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available."

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<sup>13</sup> Request, para. 135; Reply, para. 61.

<sup>14</sup> Reply, para. 61.

<sup>15</sup> Reply, para. 92.

<sup>16</sup> *CMS Gas Transmission Company v. Argentina*, Award of 12 May 2005, ICSID Case No. ARB/01/8; Request, para. 134; Reply, paras. 90 *et seq.*

<sup>17</sup> *Enron Corp. and Ponderosa Assets v. Argentine Republic*, Decision on Jurisdiction of 14 January 2004, ICSID Case No. ARB/01/3.



Claimant further cites *Micula*<sup>18</sup> (**Exhibit CA-17**), in which the tribunal observed that “[u]nder the ICSID Convention, a tribunal has the power to order pecuniary or non-pecuniary remedies, including restitution, i.e., re-establishing the situation which existed before a wrongful act was committed.”<sup>19</sup>

67. Claimant argues that Respondent cannot rely on the Decision on Provisional Measures in *Occidental*<sup>20</sup> (**Exhibit RLA-1**) because, in the case at hand, Respondent and Balochistan have not yet taken any irreversible steps that might render specific performance impossible.<sup>21</sup>

#### **4. Circumstances Warranting Provisional Measures**

68. Claimant submits that the circumstances require provisional measures pursuant to Rule 39 of the Arbitration Rules as they show “urgency” and “a risk of harm”.<sup>22</sup>

##### **a) Urgency**

69. Claimant submits that it is settled law that provisional measures are appropriate in urgent circumstances where “action prejudicial to the rights of either party is likely to be taken before [a] final decision is taken.”<sup>23</sup> According to Claimant, the current situation is urgent because Balochistan is ready to take immediate steps that will permanently deprive Claimant of its alleged right to mine Reko Diq. Claimant asserts that the requirement of urgency is met when “a question cannot await the outcome of the award on the merits.”<sup>24</sup>

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<sup>18</sup> *Ioan Micula v. Romania*, Decision on Jurisdiction and Admissibility of 24 September 2008 (ICSID Case No. ARB/05/20).

<sup>19</sup> *Micula*, para. 166.

<sup>20</sup> *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. The Republic of Ecuador*, Decision on Provisional Measures, 17 August 2007 (ICSID Case No. ARB/06/11).

<sup>21</sup> Reply, para. 97.

<sup>22</sup> Request, para. 136.

<sup>23</sup> Request, para. 138.

<sup>24</sup> Request, para. 138.

70. Claimant asserts that due to the following developments it is not possible to await the outcome of the Award on the Merits:

- As stated in Dr. Mubarakmand's Witness Statement, a meeting of the Board of Governors of the Reko Diq Copper/Gold Project, with the Chief Minister of Balochistan as Chairman and Dr. Mubarakmand as Co-Chairman, took place on 12 September 2012 and the Government of Balochistan "*resolved to grant permission for the project to begin operations at area H-4*" (Witness Statement of Dr. Samar Mubarakmand, para. 20);
- Respondent states in the Response that if the Tribunal were to grant provisional measures enjoining the Government from taking further steps to develop the Reko Diq Mining Area, "[t]he Government's efforts to develop H4 would be brought to a standstill including the preparation for the excavation of the ore due to commence in 6 months and the construction of a smelter" (Response, para. 117);
- The work plan and timeline for the Balochistan Copper/Gold Project at deposit H4 attached as Annex 6 to Dr. Mubarakmand's Witness Statement ("**H4 Work Plan**") show that there will be an initial mobilization at the site within three months, and by mid-December 2012, test drilling will begin and a temporary camping site will be established at Reko Diq (Annex 6 to Witness Statement of Dr. Samar Mubarakmand).

Respondent's plans to develop H4 are addressed in further detail below.

71. With respect to urgency in particular, Claimant also refers to the following developments:

- Press announcements of the Chief Minister of Balochistan that Balochistan is taking measures to run Reko Diq by itself (**Exhibits CE-144 and CE-146**);
- Publication by the Government of Balochistan of several notices seeking senior technical and administrative personnel and tenders seeking

advanced office equipment for the “*Reko Diq Copper Gold Project*” it would develop (**Exhibits CE-125, CE-127 and CE-133**);

- Reports by news outlets that a technical team would soon begin work at the Reko Diq site and that Balochistan had allocated budgetary resources to develop the site (**Exhibits CE-134 and CE-146 to CE-148**);
- A news report that the Federal Government had granted “*Export Processing Zone*” status to Reko Diq, thereby conferring a favorable tax and duty regime upon Balochistan’s government-run Reko Diq Copper/Gold Project (**Exhibit CE-142**);
- Restrictions placed on Claimant’s expatriate staff by Balochistan and Respondent preventing the staff from accessing the Reko Diq site, which make it impossible for Claimant to supervise the temporary closure of the site and secure its equipment and assets there;
- Reports that employees of a competitor mining company, accompanied by Balochistan officials, accessed the Reko Diq site in early July 2012 and took samples from the deposits identified in Claimant’s studies (**Exhibit CE-149**).<sup>25</sup>

**b) Risk of Harm**

72. Claimant submits that there is a substantial risk of harm if no provisional measures are granted.<sup>26</sup> Claimant asserts that the Government of Balochistan’s imminent actions would create *faits accomplis* that would be difficult, if not impossible, to undo. If one or more mining leases were granted to a Balochistan entity and/or third parties, new rights and obligations would be created under provincial mining law, and the new leaseholder or leaseholders would, in turn, enter into numerous contracts and supply agreements with other parties. It would be difficult to extinguish these rights, and in the event the Tribunal decided to grant relief to Claimant, this would undoubtedly give rise to numerous and protracted legal disputes. Furthermore, Claimant states that there is a considerable risk that the construction or mining

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<sup>25</sup> Request, para. 139.

<sup>26</sup> Request, para. 140.

activities undertaken by Balochistan or a third party lacking Claimant's expertise would reduce the commercial prospects of the Reko Diq site. Claimant submits that enforcement of a final award in Claimant's favor would be impossible as a practical matter under such circumstances.<sup>27</sup>

73. Claimant submits that the Tanjeel deposit (H4) forms an integral part of TCC's overall plans for Reko Diq and cannot simply be excised from the project. This is evidenced by the fact that TCC has consistently planned to extract ore from Tanjeel and has expended considerable time, effort and money in furtherance of this goal.
74. According to Claimant, Balochistan's planned construction, extraction and processing activities within the Reko Diq Mining Area would risk rendering specific performance of Claimant's right to mine Reko Diq impossible for the following reasons: (i) the project was purposefully designed so that, if warranted by prevailing economic conditions, it could eventually support expanded operations, in particular in Tanjeel; (ii) Balochistan would implement mine designs, choose processing methods and construct infrastructure that would almost certainly have a detrimental effect on the long-term efficiencies and returns of TCC's mining operation; (iii) Balochistan's copper mining operation will affect a much greater portion of the Reko Diq Mining Area than the five square kilometers specified in the Response; (iv) Balochistan's lack of experience in developing sustainable projects may have far-reaching and long-term effects, e.g., in the form of leakage from tailings areas, adverse effects from dust dispersion and a failure to plan for important remediation of environmental impacts following the closure of the mine; and (v) the name "*Reko Diq Copper/Gold Project*" suggests that the project will be extended to other parts of Reko Diq because there is no exploitable gold at the Tanjeel deposit.<sup>28</sup>

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<sup>27</sup> Request, paras. 141 *et seq.*

<sup>28</sup> Reply, paras. 108 *et seq.*

75. Claimant cites the Decision on Revocation of Provisional Measures in *City Oriente*<sup>29</sup> (**Exhibit CA-18**), where the arbitral tribunal concluded that:

“[u]pon weighing the interests at stake, the Arbitral Tribunal must choose to protect the possibility of enforcing a hypothetical award favorable to Claimant, even at the cost of temporarily depriving Respondents’ (sic) of their contractual right to self-protection. Thus, given that Claimant has already commenced arbitration proceedings demanding performance of the Contract, Claimant has a right to request that Respondents refrain from performing any act that may lead to the early termination of the Contract.”

76. Claimant concludes that, without provisional measures, imminent actions by the Government of Balochistan threaten to destroy Claimant’s investment and, as a practical matter, deprive the Tribunal of the opportunity to grant a performance remedy.
77. According to Claimant, the practical effect of denying provisional measures would be to deny Claimant the right to seek specific performance and obtain the mining lease before the Tribunal has had the opportunity to reach a final determination on that issue. Claimant states that the loss of the right to mine Reko Diq would not be adequately reparable by an award of damages as the Reko Diq site is an “*irreplaceable asset*”. Claimant submits that decades of exploration work, consuming tens of billions of dollars, have not uncovered a truly equivalent property. Claimant asserts that, since there is a possibility that it may be economically feasible to extract more of the mineral resources at Reko Diq in the future, any award of damages would likely undercompensate Claimant.<sup>30</sup>
78. In support of its argument, Claimant cites the Decision on Provisional Measures in *Perenco*<sup>31</sup> (**Exhibit CA-12**), in which the tribunal found provisional measures to be

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<sup>29</sup> *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Decision on Revocation of Provisional Measures and Other Procedural Matters of 13 May 2008, ICSID Case No. ARB/06/21.

<sup>30</sup> Request, paras. 143 *et seq.*

<sup>31</sup> *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Decision on Provisional Measures of 8 May 2009, ICSID Case No. ARB/08/06.

necessary where the imminent seizure of the claimant's assets would have caused it to go out of business, an injury that could not be fully remedied by damages.

**c) Balance of Harms**

79. Claimant submits that international tribunals typically assess whether the harm likely to result if the provisional measures are not ordered substantially outweighs the harm that is likely to result to the party against whom the interim relief is directed. If provisional measures are ordered, Claimant argues, all Respondent faces is a temporary hold on work at Reko Diq pending the outcome of this dispute. Even if Respondent were to prevail in this arbitration, the Government of Balochistan could still carry out its plans to dispose of the asset or run the project itself, thereby enjoying the substantial direct and indirect benefits of the mining operations over the long life of the mine. By contrast, if provisional measures are not granted, the imminent actions of Balochistan would be effectively irreversible.<sup>32</sup>
80. Claimant states that any harm that Respondent alleges it will suffer is self-inflicted and could have been avoided had Respondent observed its obligations under the Australia-Pakistan Treaty and Balochistan observed its obligations under the CHEJVA and the BM Rules.<sup>33</sup>
81. Claimant asserts that, as compared to the 1,500 jobs envisaged by the PC-1 Proposal, the mining project planned by TCC would create up to 11,500 jobs in the construction phase and more than 2,500 full-time jobs in the operating phase. Further, Claimant notes that even though it viewed a smelter built and operated by Balochistan or a third party as being unnecessary for the processing method applied, Claimant nevertheless did not object to supplying copper concentrate to this planned smelter. According to Claimant, the calculations on which the PC-1 Proposal is based do not take into consideration the significant capital and operating costs that are involved in mining, producing and processing copper. Claimant states that the

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<sup>32</sup> Request, paras. 150 *et seq.*

<sup>33</sup> Reply, para. 119.

mining project as contemplated by Claimant in the Feasibility Study, if properly managed, would be in operation for at least 56 years and provide substantial direct and indirect benefits to Balochistan, Respondent and any private stakeholders.<sup>34</sup>

**d) Risk of Aggravation of the Dispute**

82. Claimant states that it is further well established that ICSID tribunals, like other international tribunals, may order provisional measures to prevent aggravation of the dispute. In particular, Claimant cites in this regard the Decision on Provisional Measures in *Perenco* (**Exhibit CA-12**) and Procedural Order No. 1 in *Burlington*<sup>35</sup> (**Exhibit CA-14**).
83. Claimant accepts Respondent's view that non-aggravation of the dispute is not an independent ground on which to grant provisional measures under Article 47 of the ICSID Convention but that the added requirements of necessity and urgency must also be met.<sup>36</sup>
84. Claimant submits that its right to avoid aggravation of the dispute deserves to be protected through the recommendation of provisional measures (i) to allow the Tribunal sufficient time to decide the issues in dispute without a Party taking justice into its own hands and rendering the resolution of the dispute more difficult, costly and time-consuming; and (ii) to prevent the relationship between the Parties from worsening, in order not to complicate or preclude a future collaboration between the Parties in the event of a settlement or necessary future collaboration.<sup>37</sup>

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<sup>34</sup> Request, paras. 155 *et seq.*; Reply, paras. 118 *et seq.*

<sup>35</sup> *Burlington Resources, Inc. v. Republic of Ecuador (formerly Burlington Resources, Inc., and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador))*, Procedural Order No. 1 on Provisional Measures of 29 June 2009, ICSID Case No. ARB/08/5.

<sup>36</sup> Reply, para. 128.

<sup>37</sup> Request, paras. 161 *et seq.*; Reply, paras. 129 *et seq.*

## II. Summary of Respondent's Position

### 1. No Authority of the Tribunal to Grant Provisional Measures

85. As regards the Tribunal's jurisdiction, Respondent makes the following arguments: (i) the matters in dispute are before the Supreme Court of Pakistan, which will state the law of Pakistan definitively with respect to the interpretation of the CHEJVA and the application of the relevant legislation; (ii) the terms of the Australia-Pakistan Treaty are under review by the Governments of Australia and Pakistan, in particular the issue of whether the BIT should apply to Claimant as a company owned and controlled by non-Australian companies; (iii) Claimant's voluntary participation in court proceedings in Pakistan prevents it from invoking the right to arbitration in Article 13 of the Australia-Pakistan Treaty; (iv) public interest overwhelmingly favors the Government of Balochistan's proceeding with the H4 project without further delay and (v) Claimant has made an application for provisional measures in the parallel ICC arbitration that seeks the same relief against Balochistan.<sup>38</sup>

86. Respondent refers to the decision on Provisional Measures in *Occidental* ("**Exhibit RLA-1**"), which states that "*in order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm.*" (emphasis in the original)<sup>39</sup> Respondent submits that the power to grant specific performance is not explicit in the ICSID Convention and that no ICSID tribunal has ordered a state to grant rights to an investor over its natural resources as a final or interim remedy.<sup>40</sup>

### 2. No Right to Mine Reko Diq

87. Respondent states that, even though Claimant sought a mining lease over the entire Reko Diq area which contains at least 14 known deposits, the Feasibility Study was

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<sup>38</sup> Response, paras. 23 *et seq.*; Rejoinder, paras. 8 *et seq.* and 41.

<sup>39</sup> *Occidental*, para. 61.

<sup>40</sup> Response, paras. 1 *et seq.* and 28-29.



limited to only two deposits, i.e., H14 and H15. Respondent submits that a project of this size has never previously been contemplated in Balochistan or Pakistan and that, therefore, the governmental mechanisms for putting it into effect cannot be considered “routine”.<sup>41</sup>

88. Respondent submits that the BM Rules make clear that when the Government enters into mineral agreements with companies or other entities, these agreements are subject to the BM Rules and the discretion of the Licensing Authority, which is in turn advised exclusively by the Mines Committee consisting of officials of the Directorate General of Mines and Minerals.<sup>42</sup> Respondent states that the Licensing Authority is not a party to the CHEJVA and is not bound by any attempt to “agree in advance or to preordain the result of the application of the mining rules and the exercise of the statutory discretion to grant or to refuse an application for a mining lease”.<sup>43</sup>
89. Respondent submits that Claimant lacks any right or title to mine in the Reko Diq Mining Area because its Application was rejected by the Licensing Authority.<sup>44</sup> Respondent submits that, under the BM Rules, the Licensing Authority has broad discretion to refuse a mining lease application if it believes that this would not be in the interest of the development of Balochistan’s mineral resources. Respondent submits that the Licensing Authority properly exercised its discretion under the BM Rules to refuse Claimant’s Application. According to Respondent, Claimant had no *locus standi* under the BM Rules to apply for the mining license because the Joint Venture, not Claimant, was the holder of License EL-5.<sup>45</sup>

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<sup>41</sup> Response, paras. 39 *et seq.*

<sup>42</sup> Response, paras. 45 *et seq.*

<sup>43</sup> Response, para. 59.

<sup>44</sup> Response, para. 50.

<sup>45</sup> Response, paras. 90 *et seq.*; Rejoinder, paras. 5 *et seq.*

90. Respondent asserts that, under the BM Rules, mining lease applications can be refused in the public interest and for failure to provide for additional value.<sup>46</sup>
91. Respondent submits that the issues of the validity and legality of the CHEJVA, Addendum No. 1 and the Novation Agreement are currently before the Supreme Court of Pakistan and have been pending since 2007. Respondent notes that the signatory to the CHEJVA on behalf of the BDA, then BDA Chairman Mr. Ata Muhammad Jafar, was later convicted of corruption. Respondent argues that Claimant's reliance on the *ultra vires* joint venture contracts is misplaced because, whether or not they are declared by the Supreme Court of Pakistan as void *ab initio* under applicable law, they do not contain any promise to grant a mining lease to Claimant.<sup>47</sup>
92. Respondent argues that, even if Claimant succeeds in establishing that the BM Rules entitle it to a mining lease, this would be in relation to a certain mine or mineral deposit, in accordance with the procedure set out in the CHEJVA. Respondent submits that Claimant's Application related to at least 14 mineral deposits contained in Reko Diq, while the Feasibility Study related only to the two mineral deposits at H14 and H15. Respondent argues that Claimant failed to follow the procedures in the joint venture contracts in relation to the other mineral deposits in Reko Diq; it unilaterally submitted an application for the entire 99.483 square kilometers in breach of the joint venture contracts.<sup>48</sup>
93. Respondent submits that Claimant applied for a mining lease as the holder of License EL-5 even though this license was granted to the Joint Venture and not to Claimant. Thus, pursuant to the CHEJVA, it was the property of the Joint Venture and not of Claimant.<sup>49</sup>

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<sup>46</sup> Rejoinder, para. 53.

<sup>47</sup> Response, paras. 53 *et seq.*

<sup>48</sup> Response, 77; Rejoinder, para. 58.

<sup>49</sup> Response, 81.

94. Respondent argues that the Licensing Authority gave Claimant sufficient notice of its intent to refuse the Application and thus provided Claimant with an opportunity for it to amend its Application – which Claimant did not do.<sup>50</sup>

### 3. No Legitimate Expectation

95. Respondent submits that Claimant was well aware, or that it ought to have been plain to a prudent investor in Claimant’s position, that the legislative framework applicable to mining titles as set out in the BM Rules provides the Licensing Authority with extremely wide discretion to refuse a mining lease application. Further, Claimant should have appreciated that an exploration license could not automatically be converted to a mining lease, and that the provisions of the Joint Venture contracts did not contain such a guarantee.<sup>51</sup>

96. Respondent states that Claimant could not expect that the lease of the entire area of 99.473 square kilometers for which it applied would be granted by the Licensing Authority, particularly because the Feasibility Study related only to 6 square kilometers (deposits H14 and H15).<sup>52</sup> In the Rejoinder, Respondent contends that the “*feasibilities or pre-feasibilities were made in relation to mineral deposits, namely H4, H14 and H15, and not areas in terms of square kilometres.*”<sup>53</sup>

97. Respondent contends that Claimant’s expectation that the CHEJVA gave rise to an entitlement to a mining lease is wrong for the following reasons: (i) the CHEJVA does not make such a representation or promise, but rather, Article 5.9 of the CHEJVA provides that the parties shall “*seek an assurance from the Provincial Government, namely that the Joint Venture shall have the right to apply for a mining lease*”; and (ii) pursuant to Rules 9(4) and 9(5) of the BM Rules, and as a matter of common law and common sense, such a guarantee by the Government of Balochistan

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<sup>50</sup> Response, paras. 91 *et seq.*

<sup>51</sup> Response, para. 97.

<sup>52</sup> Response, para. 98; Rejoinder, para. 17.

<sup>53</sup> Rejoinder, para. 44.

in an agreement would be unenforceable and void.<sup>54</sup> According to Respondent, Claimant was never given an assurance within the meaning of Article 5.9 of the CHEJVA by the Government of Balochistan.

#### 4. No Right to Specific Performance

98. Respondent submits that it is established as a matter of customary international law that a State controls its own natural resources and no international tribunal can compel a State to transfer title to natural resources. Respondent states that the ICSID cases cited by Claimant in support of specific performance do not address the question of whether specific performance can be ordered where title to natural resources is at stake.<sup>55</sup> According to Respondent, the reasoning in *Occidental* applies here, namely that “*where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor’s entitlement, specific performance must be deemed legally impossible.*”<sup>56</sup> Respondent submits that by denying Claimant’s application for a mining lease, the Licensing Authority put an end to the CHEJVA.<sup>57</sup>
99. Respondent concludes that, should the Tribunal find liability to exist in this case, the only remedy available to Claimant is damages.<sup>58</sup>

#### 5. Circumstances Do Not Warrant Provisional Measures

##### a) No Urgency and Necessity

100. Respondent submits that Claimant has failed to demonstrate that there are circumstances of urgency and necessity that merit the grant of provisional measures.

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<sup>54</sup> Response, para. 99; Rejoinder, paras. 47 *et seq.*

<sup>55</sup> Rejoinder, paras. 57 *et seq.* referring to the cases of *Micula*, *Enron* and *Burlington*.

<sup>56</sup> *Occidental*, para. 79

<sup>57</sup> Rejoinder, paras. 69 *et seq.*

<sup>58</sup> Rejoinder, para. 71.

According to Respondent, Balochistan has no current intention of granting mining rights over Reko Diq to a third party or parties.<sup>59</sup>

101. Respondent submits that the Government of Balochistan's plans are limited to mining 5.08 square kilometres at deposit H4 of Reko Diq in order to meet Pakistan's domestic copper consumption needs. Further, Respondent states that the Government of Balochistan has no intention to extend its current development plans to the rest of Reko Diq.<sup>60</sup>
102. Respondent submits that Balochistan will only mine at deposit H4 at an initial rate of 15,000 tons per day. Considering that Claimant's plan is to mine 110,000 tons of ore per day at deposits H14 and H15 on the basis of an initial 30-year mining lease over an area of 99.473 square kilometres, it is inconceivable that Respondent's activities could cause any harm to Claimant, let alone harm of an irreparable nature. Respondent concludes that damages are an adequate remedy and, in fact, the only available remedy; none of Balochistan's actions with respect to Reko Diq during the pendency of these proceedings will compromise Claimant's ability to claim monetary compensation as part of the final award.<sup>61</sup>

**b) Balance of Harms Not at Issue**

103. Respondent claims that arguments as to the "*balance of convenience*" come into play only where the requirements of necessity, urgency and "an arguable case" are met. Respondent submits that Claimant is unable to prove that these requirements are met here.<sup>62</sup>
104. Furthermore, Respondent states that Claimant's project, which requires that a pipeline of 682 kilometers be constructed through inhospitable territory with major security concerns, cannot be realized in practice. Respondent states that, in view of

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<sup>59</sup> Response, para. 104.

<sup>60</sup> Response, para. 104.

<sup>61</sup> Response, paras. 106 *et seq.*

<sup>62</sup> Response, para. 116.

likely terrorist attacks on the pipeline, the security of the project cannot be guaranteed.<sup>63</sup>

105. Respondent explains that the project is politically unacceptable for the Federal Government and the Government of Balochistan given the strength of public opinion against it in the absence of economic benefits to the people of Balochistan.<sup>64</sup>
106. Respondent rejects as untenable Claimant's concerns that its mining project in relation to H4 would damage the deposit or the environment.<sup>65</sup>
107. Respondent states that Claimant's conduct can be interpreted both as a deliberate attempt to conceal the extent of the mineral deposits in Reko Diq and mislead the Government of Balochistan, as well as an act of bad faith.<sup>66</sup>
108. Respondent asserts that there is a political and economic need for the Balochistan Copper/Gold Project.

**c) No Aggravation of the Dispute**

109. Citing *Cemex v. Venezuela*<sup>67</sup> (**Exhibit CA 26**), Respondent submits that the “*non-aggravation of the dispute*” is not an independent ground on which to grant provisional measures under Article 47 of the ICSID Convention. The added requirements of urgency and necessity must be met.<sup>68</sup>

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<sup>63</sup> Rejoinder, paras. 20 *et seq.*

<sup>64</sup> Rejoinder, paras. 15 *et seq.*

<sup>65</sup> Rejoinder, paras. 26 *et seq.*

<sup>66</sup> Rejoinder, para. 37.

<sup>67</sup> *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimant's Request for Provisional Measures of 3 March 2010, para. 61.

<sup>68</sup> Response, para. 112.

110. Respondent submits that it is unclear how the Government of Balochistan's proposals with regard to deposit H4 will "*aggravate the dispute*", as the only remedy available to Claimant is damages.<sup>69</sup>
111. Respondent claims that the Government's proposed actions with respect to deposit H4 presently do not involve granting rights to any third parties during the pendency of these proceedings and beyond. Thus, Claimant's request for provisional measures does not help or hinder the Tribunal's ability to resolve this dispute in any way.<sup>70</sup>

### **III. The Parties' Requests for Relief**

#### **1. Claimant's Request for Relief**

112. Claimant requests the Tribunal to issue an Interim Award ordering that Respondent, during the pendency of this dispute:
- a. *refrain from, and take all steps necessary to ensure that Balochistan refrain from, taking further steps to develop the Reko Diq Mining Area, or any part thereof, by itself or with third parties;*
  - b. *refrain from, and take all steps necessary to ensure that Balochistan refrain from, selling, leasing, transferring, authorizing or otherwise disposing of the Reko Diq Mining Area, or its interest in the Joint Venture, or any part thereof to any third party;*
  - c. *refrain from, and take all steps necessary to ensure that Balochistan refrain from, breaching the confidentiality provisions of TCC's Feasibility Study by sharing or disclosing any portion of its contents with any unauthorized persons or entities;*

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<sup>69</sup> Response, para. 111.

<sup>70</sup> Response, para. 111; Rejoinder, paras. 22 *et seq.*

- d. *refrain from, and take all steps necessary to ensure that Balochistan refrain from, taking any steps that infringe TCC's exclusive surface rights under the Surface Rights Lease;*
- e. *issue, and take all steps necessary to ensure that Balochistan issue, any authorization required to allow TCC's expatriate staff to work in Pakistan and to travel to and access the Reko Diq site, including work visas, security clearances and No-Objection Certificates; and*
- f. *refrain from, and take all steps necessary to ensure that Balochistan refrain from, taking any steps that would unsettle the status quo, aggravate the dispute, or render ineffective any ultimate relief granted by the Tribunal.*<sup>71</sup>

## **2. Respondent's Request for Relief**

113. Respondent requests the Tribunal to dismiss the application with costs awarded in Respondent's favor.<sup>72</sup>

## **E. DECISION BY THE TRIBUNAL**

### **I. Legal Framework for the Recommendation of Provisional Measures**

114. Article 47 of the ICSID Convention provides as follows:

*"Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."*

Thus, there is no question that the Tribunal has the authority to order provisional measures to preserve a party's rights.

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<sup>71</sup> Request, para. 166; Reply, para. 132.

<sup>72</sup> Response, para. 123; Rejoinder, para 72.



115. Rule 39(1) of the ICSID Arbitration Rules also states:

*“At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.”*

116. Thus, before “*recommending*” any provisional measure under the ICSID Convention and the Arbitration Rules, an arbitral tribunal must be satisfied that two prerequisites are met: (i) that a right exists and (ii) that the circumstances require that the provisional measures be ordered to preserve such right.

117. The question of whether the right to be preserved exists goes to the merits of the case which will not be decided at this preliminary stage of the proceedings. It therefore suffices that the party requesting the provisional measure establishes a *prima facie* case that it owns a legally protected interest.<sup>73</sup>

118. Neither the ICSID Convention nor the ICSID Arbitration Rules further specify the circumstances under which provisional measures may be granted. This question has, however, been dealt with extensively in various decisions by ICSID tribunals. Pursuant to the well-established jurisprudence of ICSID tribunals, provisional measures may be granted where the situation is urgent and the requested measures are necessary to preserve a party’s right from irreparable harm.<sup>74</sup>

119. This test is in conformity with the practice of the International Court of Justice (“**ICJ**”) under Article 41 of its Statute, on which Article 47 of the ICSID Convention is modeled.<sup>75</sup> Article 41 of the ICJ Statute reads:

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<sup>73</sup> *Burlington*, para. 53; *Occidental*, para. 64.

<sup>74</sup> *Occidental*, para. 61; *Burlington*, para. 82; *Perenco*, para. 43. See also *Cemex*, paras. 44-56.

<sup>75</sup> L. Malintoppi, “Provisional Measures in Recent ICSID Proceedings: What Parties Request and Tribunals Order,” in C. Binder, U. Kriebaum, A. Reinisch, S. Wittich (eds.), *International Investment Law for The 21st Century*, Oxford University Press, 2009, p. 158 *et seq.*

“1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”

120. Although Article 47 of the ICSID Convention and Rule 39 of the Arbitration Rules use the word “*recommend*”, it is generally recognized that arbitral tribunals are empowered under these provisions to order provisional measures with binding force and that the parties are obliged to comply with such orders.<sup>76</sup> The Parties to the present arbitration have not contested the binding nature of provisional measures.

121. Under the ICSID Convention, moreover, an arbitral tribunal may recommend provisional measures before it has decided on whether it has jurisdiction over the dispute. However, the Tribunal, in accordance with the well-established practice of ICSID tribunals,<sup>77</sup> will only recommend provisional measures if it is satisfied that it has *prima facie* jurisdiction to decide the merits of the case.

122. In view of the above, the Tribunal will proceed to determine whether it has *prima facie* jurisdiction over the dispute (II.) and whether provisional measures are required by the circumstances at hand to preserve Claimant’s asserted right to mine Reko Diq (III.).

## II. *Prima Facie* Jurisdiction of the Tribunal

123. The Tribunal is satisfied that, in the present circumstances, it has *prima facie* jurisdiction over the merits of the dispute pursuant to Article 25(1) of the ICSID Convention and Article 13 of the Australia-Pakistan Treaty.

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<sup>76</sup> *Occidental*, para. 58; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 on Request for Provisional Measures, para. 4; *City Oriente*, paras. 51-53. See also *La Grand* (Federal Republic of Germany v. United States), Judgment, 2001 I.C.J. Rep. p. 466 (**Exhibit CA-4**), p. 502 *et seq.* (“*The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.*”)

<sup>77</sup> *Burlington*, para. 49; *City Oriente*, para. 50; *Perenco*, para. 39; *Occidental*, para. 55.

124. Article 25(1) of the ICSID Convention reads as follows:

*“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”*

125. In Article 13 of the Australia-Pakistan Treaty, it is stated, in relevant part:

*“1. In the event of a dispute between a Party and an investor of the other Party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.*

*2. If the dispute in question cannot be resolved through consultations and negotiations, either party to the dispute may:*

*(a) in accordance with the law of the Party which admitted the investment, initiate proceedings before that Party's competent judicial or administrative bodies;*

*(b) if both Parties are at that time party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Convention"), refer the dispute to the International Centre for Settlement of Investment Disputes ("the Centre") for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention;*

*(...)*

*3. Where a dispute is referred to the Centre pursuant to paragraph 2(b) of this Article:*

*(a) where that action is taken by an investor of one Party, the other Party shall consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor;*

*(...)”*

126. Pursuant to Article 13(3)(a) of the Australia-Pakistan Treaty, Respondent agreed to “*consent in writing to the submission of the dispute to the Centre within thirty days*” after receiving the Request for Arbitration. On 28 November 2011, Claimant filed its Request for Arbitration and consented “*to submit to the Centre the dispute that is subject of this Request for Arbitration.*”<sup>78</sup>
127. Respondent contests the jurisdiction of the Tribunal for the reasons set out in paragraph 85. As to the second reason – the review of the terms of the Australia-Pakistan Treaty by the two signatory governments with respect to its application to companies owned and controlled by non-Australian companies – the Parties confirmed at the First Session that Australia had advised the Pakistani Government that it has no intention of denying Claimant the benefits of the Australia-Pakistan Treaty.<sup>79</sup> The Tribunal understands that this issue has become moot.
128. Claimant contends that the Tribunal has *prima facie* jurisdiction to decide on the merits.
129. The Tribunal considers it to be preliminarily established that (i) the Parties tried, but failed, to resolve their dispute through negotiations pursuant to Article 13(1) of the Australia-Pakistan Treaty; (ii) Claimant is an Australian “*investor*” under Articles 1(1)(c) and (d) of the Australia-Pakistan Treaty; (iii) Claimant holds a protected “*investment*” within the meaning of Articles 1(1)(a) and 2(3) of the Australia-Pakistan Treaty, and the dispute relates to and arises directly out of this “*investment*” within the meaning of Article 25(1) of the ICSID Convention; and (iv) the Parties consented to the jurisdiction of ICSID in accordance with Article 25(1) of the ICSID Convention.
130. Further, the Tribunal is satisfied that its *prima facie* jurisdiction is not affected by the separate proceedings before the Supreme Court of Pakistan to decide on matters relating to the interpretation of the CHEJVA under Pakistani law and the application

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<sup>78</sup> Request for Arbitration, para. 16.

<sup>79</sup> Transcript, p. 24.

of the relevant legislation. The reasons why such proceedings *prima facie* cannot affect the Tribunal's jurisdiction over the present dispute are twofold: Firstly, the subject matter of the proceedings before the Supreme Court of Pakistan is distinct from that of the present arbitration, which deals primarily with an allegation of a breach of Respondent's obligations under the Australia-Pakistan Treaty and general international law, and not with the interpretation of the CHEJVA under Pakistani law. Secondly, the parties to the proceedings before the Supreme Court of Pakistan differ from those in the present proceedings.

131. For the same reasons, the Tribunal finds *prima facie* that its jurisdiction is not affected by the ICC arbitration proceedings in which Claimant pursues its rights under the CHEJVA against Balochistan.
132. Furthermore, in the Tribunal's view, Respondent has not established that Claimant is pursuing its rights under the Australia-Pakistan Treaty in court proceedings in Pakistan. The Tribunal therefore does not have to express its view on whether Article 13 of the Australia-Pakistan Treaty contains a fork-in-the-road clause that would preclude submission of this dispute to an international tribunal.
133. Finally, the question of whether public interest overwhelmingly favors the Government of Balochistan's proceeding with the H4 project without further delay is a question that goes to the merits and does not affect the Tribunal's jurisdiction.

### **III. Interim Measures for Preserving Claimant's Asserted Right to Mine Reko Diq**

#### **1. Right to be Preserved**

134. Claimant requests provisional measures for the protection of the asserted right to "*mine all ore in the Reko Diq Mining Area*"<sup>80</sup> because it has satisfied the requirements for receiving a mining lease under both the CHEJVA, in particular

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<sup>80</sup> Cf. Reply, para. 61.

Clause 11.8.2, and the BM Rules. Claimant also seeks protection of its asserted right to “*restitution in the form of specific performance*”<sup>81</sup> as a remedy for Respondent’s failure to grant TCC the mining lease. In addition hereto, Claimant pursues its request in order to prevent the aggravation of the dispute.

135. Respondent, on the other hand, denies that Claimant has the right to a mining lease or any right capable of enforcement by specific performance.
136. The Parties’ submissions regarding the existence of the asserted right to be preserved raise complex questions of law and fact. In the Tribunal’s view, they are unsuitable for decision before a full hearing on the merits of the case.
137. At this early stage in the proceedings, the Tribunal cannot assume that Claimant does not have the rights or remedies to which it asserts it is entitled, including any right capable of enforcement by specific performance. To make this assumption would be tantamount to deciding the merits of the case in Respondent’s favor based only on the evidence and argumentation that has been presented thus far. Accordingly, for the purpose of deciding on the Request, the Tribunal will assume that Claimant will succeed on these points, and turn its focus to the question of whether the circumstances in the present case require that provisional measures be ordered for the preservation of the asserted rights.

## **2. Circumstances Requiring Provisional Measures**

138. As set out above, provisional measures may be ordered where the situation is urgent and the requested measures are necessary to preserve the asserted right from irreparable harm. Claimant bases the Request on two scenarios, which it set out during the Hearing. In the first scenario, Respondent limits its mining activities to deposit H4 (Tanjeel). In the second scenario, Respondent expands its activities to

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<sup>81</sup> Reply, para. 93.

deposit H15.<sup>82</sup> The Tribunal must therefore determine with regard to both scenarios whether the requirements of urgency and necessity are met.

**a) Urgency**

139. As regards the first scenario, the element of urgency is not disputed between the Parties. Indeed, Respondent itself stated during the Hearing that it intends to commence mining activities at deposit H4 within the next few months. At the Hearing, Respondent's Counsel stated that "[y]es, *there will be mining in the H4 deposit within the space of the coming year.*"<sup>83</sup> Assuming that Claimant is correct that Respondent's mining activities would cause it irreparable harm by limiting or even closing off completely Claimant's ability to mine at Tanjeel, there is no question that the situation is urgent.
140. In contrast, it remains unclear whether the situation is urgent with respect to the second scenario, i.e., deposits other than H4, in particular H14 and H15.
141. Claimant submits that Respondent will most likely expand its activities to H15.<sup>84</sup> In further support of this submission, Claimant adduced a Third Witness Statement by Mr. Timothy Livesey following the Hearing, in which Mr. Livesey attests that on 4 November 2012, a local employee of TCC encountered a convoy of vehicles traveling to the Reko Diq site led by an employee of Balochistan's Reko Diq Copper/Gold Project, Mr. Rehmat Ullah, and that some of the convoy's vehicles and drivers had been supplied by the nearby mining project operated by MCC. The Third Witness Statement contains three photographs which show off-road cars in a desert landscape. According to Mr. Livesey, the photographs on pages 2 and 3 of the Third Witness Statement show the convoy at the Tanjeel deposit and the photo on page 4 of the Third Witness Statement shows the convoy at deposit H15.

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<sup>82</sup> Transcript, p. 190 and 192.

<sup>83</sup> Transcript, p. 226.

<sup>84</sup> Transcript, p. 192 *et seq.*

142. In his oral testimony given at the Hearing, Dr. Samar Mubarakmand stated that Balochistan had no present intention to develop the deposits H14 and H15.<sup>85</sup> This statement was confirmed by Counsel for Respondent who submitted that “*the Government has no present intention to do other than implement the plan that it has proposed for H-4; it has no present intention to develop H-14 or H-15, or any other deposit covered by the application for the mining links; and it has no present intention to give any rights whatsoever to any third parties (...)*.”<sup>86</sup>
143. Upon questioning by the Tribunal as to whether Respondent would give an undertaking to the Tribunal as to any grant of rights to third parties, Counsel for Respondent declined to do so, stating that “*the Government does not feel it appropriate, as a sovereign government, to give undertakings over what it considers to be its sovereign property and its sovereign rights*”, which included the right “*to develop H-14 and H-15 in due course if it chooses to do so.*”<sup>87</sup>
144. Counsel for Respondent did, however, state that “*the Government has given (...) assurances such as have been set out in the pleading.*”<sup>88</sup> Counsel for Respondent further stated that by “*Government*” he referred to both governments, i.e., of Respondent and Balochistan. Finally, Counsel for Respondent confirmed that “[i]f there is a change of position, a change of mind, the governments will give immediate notice”, “*first of all to the people of both the Province and the nation; secondly, it will be to the Supreme Court; and, thirdly, it will be to this Tribunal.*”<sup>89</sup> By letter of 19 November 2012, Counsel for Respondent confirmed that this assurance “*stands good, the Government has not changed its plans and that there is no urgent need for Provisional Measures.*” By letter dated 30 November 2012, Counsel for Respondent again affirmed the assurance given.

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<sup>85</sup> Transcript, p. 128 *et seq.*

<sup>86</sup> Transcript, p. 205 *et seq.*

<sup>87</sup> Transcript, p. 206.

<sup>88</sup> Transcript, p. 206.

<sup>89</sup> Transcript, p. 206 *et seq.*



145. The Tribunal notes the assurances given by Counsel for Respondent, which Respondent renewed in its letter dated 19 November 2012, that Respondent will immediately inform the Tribunal and Claimant if there is any change to Respondent's present intention to limit its activities to H4. In view of the position taken by Respondent, the Tribunal, for the time being, will presume that Respondent does not intend to expand its mining activities beyond deposit H4. The assurances given by Respondent are reflected in the decision on the Request.

**b) Necessity**

146. This leaves the question of whether Respondent's planned mining activities in the H4 area will, during the period before the final award, cause harm to Claimant which is "*irreparable*", i.e., which cannot be repaired by an award of damages or subsequent work of repair.

147. The burden is on Claimant to show that this is likely to happen in the absence of provisional measures.

148. As regards the harm to its mining project in the first scenario, Claimant has offered written testimony of Mr. Livesey, who in his First Witness Statement states that there is "*substantial risk*" of "*irremediable harm*"<sup>90</sup> to TCC's planned project if Balochistan or a third party were to begin construction or mining at the Reko Diq site because they might (i) render a portion of the viable mineral resource inaccessible due to improper placement of infrastructure or inadequate mining,<sup>91</sup> (ii) enter into supply and service agreements with unsuitable subcontractors,<sup>92</sup> and (iii) carry out substandard construction work with a view toward short-term profits to the detriment of long-term potential.<sup>93</sup> Moreover, Mr. Livesey states in his First Witness Statement that "*additional harmful possibilities that may result from inexpert operations are*

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<sup>90</sup> First Witness Statement of Mr. Livesey, para. 95.

<sup>91</sup> First Witness Statement of Mr. Livesey, para. 96.

<sup>92</sup> First Witness Statement of Mr. Livesey, para. 98.

<sup>93</sup> First Witness Statement of Mr. Livesey, para. 99.

*environmental damage, poor labor conditions, or diminished welfare in the local community.*”<sup>94</sup>

149. In his Second Witness Statement, Mr. Livesey states that “*Tanjeel forms an integral part of TCC’s planned mining project and cannot simply be excised from the project without significantly impacting the economics of TCC’s mining venture at Reko Diq,*”<sup>95</sup> which would permanently impair “*the ‘optionality’, or flexibility of TCC’s mining project.*”<sup>96</sup>

150. The above statements are all based on possible mistakes which Balochistan might make when mining at deposit H4. There is no evidence that Balochistan or Respondent intends to do any of these things. Nor is there evidence that Respondent’s planned mining activities in deposit H4 will have the significant impact on the economics of TCC’s mining venture that Claimant alleges. The Tribunal also notes that Claimant did not propose to expand its activities to deposit H4 for six years after it started mining at deposits H14 and H15. Indeed, at the Hearing, Counsel for Claimant stated that “*Tanjeel would get going six years later as part of the project.*”<sup>97</sup>

151. In conclusion, the Tribunal finds that, at present, there is insufficient evidence on record to show that provisional measures are necessary to avoid irreparable harm. However, the Tribunal notes that the H4 Work Plan is fairly general and does not provide any details about the work specifically envisaged by Respondent with respect to deposit H4. The Tribunal therefore requests Respondent to inform the Tribunal and Claimant, on a regular basis, about its specific plans and activities with respect to deposit H4.

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<sup>94</sup> First Witness Statement of Mr. Livesey, para. 101. See also Second Witness Statement of Mr. Livesey, paras. 21-23.

<sup>95</sup> Second Witness Statement of Mr. Livesey, para. 19.

<sup>96</sup> Second Witness Statement of Mr. Livesey, para. 20.

152. In the remaining parts (c) to (f) of the Request, Claimant further requests the Tribunal to order Respondent or Balochistan to refrain from breaching the confidentiality provisions of TCC's Feasibility Study, infringing TCC's exclusive surface rights under the Surface Rights Lease, and unsettling the *status quo*, aggravating the dispute or rendering ineffective any ultimate relief granted by the Tribunal. Finally, Claimant requests the Tribunal to order that Respondent or Balochistan issue any authorizations necessary for TCC's expatriate staff to work in Pakistan and travel to and access the Reko Diq site.
153. In its pleadings, Claimant has based these requests on the same arguments of urgency and necessity without however developing them further during the Hearing. The Tribunal is of the view that in regard to these requests Claimant failed to meet its burden of showing urgency and necessity. This leads the Tribunal to dismiss these parts of the Request.

#### **IV. Decision**

154. The Tribunal therefore decides as follows:

- 1. Respondent shall immediately inform the Tribunal and Claimant of any change of its present intention (i) to implement the H4 Work Plan, (ii) not to expand its mining activities to H14 and/or H15 or to any other deposit within License EL-5 and (iii) not to give any rights in this regard to any third party.**
- 2. Respondent shall further inform the Tribunal and Claimant, on a regular basis, about its specific plans and activities with respect to deposit H4.**
- 3. The Tribunal remains seized of the matter and shall consider future applications by Claimant if the situation materially changes, in particular in case Respondent (i) materially deviates from the H4 Work Plan, (ii) expands its mining activities to deposits H14 and/or H15 or to any other deposit within License EL-5 or (iii) gives any rights in this regard to any third party.**
- 4. Otherwise, the Request is dismissed.**
- 5. The Tribunal will decide on the costs related to the Request at a later stage of the arbitral proceedings.**

*[signed]*

Dr. Klaus Sachs  
President of the Tribunal

*[signed]*

Lord Hoffmann  
Arbitrator

*[signed]*

Mr. Stanimir A. Alexandrov  
Arbitrator