Assumption of Jurisdiction by Supreme Court of Pakistan in Reko Diq Case: Another Violation of International Investment Law

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**ABSTRACT**

**Purpose:** This paper discusses that Pakistani judicial approach to separability, arbitrability and grounds to assume jurisdictions to decide these matters does not sit well with the ICSID jurisprudence.

**Design/Methodology/Approach:** Qualitative approach has been used.

**Findings:** The Supreme Court’s judgment in Reko Diq is discussed in the light of awards rendered by ICSID to establish that the jurisdiction to decide the separability of arbitration agreement, arbitrability of a dispute or subject matter does not rest with a domestic court where parties have already conferred jurisdiction to determine these matters to ICSID and that Pakistani court cannot use any ground to assume jurisdiction over these matters.

**Implications/Originality/Value:** The paper concludes that the judicial system of Pakistan needs reforms to formalize and ascertain the role of domestic arbitration councils in alignment with the ICSID. This will help Pakistani firms competing in international markets to get necessary legal support at home in line with international standards.

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**Introduction**

In Maulana Abdul Haque Baloch v. Government of Balochistan (Reko Diq, 2013), Supreme Court of Pakistan assumed jurisdiction and declared main contract along with ICSID arbitration clause incorporated in it to be invalid and void ab initio, on the grounds including illegality, corruption, etc. The inarbitrability of these matters in Pakistani jurisprudence is once again established for Supreme Court refused to refer the matter to arbitration and also held the arbitration clause to be inseparable. Supreme Court came to this decision after seizing jurisdiction over the matter on the basis of choice of law clause subordinating the main contract to Pakistani
Refusal to enforce arbitration agreement is not a new phenomenon for Pakistani courts. So, while analysing the reasoning of Supreme Court for taking of jurisdiction and refusal to enforce arbitration clause in Reko Diq case, this paper also explores past Pakistani judgements deciding jurisdictional issues on the basis of governing law clause and arbitrability and then compares the conclusions so drawn to ICSID jurisprudence developed by ICSID tribunals to manifest the aberration in Pakistani courts' attitude from ICSID obligation.

Facts of the Case

On 29-7-1993, a joint venture agreement called as "Chaghi Hills Exploration Joint Venture Agreement" (CHEJVA) with an objective to explore copper and gold in Reko Diq area was concluded between Balochistan Development Authority (hereinafter BDA), a statutory corporation established under section 3(2) of the Balochistan Development Authority Act, 1974 and BHP Minerals Intermediate Exploration Inc. (hereinafter BHP), incorporated at Delaware, USA. Article 2 of CHEJWA made it conditional on parties' attainment of certain consents, assurances and approvals from government within six months, or extendible by parties, of its conclusion failing thereby, unless parties agree otherwise, will cease CHEJWA absolutely. Pursuant to this Article, Government of Balochistan (hereinafter GOB) gave relaxation to some rules governing this transaction within the stipulated period.

Article 15 of CHEJVA says that if neither amicable settlement succeeds nor Expert determination is requested by either party thereafter within stipulated time, the dispute shall be submitted to ICSID Centre for its resolution. If Centre does not accept jurisdiction for some reason, then the dispute will finally be adjudicated under ICC Rules with London as seat of arbitration. Regarding applicable law, Article 16 of CHEJVA says that: "the Law applicable to this agreement is the law of Pakistan which the Parties acknowledge and agree includes the principles of international law" (Reko Diq, 2013, pp. 3, 25).

On 01-04-2006, Governor of Balochistan for and on behalf of GOB through BDA entered into an agreement (novation agreement) with BHP and TCC to novate CHEJWA in order to assign all the rights of BHP under CHEJWA to TCC. In 2006, the legality of CHEJVA and relaxations granted by GOB thereunder were challenged in Balochistan High Court which declared them to be valid and then appeal was made to Supreme Court of Pakistan. Some other petitioners also filed direct constitution petitions to Supreme Court under Article 184(3) of the Constitution of Pakistan relating to same subject and all of these petitions and applications were heard together by Supreme Court.

On 8-2-2011, TCC applied for mining lease to GOB which was refused by its Mining Committee. (Reko Diq, 2013, pp. 92, 93, 96) TCC challenged this decision by an administrative appeal before the Secretary, Department of Mines and Minerals, Government of Balochistan, as given under the Balochistan Mineral Rules, 2002, which too was dismissed. However, TCC did not challenge such dismissal to Balochistan High Court which declared them to be valid and then appeal was made to Supreme Court of Pakistan. Some other petitioners also filed direct constitution petitions to Supreme Court under Article 184(3) of the Constitution of Pakistan relating to same subject and all of these petitions and applications were heard together by Supreme Court.

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Grounds for Assumption of Jurisdiction

Governing Law Ground

In the presence of arbitration clause, Supreme Court in Reko Diq Case assumed jurisdiction to adjudicate the validity of CHEJVA for the reason that agreement is governed by Pakistani law which does not seem to be an appropriate and convincing argument to justify the wrestling of
jurisdiction (Reko Diq, 2013, p. 106). The purpose of law governing the agreement is to determine rights, obligations and their discharge under the matrix of that contract Sutton and others, 2007, p. 2.088) and as in the present case, this law is supposed to be utilised only by tribunal to ascertain the matters covered under it (Redfem & Hunter, 2007, p. 110).

To grab jurisdiction on the basis of governing law is not an unfamiliar trend for Pakistani courts. Supreme Court has also held that if the law governing the parent contract is Pakistani Law, then the Pakistani court will have jurisdiction to rule on the validity and existence of that contract (Hitachi v Rupali, 1998). It maintained that if the parties have not specified the law applicable to arbitration clause which is embedded in the parent contract, then law governing the main contract will govern arbitration agreement and the court whose law is thus chosen, Pakistani court in this case, will have exclusive jurisdiction to try the matters coming in the purview of arbitration clause whereas the jurisdiction of court of seat will be limited only to the procedural matters coming under curial law (K. S. B v. Pakistan, 1979).

From Hitachi case and Reko Diq case, it is patent that Pakistani courts take exclusive jurisdiction to rule on the validity of contract if law governing the contract is Pakistani Law. But in another case (HUBCO, 2000), the law governing the contract was English law and Supreme Court of Pakistan, while assuming jurisdiction to adjudge the validity of contract, did not even mention the fact of governing law and seized the jurisdiction on public policy ground.

Arbitrability Ground
In Reko Diq Case, Supreme Court held CHEJVA to be illegal and thus void ab initio (Reko Diq, 2013, p. 122). It also held that "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" (Reko Diq, 2013, p. 24).

BDA was represented by its Chairman to sign CHEJVA. The matter of Chairman's conviction in a court operating under National Accountability Ordinance 1999 on the charges of "having assets and living beyond his means" (Reko Diq, 2013, p. 49) was also raised which was not rebutted before Supreme Court. For that reason, it was held that "having assets and living beyond his means" amounts to corruption under Balochistan Civil Servants (Efficiency and Discipline) Rules 1983 (Reko Diq, 2013, p. 50). It is noteworthy that the nexus between such conviction and the execution of CHEJVA was not engendered by Supreme Court. The other fact regarding corruption emerged when GOB, who had been successfully defending the validity of CHEJVA in Balochistan High Court, changed its position while the case was in Supreme Court where it argued against the validity of CHEJVA. The about-turn in its position came about when GOB perused the records produced on the order of court in relation to the case which "made shocking disclosures of extensive irregularities and corruption." But these shocking irregularities and corruption, which was one of the grounds for the demolition of CHEJVA, could not get the description of more than couple of words in the judgement (Reko Diq, 2013, p. 63, 116). It is in this background of corruption in connection with CHEJVA that Supreme Court alluded to Article 34 of the UN Convention against Corruption 2003 which read as:

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.
and concluded that this Article entrusts Supreme Court with another ground under international law to rule on the validity of CHEJVA and other documents related to it (Reko Diq, 2013, p. 106).

Supreme Court also cited Article 2(3) of New York Convention and Section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 which incorporated New York Convention to the domestic law of Pakistan (Reko Diq, 2013, p. 105). Section 4 provides

(1) a party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter, which is covered by the arbitration agreement, may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings in so far as they concern that matter.

(2) on an application so moved, 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."

Supreme Court applied the criterion of "null and void, inoperative or incapable of being performed" from New York Convention to have jurisdiction over the matters which were supposed to be decided under ICSID Convention despite the fact that the later Convention does not furnish any such ground for domestic courts to preclude arbitration. Supreme Court did not appreciate the differentiation between International Commercial Arbitration under the auspices of New York Convention and International Investment Arbitration regulated under ICSID Convention which also has been incorporated into Pakistani law by Arbitration (International Investment Disputes) Act 211.

With regard to level of evidence on corruption required to refuse arbitration, judicial precedents are not consistent. If contract is alleged to be procured through fraud, misrepresentation or corruption, the court will retain the jurisdiction by precluding arbitration. However, in HUBCO Case, Sindh High Court held that to preclude arbitration, the case of fraud and corruption should be established by indisputable evidence (The Hub Power, 1999) but this judgement was overturned by Supreme Court which pronounced that the prima facie level of evidence is sufficient to deny the jurisdiction of arbitrator (HUBCO, 2000). Prima facie level of evidence to establish fraud and misrepresentation, as held in HUBCO to preclude arbitration was acknowledged in other cases (Sindh v Tausif, 2003; Nelofar v Saiban, 2011). Court in HUBCO also held that the disputes and allegation about the corruption are not arbitrable due to public policy considerations and that these are the disputes regarding the "very existence of a valid contract and not a dispute under such a contract." Supreme Court's verdict in HUBCO Case on requisite standard of evidence to exclude arbitration is consistent with the past judgements (Sir E. Haroon v Haji E. Dossa, 1956; Haji Soomar v Muhammad Amin, 1981). It also merits mentioning that as far as fraud and misrepresentation are concerned, judgements holding them to be arbitrable may also be seen on the landscape of Pakistani jurisprudence. If the validity and existence of contract is set upon the premise that it has been frustrated, repudiated, or was entered into by an unauthorised person, then the determination of such matters is normally left for arbitrator but for that purpose, the arbitration clause should be broadly worded to confer such powers on arbitrator to determine such matters. (Island Textile v. Technoexpert, 1979; Lahore Stock Exchange v Fredrick, 1990; Aswan v Razzaq, 1993; Port Qasim v Al-Ghurair, 1997; Sezai v Crescent, 1997).

Foregoing discussion demonstrates that even after incorporation of New York Convention and ICSID Convention into Pakistani law, courts are still sensitive to preserve their jurisdiction by giving an impression as arbitration to them is even now an alien element. This credence becomes weighty when the purpose of the choice of law clause in contract is misinterpreted to gain the
jurisdiction from arbitrator. Another determinant which fortifies the feeling about Pakistani courts' interventionist approach is the fact of lowering the threshold level of evidence required for the preclusion of arbitration on grounds of misrepresentation, fraud and corruption from "indisputable evidence" as held by Sindh High Court to "prima facie" level of evidence as proclaimed by Supreme Court in HUBCO Case. This standard of evidence even went down in Reko Diq Case where the allegations of corruption look heresy on the basis of which Supreme Court founded its jurisdiction. One wonders that when Supreme Court's elucidation of the fact of corruption containing in couple of pages in HUBCO case was taken as unsatisfactory and unconvincing (Nudrat, 2000, pp 431-438, 435), then how would the one liner sentence in Reko Diq case about the existence of corruption i.e., "shocking disclosures of extensive irregularities and corruption" give a just and fair look to the decision of Supreme Court to assume jurisdiction. It is also interesting to note that Supreme Court has sometimes allowed arbitration even in the presence of undisputed evidence on corruption and bribe. In another case (Societe Generale De Surveillance, 2000), Respondent alleged that the contract was induced by corruption, bribe and kickbacks and also pleaded to refer the matter to arbitration seated in Pakistan. Appellant too referred to HUBCO case to evince that corruption and bribe are not arbitrable and prayed not to send the suit to arbitration because the contract as alleged by respondent was entered into by corruption and bribe. Supreme Court said that disputes arising from the contract concluded by corruption and fraud will be arbitrable if the corruption and bribe do not become the part of claim to be arbitrated. It differentiated between the SGS case and the HUBCO case by saying that "in HUBCO case, there was no dispute about any claim determinable under the terms and conditions of either the original agreement or about the rates of tariff etc., embodied in subsequent disputed amendments made in the original agreement but it was a case of dispute regarding commission of criminal act, therefore, it was held that the same was not arbitrable."

In SGS case, both the Respondent and Appellant seemed to be in consensus on the inducement of contract by bribe and corruption which amounts to an undisputed evidence. This proof of corruption and bribe should have made the whole of the contract, including arbitration clause, void, had the Supreme Court followed the HUBCO case wherein it was held that allegations of corruption and bribe are disputes concerning the very existence of contract which if proved will render the contract void. Then question would be, when arbitration clause dies along with the main contract, from where does arbitrator get his jurisdiction to decide even arbitrable matters like validity of the terms and conditions of contract.

ICSID Jurisprudence

In Accordance with law' Requirement

ICSID tribunals have held to the clauses articulated in BITs explicating that divergencies respecting investment will be adjudged by arbitrator, but the system of arbitration will be available for those investments only which are conducted "in accordance with host state's law". Where the investment was held by tribunal to be in violation of local law or obtained through corrupt and fraudulent manner, tribunal declared itself of lacking jurisdiction to rule on the dispute (Alasdair Ross, 2010, pp. 55,59; Inceysa, 2006, p. 257; Plama Consortium, 2008, p. 143; World Duty Free, 2006, pp. 130-136). Illegal and fraudulent conduct from the investor deprives him of the investment protections afforded to him under the treaty (Plama Consortium, 2008, p. 321) including the resolution of dispute through international arbitration (Inceysa, 2006, p. 240). Tribunal also declared that if the BIT is silent on the 'investment according to host state's law' obligation, even then the investor can not enjoy investment protection for its acts done in breach of state's law because absence of such stipulation in BIT cannot be construed as state's consent to protect investor's action performed in contradiction to its laws (Plama Consortium, 2008, pp. 138-140). All this obligates prudent investors to exert due diligence prior to making investment to assure themselves that such investment is not in contravention to the national laws of host state
Tribunal declined its jurisdiction after finding that the investor has infracted the law of host state (Fraport Frankfurt, 2007, pp. 120, 124, 217, 283, 336, 369-304). Although this award was overturned for the reason that tribunal committed a "serious departure from the fundamental rule of procedure entitling the parties to be heard" (Fraport Frankfurt, 2007, pp. 218-247) but Ad hoc committee did not disagree with the ground that the jurisdiction should be abstained if the transaction is not consistent with host state's law.

Although the general principle in international investment law is that the tribunal will decline jurisdiction if investment is conducted illegally but the dissenting note annexed to Fraport v Philippines by Mr. Bernardo M. Cremades convincingly guides towards the other direction. After conceding that tribunal will never overlook the illegality, he emphasised that the important thing is time when the ascertainment of illegality and its repercussions should be made by tribunal (Fraport Frankfurt, 2007, p. 39). He vindicates that legality requirement of investment applies on both the state and the investor as apply the other principles like good faith and pacta sunt servanda (Fraport Frankfurt, 2007, p. 36). He avers that if the illegality in the state's conduct is the merits issue, then holding the commission of illegality from investor to be jurisdictional issue may put state in a stronger position which, he expressed "in the Biblical phrase", is like "the Tribunal must first examine the speck in the eye of the investor and defer, and maybe never address, a beam in the eye of the Host State." For the reason "such an approach does not respect fundamental principles of procedure" ((Fraport Frankfurt, 2007, p. 37) he concludes that the matter of illegality in the conduct of investment should be dealt at the merit stage.

All this from dissenting opinion is justly suggestive that even if the investment is illegal or induced by corruption etc. the tribunal should not decline jurisdiction because the refusal to assume the jurisdiction may benefit the state party to the detriment of investor, despite the fact that state itself or its officials were involved in the corrupt or illegal practices. To be more specific, if the corruption tends to advantage state or its officials and if on the mere proof of such corruption, the tribunal declines its jurisdiction, it may add piles of damage to investor and may leave him remediless.

**Tribunal, not a Court, will Decide the Legality Requirement**

Investment made in contravention to the host state's law would be illegal and tribunal will not have jurisdiction to decide the merits of such claims. But whether the investment was made in accordance with state's law and whether the tribunal have jurisdiction to try the merits of the claims, will be decided by tribunal itself and not by the court. So, the reference of Supreme Court in Reko Diq Case to four ICSID tribunal cases (World Duty Free, 2006; Tokios, 2004; Inceysa, 2006; TSA Spectrum, 2008), wherein tribunals denied their jurisdiction for illegality in investment, is not a sound argument to substantiate the taking of jurisdiction.

In determining the question whether investment made in El Salvador was according to the law of host state and hence protected under BIT, tribunal said that "as the legality of the investment is a premise for this Tribunal's jurisdiction, the determination of such legality can only be made by the tribunal hearing the case, i.e. by this Arbitral Tribunal" (Inceysa, 2006, p. 209) solely and exclusively (Inceysa, 2006, p.p.13). By saying this tribunal ruled out any validity or importance of state court's verdict on competence of tribunal to adjudge the legality of investment (Inceysa, 2006, p. 210) because if power to determine the legality of investment is ceded to host state, it will come into the possession of power for unilateral withdrawal of its consent (Inceysa, 2006 p. 211) or this will beget a possibility for host state to re-ascertain the substance and scope of its consent (Inceysa, 2006, p. 213). Lack of binding nature of state court's judgement is also
accordant with neutrality, the basic tenet of arbitration, which will be lost if judicial pronouncements from court of state party to the dispute are accepted as binding on the tribunals (Burlington, 2012, p. 410; EDF, 2012, p. 1130; Fraport Frankfurt, 2007, p. 391). The other argument in favour of tribunal's sole and exclusive authority to rule on the legality requirement is the fundamental principle of separability meaning thereby that arbitration agreement, being autonomous and independent of the main contract, survives despite the defects affecting the validity of the main contract. Even if the parent contract was procured by corruption or misrepresentation, the arbitrator will be competent for adjudication. Arbitrator will be divested of jurisdiction only if the consent to arbitration agreement is defective (Malicorp, 2011, p. 119).

The fact that law governing the contract is Pakistani law, does not change the situation because choice of law clause only instructs about the law which has to be applied by tribunal to resolve the merits of the case and it has nothing to do with the allocation of jurisdiction. Article 42(1) of ICSID Convention says that "the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In absence of such agreement, the tribunal shall apply the law of contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable" (Christoph, 2009, pp. 42.24-42). This Article deals only with the substantive law and does not govern the jurisdictional issues. This provision mandates tribunal to choose the pertinent legal system or specific rules of some legal system, as the case may be, to be employed to decide the dispute before it (Christoph, 2009, pp. 42.3,4,7,39-42; CMS on Jurisdiction, 2003, p. 88; CMS on Annulment, 2007, p. 68). In this regard, tribunal first looks for the law agreed by parties in their contract to govern their relationship and then brings it into play to resolve the dispute (Christoph, 2009, p. 42.26; Tanzania, 2001, p. 51, App. B, pp. 98 et seq). So, it is established that Supreme Court's assumption of jurisdiction on the basis of choice of law clause or fraud, illegality, corruption, etc. does not sit with ICSID jurisprudence.

Conclusion
The grounds utilised by Pakistani courts to get jurisdiction, it may be said, are used as yardstick to make an opinion about a legal regime whether it is arbitration friendly or otherwise and ironically, the jurisdiction like Pakistan, cannot be termed as pro-arbitration. To transform the image of Pakistan as an arbitration friendly place, enactment of pro-arbitration legislation is not sufficient rather more importantly, the judicial attitude prevailing in Pakistan towards arbitration needs a change. For instance, ICSID convention has been incorporated in the domestic law of Pakistan but despite that assumption of jurisdiction by Supreme Court over a matter agreed to be decided in ICSID Centre is an instance of such propensity. If the contract is invalid in the eyes of Pakistani court for some reason, even then the courts are obliged to defer the matter to ICSID Centre which will send it back to court in case of illegality or whatsoever. This will not only give a good preamble to Pakistani jurisdiction on arbitration but will also save the potential of investor with regard to pursue the proceedings over the resolution of that dispute. The judicial outlook will be changed when arbitration is owned by the judges who need to eradicate the feelings of alienation for arbitration. Judges should recognise that the purpose of arbitration is not confined to decrease the burden of cases on them, rather arbitration has got its acceptance on the globe as a system of deliverance of justice because it has the capacity to provide justice to the people and the arbitrators are having the competence, sense of responsibility and dedication to provide justice not lesser than judges. If this sense is developed in the official decision makers in Pakistan, then outdated jurisdictional grounds will be shun.

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