SUPREME COURT OF PAKISTAN

JUDGMENT

3 JULY 2002

Munir A. Sheikh J. 1. By this consolidated judgment, we propose to decide Civil Appeals Nos. 459 and 460 of 2002, involving identical questions of law and facts.

2. These two appeals by leave of the court are directed against the judgment dated 14 February 2002 of the Lahore High Court, Rawalpindi Bench, Rawalpindi whereby appeal filed by the appellant (Civil Appeal No. 459 of 2002) against the order dated 7 February 2002 of the trial court has been dismissed and the request of the appellant Pakistan through Secretary, Ministry of Finance, Islamabad in the connected Appeal No. 460 of 2002 to restrain the SGS to pursue the remedy through arbitration of International Centre for Settlement of Investment Disputes (ICSID) has been dismissed.

3. The facts of the case are that SGS, hereinafter called the "appellant", entered into an agreement on 29 September 1994 with the Federation of Pakistan, hereinafter called the "respondent", by which the services of the appellant were hired for pre-shipment inspection of all consignments to be imported into Pakistan on the basis of which the custom duty, etc., and other Government dues as prescribed under the relevant Statutes were to be charged and recovered from the importers. This contract was terminated by the respondent on 12 December 1996 which was accepted by the appellant on 23 December 1997 with the reservation of its legal right. This agreement contained an arbitration Clause which is Clause 11.1. It reads as under:

> 11.1 *Arbitration* Any dispute, controversy, or claim arising out of, or relating to this Agreement, or breach, termination [or] invalidity thereof, shall as far as it is possible, be settled amicably. Failing such amicable settlement, any such dispute shall be settled by arbitration in accordance with the Arbitration Act of the Territory as presently in force. The place of arbitration shall be Islamabad, Pakistan and the language to be used in the arbitration proceedings shall be the English language.

4. The appellant, however, filed a case against the respondent in the Court of first instance in Geneva for the recovery of an amount of US $8,368,430.49 with interest thereon and the balance due on SGS invoices. In the petition filed before the said Court, it was alleged that the appellant did not expect fair trial from the Courts in Pakistan to justify its act of not invoking the arbitration Clause, for settlement of dispute by Courts in Pakistan. The said Court decided the case against the appellant on the ground that arbitration Clause was reasonable, fair trial was possible in Pakistan. The claim of sovereign immunity of

Pakistan was also upheld. The appeal filed by the appellant before the Swiss Court of Justice against the said judgment was dismissed through judgment dated 23 June 2000.

5. The respondent on 7 September 2000 filed an application under section 20 of the Arbitration Act 1940 for filing of the agreement in the Court and appointment of an arbitrator as per Arbitration Clause No. 11.1 of the said Agreement. The appellant filed an appeal before the Swiss Supreme Court which too was dismissed on 23 November 2000.

6. The appellant contested the said application by filing detailed reply on 7 April 2001. After filing this reply, on 10 October 2001, the appellant filed consent to ICSID Arbitration which was followed by a formal request for arbitration dated 12 October 2001 which was registered on 12 November 2001. Apart from preliminary and other legal objections, the appellant also raised counter claim of more or less the amounts which were claimed in the case filed before the Swiss Court of first instance. No plea was raised that the dispute between the parties by force of Bilateral Investment Treaty dated 11 July 1995 or the Convention of Washington dated 18 March 1965 could exclusively or at the option of the appellant be resolved through arbitration of ICSID. It was long after the dismissal of the appeal of the appellant by the Swiss Supreme Court on 23 November 2000 that the appellant made an application under section 41 of the Arbitration Act before the trial Court on 4 January 2002 seeking stay of proceedings under section 20 of the Arbitration Act 1940 contending that ICSID arbitration proceedings had been instituted, therefore, these proceedings should be stayed. The trial Court through order dated 7 January 2002 dismissed this application and on the same date, by a separate order, it directed the parties to file panel of proposed Arbitrators. The appellant filed appeal (FAO No. 9 of 2002) before the Lahore High Court, Rawalpindi Bench, through which it assailed both the orders, i.e., the order by which its application for stay of proceedings was dismissed and the order of acceptance of application under section 20 of the Arbitration Act made by the respondent.

7. In the said appeal, the respondent moved CM No. 339-C/2002 praying that the appellant be restrained from taking any step, action or measure to pursue or participate or to continue to pursue or participate in the ICSID Arbitration. The appeal filed by the appellant and the said civil miscellaneous application made by the respondent have been dismissed through the impugned judgment dated 14 February 2002 by the High Court against which these two appeals by leave are directed.

8. The learned Judge in Chamber of the High Court after surveying the facts and relevant laws on the subject came to the conclusion that no domestic law was enacted to give effect to the Washington Convention of 1965 or bilateral treaty for which reasons the legal efficacy of both of them was nothing but an instrument of administrative nature as such could not be enforced as law.

9. As to the effect of Bilateral Investment Treaty dated 11 July 1995 in which a provision was made for ICSID arbitration of the disputes between investor of one contracting State and the other relating to or arising from investment made after 1 September 1954, it was held that though the appellant was not party to the said treaty but it could invoke the same on the basis of generally accepted principles that a contract can be enforced also by a person who is beneficiary thereunder but this principle was not attracted in this case for no law had been enacted to give provisions of the treaty the status of Municipal Law which could be enforced as such. It was also held that the same did not have the effect of taking away the rights accrued to the parties under a particular agreement entered into by them of their free volition. It was also declared that since the respondent had earlier approached the trial Court under section 20 of the Arbitration Act and the appellant had also raised counter claims and was contesting, the said application on merits of the claims, therefore, the said process which had already commenced could not be reversed even under the Bilateral Investment Treaty, the same having been initiated earlier in time would exclude any of the parties to seek ICSID arbitration which according to learned Judge of the High Court was applicable to those cases which had not yet been commenced before a judicial forum. It was held that there was no conflict between the treaty and the agreement in question between the parties, therefore, the jurisdiction of the trial Court to entertain the said application was held to have not been adversely affected by the treaty. The learned Judge in Chamber further held that under Article 26 of the ICSID Convention, the assertion of supremacy of ICSID Convention and the Bilateral Investment Treaty as major piece of primary law over the agreement as subordinate instrument was not tenable. According to him, the non-ICSID forum already seized of the same matter could not be asked to take its hands off the dispute.

10. As to the arbitration proceedings initiated by the appellant before the ICSID, it was held that the same were not maintainable on account of lack of consent by one of the parties, i.e. the Federation of Pakistan under the relevant Convention, BIT, etc. On the question whether the agreement between the parties related to investment as contemplated by Article 1(2) of the Bilateral Treaty dated 11 July 1995, it has been held that the disputed claim of either of the parties did not fall within the ambit of the meanings assigned to the expression “investment” in this Article. It has also been held that the act of the appellant of approaching the Swiss Courts of general jurisdiction for the recovery of specific amounts under the agreement and of its prosecution up to the Swiss Supreme Court, coupled with the act of filing reply to application under section 20 of Arbitration Act made by the respondent and raising counter claim without indicating expressly or impliedly that the dispute was referable to ICSID arbitration, amounted to waiver by it of the right, if any, under bilateral treaty or otherwise to approach ICSID in the matter. In support of these propositions of law, the learned Judge of the High Court made reliance on the statement of law made in the American Jurisprudence para. 51 at page 260 which need not be reproduced here.

11. The learned Judge in Chamber went on to hold that the arbitration Clause in the agreement had a separate entity meaning thereby that the same was severable, as such, survived the termination of the

contract of which it was a part. According to his findings, the arbitration Clause embodied in the agreement subject matter of this litigation clearly spelt out the intention of the parties that they had decided to have recourse through arbitration thereunder in order to settle their contractual disputes at Islamabad, Pakistan. It was held that this Clause could not be deemed to be either varied or superseded by the Bilateral Investment Treaty, therefore, the parties were bound lo abide by it. Keeping in view the fact that the agreement in dispute was executed in Islamabad, the part performance of which was also lo be made at Islamabad coupled with the fact that seat of arbitration as argued was Islamabad, as such, it has been held that the parties shall be deemed to have agreed that governing law shall be the law of Pakistan.

12. The learned Judge of the High Court, however, dismissed CM No. 339-C of 2002 made by the respondent to restrain the appellant from taking any step, action or measure to pursue or participate or to continue to pursue or participate in the ICSID Arbitration on the assumption as if an order of injunction of the nature could only be made in a regular civil suit and not in the present proceedings.

13. These two appeals by leave of the court are directed against the judgment dated 14 February 2002 of the High Court. Leave was granted, inter alia, to consider the following points:

(a) Whether the arbitration agreement between the parties was binding upon them notwithstanding the coming into force of the Bilateral Investment Treaty;

(b) Whether the trial court was right in holding that the petitioner was not an investor within the meaning of the said word as defined in Bilateral Investment Treaty?

(c) Whether it has been rightly held keeping in view the circumstances of the case that the petitioner had waived its right to seek remedy before ICSID?

14. Mr K. M. A. Samdani, learned counsel for the appellant before making submissions on these points raised an argument that the application of the respondent made under section 20 of the Act for making a reference of the dispute between the parties to arbitrator was not maintainable, for in the application itself, allegations had been made that the same was obtained by payment of bribe, kick-backs and commission as such void in view of law laid down by this court in *HUBCO* case reported as *The Hub Power Company Limited (HUBCO) through Chief Executive and another* v. *Pakistan WAPDA through Chairman and others* (PLD 2000 SC 841) in which this court held that the points were not arbitrable.

15. In order to determine whether principles of law laid down in *HUBCO* case (supra) are attracted to the facts of this case, it would be advantageous to reproduce in extenso the relevant paragraph of the said application:

3. Investigations have revealed that out of the fee that was being received by the respondent

company from the applicant (being 78% of the dutiable value of the goods inspected by the respondent) an amount equivalent to 6% of the fee was paid to Bomer Finance Inc., an offshore company operated by Jens Schlegelmilch, beneficial owner of which is Asif Ali Zardari, husband of Ms Benazir Bhutto. This amount was paid as kickback and commission for procuring the contract. Similarly, 3% was paid to another off-shore company Nassam Associates which is also operated by Jens Schlegelmilch, beneficial owner of which was Nasir Hussain, then husband of Sanam Bhutto, while another amount of 1% was paid to Jens Schlegelmilch for the same contract. The bank accounts of these companies were also being handled by Jens Schlegelmilch.

4. The above facts show that the respondent paid bribes and commissions to the beneficiaries out of the fee being recovered from the Government of Pakistan. This amount of bribes and commission, during the course of operation of the contract, came to US $4.3 million. Furthermore the respondent also charged the applicant as its agreed fee a total sum of US $65.7 million (out of which the above amounts was paid).

16. The law declared in *HUBCO* case (supra) is as under:

S.23 *Illegal objects and consideration of an agreement* Agreement was alleged to have been obtained through fraud or bribe—Allegations of corruption were supported by circumstances—which provided basis for further probe into the matter judicially, and, if proved would render the agreement as void—Dispute between the parties was not commercial dispute arising from an undisputed legally valid contract, or relatable to such a contract, for, on account of such criminal acts disputed documents did not bring into existence any legally binding contract between the parties, therefore, dispute primarily related to the very existence of valid contract and not a dispute under such a contract—Such matter, according to the public policy, held, required finding about alleged criminality and was not referable to arbitration.

From a bare reading of this part of the application, it is manifest that though allegation of receipt of kickbacks and bribe have been made to explain the factual background as to how allegedly the contract was obtained but there is nothing in the application that the respondent claimed arbitration on these points also, therefore, *HUBCO* case is not applicable to the facts of the case in hand. It has further been clarified by the learned Attorney General that the respondent would neither file any claim based on these allegations in arbitration proceedings nor ask for arbitration qua them or produce any evidence in respect thereof in these proceedings and would follow the law strictly as laid down in *HUBCO* case (supra). The claims of the respondent would be based on the terms and conditions embodied in the agreement itself.

17. Before, however, proceeding further, it is necessary to examine the facts of *HUBCO* case to

understand correctly the above principles of law laid down in that case. 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.

18. Mr K. M. A. Samdani learned counsel for the appellant in relation to point A of the leave granting order submitted that prior to the ratification of Bilateral Investment Treaty by the Federation of Pakistan on 4 April 1996 and the Swiss Confederation on 6 May 1996, the agreement in dispute between the parties had already been executed on 29 September 1994 but the same was not saved from the mischief of the provisions of the said Treaty and the Convention as they were made applicable to all investments made after 1 September 1954, therefore, the said agreement became subservient to the Convention and the Bilateral Investment Treaty inclusive of the Arbitration Clause 11.1 embodied therein as such arbitration through ICSID could only be adhered to for settlement of disputes.

19. This argument has been raised on the erroneous assumption as if the Washington Convention, 1965 and the Bilateral Investment Treaty had attained legal status of Municipal Law which could be pressed into service and enforced as such.

20. On the other hand, learned Attorney General maintained that it has consistently been held by the Courts that a Treaty unless [it] was incorporated into the laws of the Country by a Statute, the Courts would have no power to enforce treaty rights and obligations arising therefrom at the behest of an individual or State. To support this contention, he has made reference to the rule laid down in the cases of *Maclaine Watson & Co. Ltd* v. *Department of Trade and Industry* and related appeals *Maclaine Watson & Co. Ltd* v. *International Tin Council* (All England Law Reports 1989 Volume 3 page 523) in which the question which came up for consideration was as to what was the legal status of a Treaty between the two States. It was held as under:

> A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

21. In amplification of the above principles, it was also held as under:

> The second is that, as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown; but also because, as a source of rights and obligations, it is irrelevant.

22. Learned Attorney General has also referred to Article VI of the United States Constitution to demonstrate that wherever it was intended to give effect to a Treaty by a State as Municipal Law of the Country for enforcement of rights thereunder as such through courts, law was made through Statutes to incorporate the provisions of the Treaty in the Municipal Law of the Country. Sub-Article (2) of Article VI of the said Constitution reads as under:

> (2) This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

23. The argument raised by the learned Attorney General has considerable force.

Admittedly, in Pakistan, the provisions of the Treaty were not incorporated through legislation into the laws of the Country, therefore, the same did not have the effect of altering the existing laws, as such, rights arising therefrom called treaty rights cannot be enforced through court as in such a situation, the Court is not vested with the power to do so.

It may be significantly mentioned here that according to Article 175(2) of the Constitution of Islamic Republic of Pakistan, no Court has any jurisdiction unless conferred by or under any law or the Constitution, therefore, treaty unless [it] was incorporated into the law so that it become part of Municipal Laws of the Country, no Court shall have jurisdiction to enforce any right arising therefrom.

25.[1] Faced with this difficulty, Mr K.M.A. Samdani, learned counsel for the appellant, attempted to overcome it by arguing that by reason of unilateral act of the Federation of Pakistan itself of omission or inaction to incorporate into the laws of the country the provisions of the treaty by legislation it should not be allowed to raise such a plea to avoid the enforcement of the provisions of the treaty. He further argued that according to Article 97 of the Constitution of Islamic Republic of Pakistan, 1973, the executive authority of the Federation extends to the matters enumerated in Part I of Fourth Schedule regarding which the Parliament could legislate therefore, its act of ratification of Bilateral Investment Treaty amounted to give it status of law.

26. Article 97 of the Constitution only provides that subject to the Constitution, the executive authority of the Federation shall extend only to those matters with respect to which Majlis-e-Shoora (Parliament) has the power to make laws, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan. Fourth Schedule embodies the list of those matters with respect to which Majlis-e-Shoora has the power to make the laws, Item 3 of which is very relevant which reads as under:

> 3. External-affairs; the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan.

Since Majlis-e-Shoora has the power to make laws in respect of these matters therefore, by virtue of Article 97 of the Constitution, the Federal Government of Pakistan has the power to exercise executive authority in respect thereof which was exercised to ratify the treaty, but it has not conferred power on the executive authority to legislate a Statute.

27. Learned Attorney General has brought to our notice that legislations were made by a number of Countries to incorporate the provisions of the Convention and the Treaties to enforce the same through Courts of law as Municipal Law. Following laws listed below were made by the Countries shown against them:

Contracting State	*Title of Legislation (Citation)*
Australia	ICSID Implementation Act 1990. (Act No. 107 of 1990)
Austria	Ratifikationsurkunde fur das Ubereinkommen zur Beilegung von

[1 Paragraph numbering as in the original text.]

	Investitionsstreitigkeiten zwischen Staaten und Angehorigen anderer Staaten. (Off. Gaz. 357, Vol. 99, Sept. 10, 1971, p. 1853)
Belgium	Loi du 17 juillet 1970 portant approbation de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats, faite a Washington le 18 mars 1965. (Off. Gaz. 185, Sept. 24, 1970, p. 9548)
Benin	Ordonnance No. 36/PR/MFAE du 26 aout 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats el ressortissants d'autres Etats. (Off. Gaz. 17, Sept. 1, 1966, p. 773) Decret No. 445/PR/MFAEP du 28 decembre 1967 portant nomination de concilliateurs et d'arbitres au Centre International pour le Reglement des Differends relatifs aux Investissements. (Off. Gaz. 4, February 14, 1968, p. 161)
Botswana	The Settlement of Investment Disputes (Convention) Act 1970. (Act No. 65 of 1970)
Burkina Faso	Ordonnance No. 17/PRES/DEV.T/AET du 31 mars 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats conclue sous les auspices de la Banque Internationale pour la Reconstruction et le Developpement.
Cameroon	Loi No. 66/LF/13 du 30 aout 1966 autorisant le President de la Republique Federale a ratifier la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats. (Off. Gaz. Sept. 1, 1966, p. 93) Decret No. 66/DF/454 du 30 aout 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats. (Off. Gaz. December 1, 1966, p. 1250). Loi 75-18 du 8 decembre 1975 relative a la reconnaissance des sentences arbitrales, (Off. Gaz. 6. Suppl., December 15, 1975, p. 234)
Chad	Loi No. 6 du 8 janvier 1966 portant approbation de la Convention. Decret No. 15/PR du 21 janvier 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et

	ressortissants d'autres Etats.
Comoro	Decret No. 78/0073/PR portant ratification de l'adhesion de la R.R.I. des Comores a la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats (CIRDI)
Congo, People's Republic of	Loi No. 69/65 autorisant la ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.
Cote d'Ivoire	Loi No. 65-237 du 26 juin 1965 autorisant le President de la Republique a ratifier la Convention passee avec la Banque Internationale pour la Reconstruction et le Developpement entre Etats et ressortissants d'autres Etats. (Off. Gaz. 35, July 15, 1965, p. 770) Decret No. 65-238 du 28 juin 1965 portant ratification de la Convention passee avec la Banque Internationale pour la Reconstruction et le Developpement pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats. Council of Ministers Decision No. 5331 of January 20, 1966. (Off. Gaz. 532, October 27, 1966) Law No. 64 of 1966 on approval of Convention by the House of Representatives. (Off. Gaz. 532, October 27, 1966)
Denmark	Act No. 466 of December 16, 1967, on Recognition and Execution of Orders Concerning Certain International Investment Disputes.
Egypt, Arab Republic of	Decree-Law No. 90 of November 7, 1971, approving the accession of the Arab Republic of Egypt to the International Convention. (Off. Gaz. November 11, 1971)
El Salvador	Acuerdo No. 349 de 19 jullo 1982. Decreto No. 111 de 7 diciembre 1982. (Off. Gaz. 230, Vol. 277, December 14, 1982)
Finland	Law No. 74/69 of December 27, 1968 containing the approval of the Convention. (Off. Gaz. No. 1–8, 1969, p. 7) Decree No. 75/69 of January 24, 1969, containing regulations for the

	implementation of the Convention.
France	Loi No. 67-551 du 8 juillet 1967 autorisant la ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats, du 18 mars 1965. (Off. Gaz. July 11, 1967, p. 6931)
Gabon	Loi No. 19/65 du 20 decembre 1965 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats.
Germany	Gesetz zu dem Ubereinkommen vom 18 Marz 1965 zur Beilegung von Investitionsstreitigkeiten zwischen Staaten und Angehorigen anderer Staaten vom 25 Februar 1969. (Off. Gaz. 12, Part II, March 4, 1969, p. 369)
Greece	Necessity Law No. 608, November 11, 1968.
Guinea	Loi No. 12/AN-68, portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats. Decret No. 409/PRG du 28 sept. 1968 promulgant une loi de l'Assemblee Nationale portant ratification par la Republique de Guinee de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.
Honduras	Decreto No. 41–88. (Off. Gaz. August 4, 1988)
Iceland	Law authorizing the Government to become a party to an International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. (Off. Gaz. A, 74, 1966)
Indonesia	Law No. 5 of June 29, 1968. (Off. Gaz. 32, 1968)
Ireland	Arbitration Act 1980 (covering, inter alia, the ICSID Convention). (Act No. 7 of 1980) Arbitration Act 1980 (part IV) (Commencement) Order, 1980. (SI No. 356 of 1980) International Centre for Settlement of Investment Disputes (Designation and

	Immunities) Order, 1980. (SI No. 339 of 1980)
Italy	Legge 10 maggio 1970, n. 1093 Ratifica ed execuzione della Convenzione per il regolamento delle Controversie relative agli investimenti tra Stati e cittadini di altri Stati, adottata a Washington il 18, January 12, 1971, p. 155)
Jamaica	Investment Disputes Awards (Enforcement) Act 1966 (Act 28 of August 29, 1966) (Off. Gaz. XC, 18 February 16, 1967, p. 60) Bauxite (Production Levy) Act 1974. (Act 19 of 1974)
Jordan	Royal Decree granted to Decision No. 1196 of Council of Ministers of May 17,1972, ratifying the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.
Kenya	The Investment Disputes Convention Act of 1966. (Act 31 of November 22, 1966)
Korea, Republic of	Promulgation of the Convention (as Treaty No. 234). (Off. Gaz. Extr. No. 4580, February 21, 1967, p. 361)
Kuwait	Law Decree No. 1 of January 14, 1979.
Lesotho	Arbitration International Investment (Disputes) Act (Act 23 of 1974). (Off. Gaz. 10, Suppl. 2, March 14, 1975)
Luxembourg	Loi du 8 april 1970 portant approbation de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats, en date a Washington, du 18 mars 1965. (Off. Gaz. A, No. 25, May 9, 1970, p. 536)
Malawi	Investment Disputes (Enforcement of Awards) Act 1966 (Act 46 of December 29, 1966) (Off. Gaz. Suppl, January 10, 1967)
Malaysia	Convention on the Settlement of Investment Disputes Act 1966. (Act of Parliament 14 of 1966) Notification on entry into force of the Convention on the Settlement of Investment Disputes Act 1966. (Notification No. 96 of March 10, 1966)

	Arbitration (Emendment) Act 1980. (Act A 478 of 1980)
Mali	Decret No. 09/P-CMLN portant promulgation de l'Ordonnance No. 77-63/CMLN du 11 novembre 1977. (Off. Gaz. 536, January 6, 1978) Ordonnance No. 77-63/CMLN portant approbation de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats. (Off. Gaz, 536, January 6, 1978)
Mauritania	Loi No. 65.135 du 20 juillet 1965 autorisant le President de la Republique a ratifier la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats. (Off. Gaz. 166/167, Sept. 15, 1965, p. 301)
Mauritius	Investment Disputes (Enforcement of Awards) Act 1969 (Act No. 12 of April 24, 1969)
Morocco	Decret royal No. 564-65 du 31 octobre 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats. (Off. Gaz. 2820 No. 16, 1966, pp. 1288, 1332)
Netherlands	Law of July 21, 1966, containing the approval of the Convention on the Settlement of Investment Disputes Between Slates and Nationals of Other States. (Off. Gaz. 339, 1966, p. 802)
New Zealand	Arbitration (International Investment Disputes) Act 1979, (Act No. 39 of 1979)
Niger	Loi No. 68-06 du 12 fevrier 1968 autorisant le President de la Republique a ratifier la Convention Internationale pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats, signee par le plenipotentiaire du Niger a Washington le 23 aout 1965. (Off. Gaz. 4, February 15, 1968, p. 119)
Nigeria	Decree No. 49 of 1967, International Centre for Settlement of Investment Disputes (Enforcement of Awards). (Off. Gaz. Extr. 105, Vol. 54, No. 30, 1967, p. A255)

Norway	Act of June 8, 1967, relating to the implementation of the Convention of March 18, 1965 on the Settlement of Investment Disputes Between States and Nationals of Other States. (Off. Gaz. 1 (1967), p. 23, reprinted Off. Gaz. II(1967) p. 415)
Papua New Guinea	Investment Disputes Convention Act 1978 (Act No. 48 of 1978)
Portugal	Decree Law No. 15/84. (Off. Gaz. No. 79, April 3, 1984)
Romania	Decretul Consiliului de Stat nr. 62/1975 privind ratificarea Conventia pentru reglementarea diferendelor relative la investitii intre state si persoane ale altor state, incheiata la Washington la 18 martie 1965. (Off. Gaz. 56 June 7, 1975, p. 3)
Rwanda	Decret No. 20/79 du 16 juillet 1979.
Saudi Arabia	Council of Ministers Resolution No. 372, 15/3/1394 AH Royal Decree No. M/8, 22/3/1394 AH
Senegal	Loi No. 67-14 du 28 fevrier 1967 autorisant le President de la Republique a ratifier la Convention pour le reglement des differends relatifs aux investissements entre etats et ressortissants d'autres Etats. (Off. Gaz. 3888, April 17, 1967) Decret No 67-517 du 19 mai 1967 ordonnant la publication au JO de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats. (Off. Gaz. 3897, June 10, 1967)
Singapore	Arbitration (International Investment Disputes) Act (Singapore Statutes, 1970 Rev. Ed., Act No. 18, Ch. 17, Sept. 10, 1968, p. 257)
Somalia	Law No. 11 of February 8, 1967 enforcing the Convention.
Sri Lanka	Greater Colombo Economic Commission Law, No. 4 of 1978.
Sudan	Republican Decree No. 121 of 1972, ratifying the Convention.
Sweden	Act on Recognition and Execution of Awards Concerning Certain International Investment Disputes. (Act No. 735 of December 16, 1966)

Switzerland	Arrete federal approuvant la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats. (Recueil des lois fed., 32, August 9, 1968, p. 1021)
Togo	Ordonnance No. 32 du 25 juillet 1967 portant ratification par la Republique togolaise de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.
Trinidad and Tobago	Investment Disputes Awards (Enforcement) Act 1968. (Act No. 23 of August 13, 1968)
Tunisia	Loi No. 66-23 du 3 mai 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats. (Off. Gaz. May 3-6, 1966, p. 723)
United Kingdom	Arbitration (International Investment Disputes) Act 1966 (1966 c. 41) The Arbitration (International Investment Disputes) Act 1966 (Commencement) Order 1966. (Statutory Instruments, 1966, No. 1597, December 21, 1966) The Arbitration (International Investment Disputes) Act 1966 (Application to Colonies etc.) Order 1967. The Arbitration (International Investment Disputes) (Guernsey) Order 1968. (Statutory Instruments, 1968, No. 1199, July 26, 1968). The Arbitration (International Investment Disputes) (Jersey) Order 1979. (Statutory Instruments, 1979, No. 572, May 23, 1979) The Arbitration (International Investment Disputes) Act 1983 (an Act of Tynwald).
United States	Convention on the Settlement of Investment Disputes Act of 1966. (Pub. L. 89-532; 80 Stat. 344; 22 USC sec. 1650- 1650a, August 11, 1966). Executive Order designating certain Public International Organizations entitled to enjoy certain privileges, exemptions and immunities. (Exec. Order 11966; 42 Fed. Reg. 4331 (1977)).
Zambia	Investment Disputes Convention Act 1970 (Act No. 18 of 1970). (Off. Gaz. Suppl. April 17, 1970, p. 99).

28. As regards resolution of dispute arising from investment as per terms of Bilateral Investment Treaty in this case, no law has been made in Pakistan of the nature as was done by Zambia Government or

other States, therefore, the same could not be enforced as law in order to claim that the alleged choice given to the appellant under the said treaty to approach ICSID for arbitration had preference over the existing lawful contract between the parties inclusive of arbitration Clause which is binding on the parties.

29. It is demonstrably clear to which no exception can be taken that the act of the appellant to approach the court of general jurisdiction in Switzerland seeking recovery of specific amounts under the agreement alleging that the arbitration Clause No. 11.1 embodied therein could not be invoked for the reason of termination of contract and that fair trial in the Courts of Pakistan was not possible and not on account of ICSID arbitration under treaty amounted to admission that otherwise the said Clause was valid, legal and operative and binding on the parties.

30. The next question which falls for consideration is whether the agreement between the parties is relatable to any investment to attract the provisions of the Bilateral Investment Treaty because the said Treaty governs the dispute about investment of a party of the Country signatory to the said treaty as is the case here so as to raise a plea that the arbitration clause of the agreement in dispute no longer remained binding between the parties and the choice of the appellant had to be preferred as to the forum of ICSID arbitration. Answer to this question revolves around the answer as to what is meant by the word or expression "investment". The word "investment" has been defined in Article 1(2) of the Bilateral Investment Treaty as under:

> (2) The term "investments" shall include every kind of assets and particularly:
>
> (a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
>
> (b) shares, parts or any other kinds of participation in companies;
>
> (c) claims to money or to any performance having an economic value;
>
> (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and good will;
>
> (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

31. The term "investor" has been defined in Article 1(1) of the Bilateral Investment Treaty which reads as under:

> (1) The term "investor" refers with regard to either Contracting Party to

(a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;

(b) legal entities, including companies, corporations, business associations and other organizations, which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party;

(c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party.

32. The agreement between the parties the subject matter of these appeals is to be tested on the touchstone of true meaning of the word "investment". In order to decide this question, it would be necessary to examine the agreement itself to arrive at a decision as to its scope and nature. It has to be construed strictly, carefully keeping in view the purpose for which the same was executed.

33. Articles 1.1, 1.2, 1.4, 1.5, 2.1, 2.2, 2.6 and 2.7 of the Agreement dated 29 September 1994 entered into between Government of Pakistan versus Société Générale De Survellance SA are as follows:

1.1 *Appointment* The Government hereby appoints SGS to carry out, either by itself, or through its affiliated companies and authorized agents, the services described in Articles II to IV (hereinafter referred to as the "Services"). This appointment is hereby accepted by SGS.

1.2 *Scope of Services* SGS shall perform the Services as are expressly set forth in this Agreement as amended from time to time and the following Schedules hereto which form an integral part hereof:

Schedule	*Title*	*Reference*
I	Definition of Goods	Section 3.1
II	Implementation	Section 5.1
III	Liaison Office Facilities	Section 5.8
IV	Fees	Section 6.1
V	Terms of letter of Credit	Section 7.1
VI	List of Countries	Section 3.1
VII	Definition of Benefits	Section 4.7
VIII	Geographical Area	Section 3.1
IX	List of affiliates & Agents	Section 1.1

1.4 *Strict adherence in carrying out the Services. SGS shall adhere to the provisions of the Rules referred to in Article V as amended from time to time.*

1.5 *WTO Agreement* SGS shall ensure that, in performing the Services, it does not do or cause to be done, any act that is contrary to the provisions of the agreement on pre-shipment inspection of the World Trade Organization: provided that the methods used by SGS to determine the value of duty purposes be strictly in accordance with the laws of the Territory.

Article II

Services

Physical identification of goods. Subject to this Agreement SGS shall carry out the physical identification of all consignments to be imported into the Territory prior to shipment in all countries of supply to determine that the goods presented satisfactorily correspond to the description communicated to SGS by the importer. It shall be in the discretion of SGS to determine the extent of each intervention. In those exceptional cases where goods are permitted to enter the Territory without pre-shipment inspection, including where it is so permitted under the Rules specified in Article V, and the SGS is the selected inspection company, then the inspection shall be undertaken jointly by Customs and SGS at the port of entry.

2.2 *Price verification.* Simultaneously with the physical identification of imports, SGS shall undertake a price verification of the goods in order to determine on the basis of documentary evidence or other information, whether the amount specified in the invoice by a seller in respect of such goods corresponds within reasonable limits, with the export price levels generally prevailing in the country of supply, or where applicable, the world market price verification shall not be limited to the purchase price of the goods, but shall cover the total contracted value including all related services (hereinafter referred to as the "total value")

2.6 *Re-inspection in warehouses.* Where re-inspection of goods in bonded warehouses is required, and SGS is the nominated inspection company, SGS will inspect jointly with Customs and the cost of the inspection shall be paid to SGS by the Government.

2.7 *Cost of re-inspection.* Where re-inspection is required under Article 2.6, SGS shall sub-contract this responsibility to SGS Pakistan which will invoice in Pakistan currency at the current commercial inspection rates in Pakistan. SGS shall advise the Government of the current commercial rates and keep the Government informed of any changes thereto. These specific fees shall be subject to all local applicable taxes.

34. From a bare reading of these Clauses of the agreement in particular and the agreement as a whole, it is manifest that it was an agreement through which the services of the appellant were hired for

carrying out pre-shipment inspection of the goods to determine their value for the purposes of charging custom duty on their import in Pakistan according to the rates prescribed under the relevant laws of Pakistan and the major portion of the exercise was to be undertaken out of Pakistan at the stage of shipment of the goods from the foreign countries from where they were to be imported and in case re-inspection in Warehouse in Pakistan was necessary, the appellant was given authority to carry out the same through SGS Pakistan and nothing else.

35. Considering the nature of these functions for which the services of the appellant were hired in juxtaposition of the meaning of the word "investment", it can safely be held for reasons to follow that it is not an agreement of the kind and nature relating to any investment, as such, is not covered by the said Bilateral Investment Treaty or the Washington Convention. It was an agreement between the two parties of hiring services simpliciter involving no investment, therefore, the arbitration Clause 11.1 embodied therein would not in any manner be adversely affected as to its enforcement through Court of law by any of the Clauses of Bilateral Investment Treaty inclusive of ICSID arbitration being not a dispute related to investment.

36. As is evident from the definition of "Investment" given in the Bilateral Investment Treaty that it is not exhaustive for it is controlled by the expression "includes", learned counsel for the appellant when questioned as to how it could claim in view of terms of agreement in question being an agreement of hiring services simpliciter that the same involves any investment referred to Clause C in the Treaty to argue that according to it, any claim to money simpliciter or any performance having an economic value is also investment, therefore, the claim of the appellant for the recovery of the amounts in question for the services rendered by it would be covered by this Clause. We are afraid, the argument in our view is not only devoid of any force but also plainly unsound. By raising this argument, learned counsel for the appellant has overlooked that all claims to money or any performance having an economic value must relate to investment. Clause C on which reliance has been placed by the learned counsel for the appellant as a matter of fact is of the species of assets earnable by an investor from his investment and not the investment itself. The expression "investment" has a legal connotation and meaning has to be assigned to determine whether the dispute between the parties relate to or has any nexus with investment.

37. Learned Attorney General in this connection has called our attention to the case of *Inland Revenue Comrs.* v. *Rolls Royce Ltd* ([1944] 2 All ER 340) in which the word "investment" has been interpreted as under:

> The word "investment", though it primarily means the act of investing, is in common use as meaning that which is thereby acquired; and the primary meaning of the transitive verb "to invest" is to lay out money in the acquisition of some species of property; consequently, letters patent, which are undoubtedly a species of property, may properly be described as an investment.

38. It is sufficiently clear from this that laying out of money in the acquisition of some species of the property was necessary ingredient to determine whether an entry of transaction was relatable to investment or not. Keeping in view this meaning and interpretation of the expression "investment" and examining the terms of the agreement in question in the light thereof, it can safely be concluded that the same does not fall within the scope and ambit of investment, for as observed above, it is simpliciter an agreement through which mere services had been acquired for evaluation of the goods mostly in the foreign countries and there is no element of laying of money by the appellant for acquisition of any species of property, as such, it is not a case of investment which is covered by the treaty, as such no right in the appellant has been created to invoke its provisions for ICSID arbitration.

39. It was also brought to our notice by the learned Attorney General that in Pakistan, the Foreign Private Investment (Promotion and Protection) Act 1976 (Act XLII of 1976) has been promulgated which governs the foreign investments and the matters relating thereto. In the said Act, foreign capital has been defined as investment made by foreigner in an industrial undertaking in the form of foreign exchange imported machinery and equipment or in any other form which the Federal Government may approve for the purpose. This definition is in consonance with the meaning of the word "investment" as discussed above, therefore, this act can be construed to be the law made by Pakistan relating to foreign investments and in case, the meaning to the expression "investment" given in the Bilateral Investment Treaty was to be extended to mere claim of money without laying out money in the acquisition of some species of property as argued, the said Act was required to be amended to incorporate the same in it to enforce it as law which having not been done, as such, the word "investment" as given in the treaty cannot legally be assigned the meaning as argued by the learned counsel for the appellant against the provisions of the said Act. It also does not involve any performance having an economic value for the reason that the custom duty and other government dues were liable to be charged according to the rates specified in the relevant laws. It may also be observed here that evaluation of the goods and the recovery of the import duty were held to be the sovereign acts which were to be performed by the Slate or its functionaries and by no other person or authority, therefore, it was held in the case of *Collector of Customs and others* v. *Sheikh Spinning Mills* (1999 SCMR 1402) by this Court that abdication of sovereign power or delegation thereof in favour of the appellant was not permissible under the law.

40. For what has been discussed above, we are of the view that the arbitration agreement between the parties dated 29 September 1994 was binding and continued to be binding upon them notwithstanding the ratification of the Bilateral Investment Treaty which provided another parallel forum for arbitration before ICSID in that the appellant was not an investor within the meaning of the said word used in the said Treaty and for the reasons discussed above, the findings of the High Court do not suffer from any legal infirmity.

41. This brings us to the most crucial question as to whether in the circumstances of the case, the appellant shall be deemed to have waived its right to seek remedy before ICSID even if it is held that choice was available to the appellant to seek arbitration through ICSID as against arbitration under the arbitration Clauses of the agreement.

42. Learned counsel for the appellant submitted that though the appellant is not the signatory of the Bilateral Investment Treaty but in view of the definition of "Investor" given in the Treaty to include in its provisions not only the Contracting States but also natural person, legal entities of the Contracting State, therefore, the appellant being a legal entity established in Switzerland could invoke the provisions of the treaty, as such, it had a right to make a choice to invoke the Clause of the treaty regarding arbitration of ICSID to resolve the dispute about investment which if made according to the provisions of the treaty are to be given preference over the arbitration Clause in the agreement in dispute and the appellant having opted to approach ICSID arbitration, the present proceedings commenced through application under section 20 of the Arbitration Act by the respondent are liable to be stayed.

43. Learned Attorney General on the other hand without prejudice to his other submissions and in particular submission that no provision of the treaty could be invoked or pressed into service unless incorporated by the contracting States or any one of them into the laws, maintained that in the circumstances of this case, the appellant had three choices:

a) to file a regular suit before the court of general jurisdiction;

b) to invoke arbitration clause 11.1 of the Agreement and seek arbitration accordingly; and

c) as urged by its learned counsel to have recourse in arbitration before ICSID in exercise of its alleged right to make choice.

44. He submitted that after the acceptance of the termination of the contract in December 1997, it instead of making choice about any of the two arbitration forums as mentioned above for resolution of the dispute filed a suit before the Court of general jurisdiction in Geneva. Specific amounts were claimed under the agreement which were allegedly due to the appellant but it failed and the Courts in Switzerland upheld the plea of sovereign immunity of the Federation of Pakistan and rejected the plea of the appellant that under Arbitration Clause 11.1 of the Agreement the appellant would not get fair trial in the Court in Pakistan. The judgments of all the three Swiss Courts, i.e. Court of first instance, the appellate Court and the Supreme Court held that fair trial under the said Clause was possible.

45. In view of these admitted facts, learned Attorney General made submissions that foundation has been laid to raise a plea that firstly by filing the said suit, the appellant shall be deemed to have waived its

right to get the resolution of the dispute through arbitration, secondly, the delay after acceptance of termination of the contract in 1997 in approaching the Court in Switzerland not only constituted waiver by implication of the right to seek arbitration but the same also constituted estoppel by conduct for which reason it is estopped from seeking arbitration through ICSID and thirdly the judgments passed by the Courts in Switzerland in the said suit of the appellant also attract the principle of issue estoppel. He argued that this principle is applicable with equal force vis-à-vis the foreign judgments and the conditions to be fulfilled for the applicability of this principle are:

(a) that the foreign court which decided the matter was a court of competent jurisdiction;

(b) the decision or judgment was final and conclusive; and

[. . .]

(d) on merits.

46. He also argued that additionally by raising counter claim in the present proceedings before the trial Court under the agreement, the appellant shall also be deemed to have waived its right to make a choice to take the matter before ICSID for arbitration.

47. In support of his argument that delay or failure to commence arbitration by a party would itself constitute waiver on its part to seek arbitration, he has referred to para. 19.01 of Domke on Commercial Arbitration (The Law and Practice of Commercial Arbitration) Revised Edition by Gabriel M. Wilner, Professor of Law, The University of Georgia School of Law, 1998 Cumulative Supplement (Published August, 1998). It has elaborately dealt with the principle of waiver of arbitration by laches or delay which is not only enlightening but also instructive. The opinion of the author based on case law is as follows:

> A party's right to specific enforcement of the arbitration agreement is expressly provided for in modern arbitration statutes, which allow a court order to compel arbitration, including ex parte proceedings. However, this right may be lost by waiver. It has been suggested that "[t]here is . . . nothing irrevocable about an agreement to arbitrate. Both of the parties may abandon this method of settling their differences, and under a variety of circumstances one party may waive or destroy by his conduct his right to insist upon arbitration."
>
> A party may waive its right to arbitration by failing to initiate arbitration within the time limits dictated in the agreement, or by failing to initiate arbitration within a reasonable period, giving rise to laches. Often, a party will waive the right to arbitration not because of no compliance with time limits or laches, but because that party took no affirmative action to commence arbitration. This is especially true where the party also participated in litigation over otherwise arbitrable issues.
>
> Waiver of arbitration occurs most often when a party institutes a court action in violation of the arbitration agreement. This appears clearly as a manifestation of an intention not to arbitrate.

48. It may be mentioned here that this commentary not only covers the principles of waiver not only to a case of failure to initiate arbitration proceedings within a reasonable period but also a case where a

party instituted a court action in violation of the arbitration agreement which would constitute manifestation of an intention not to arbitrate. At another place, it was reiterated in para 19.06 that a party not demanding arbitration within a reasonable time may be deemed to have waived the right to arbitrate. It goes on saying that if a party engages in deliberate delay or inaction or other efforts to frustrate the other party's attempts to arbitrate, the first party may be found to have acted in bad faith and to have impliedly waived its entitlement to arbitration. In the opinion of the author, waiver of arbitration occurs in most cases when a party initiates litigation or participates in a law suit in violation of the arbitration agreement. The Seventh Circuit has held that a party's election to proceed before a nonarbitral tribunal constitutes a presumptive waiver of the right to arbitrate. The author was of the opinion that as a practical matter, the more involved in litigation a party gets, the greater the appearance that the party has chosen an alternative to arbitration. Also, the more involved a party becomes in litigation, the greater chance that prejudice to the other party will be found. It has also been maintained that advancing a counter claim in a court action may be considered a waiver of arbitration. The author also observed that the Courts held that an insurer's motion to dismiss the complaint of a claimant for uninsured motorist coverage waived the insurer's party to resort to court action until an unfavourable result is reached and then switch to arbitration.

49. Cases and Materials on the Law and Practice of Arbitration, Second Edition by Thomas E. Carbonneau C. J. Morrow Professor of Law, Tulane University, Editor-in-Chief, World Arbitration and Mediation Report, referred to by learned Attorney General is also of immense help and provides useful guidance to determine this aspect of the case. In the opinion of the author, the question whether a contracting party waives its right to demand the arbitration of contract disputes by participating in judicial proceedings regarding those disputes is an issue that has surfaced with greater frequency in the decisional law on arbitration. On the strength of the case law, according to the author, the following principles are deducible:

> The court indicated that a waiver may be found when a party seeking arbitration "has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with wilful misconduct".

He also goes on saying:

> The court room may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration.

At another place, it has been reiterated as under:

> By not bringing the dispute to arbitration for nearly three years, the plaintiff in effect waived its right to arbitrate. Once arbitration is ordered, the court held, the party who seeks to have the dispute arbitrated carries the burden of undertaking arbitration in a timely manner.

He also goes on saying:

A Texas court of appeals held in *Vireo* v. *Cates*, 953 SW 2d 489 (Tex. Ct. App. 1997), that the trial court did not abuse its discretion by holding that the plaintiffs waived their right to compel arbitration. The court ruled that a "plaintiff who sues on an arbitrable claim unconditionally, without having initiated arbitration of the claim for demanding specific performance of the arbitration agreement, creates in the defendant a right of election—the defendant may insist or not upon arbitration, as he chooses". The court further stated that, if the defendant does not insist upon arbitration, the contracting parties have "mutually repudiated the arbitration covenant as a matter of law and waived any right thereunder".

50. American Jurisprudence, Second Edition which is a modern comprehensive text statement of American Law Volume 5 was also referred to by the learned Attorney General in which it has also been held on the strength of principles laid down in the cases decided by the Courts as under:

51. Generally. The right to arbitrate given by a contract may be waived, even in those jurisdictions where a contract for arbitration is irrevocable, Such a waiver of arbitration may come before as well as after the commencement of litigation. The waiver may be either by express words or by necessary implication. Thus where one party brings suit, he waives his right to arbitration, his conduct is clearly inconsistent with a claim that the parties were obligated to settle their differences by arbitration.

It further goes on observing:

Any conduct of the parties inconsistent with the notion that they treated the arbitration provision as in effect, or any conduct that might be reasonably construed as showing that they did not intend to avail themselves of such provision, may amount to a waiver. A right to arbitration may be waived by denying that there is anything to arbitrate, by failing to perform the preliminary steps leading to arbitration, or by being unjustifiably slow in seeking arbitration.

He also says:

and a party who is guilty of dilatory tactics or of delay may waive his right to arbitrate and to a stay of an action at law pending arbitration.

51. Corpus Juris Secundum, a complete restatement of the Entire American Law Volume 6 has also been pressed into service by the learned Attorney General which on this point is as under:

The parties to an arbitration may by agreement or action expressly or implicitly waive, or abandon the arbitration agreement, and come into court if they mutually choose to do so. Also, the parties may, by their voluntary act, abandon one arbitration proceeding and proceed with a new proceeding covering the subject matter embraced in the abandoned proceeding.

Abandonment may result from a lapse of time without any activity therein by the parties, or otherwise by actions and conduct or omissions, clearly indicating an intention to forego the prosecution.

It also opines:

Generally the institution of a suit covering the same subject matter as that submitted to arbitration revokes the submission.

> While there is authority to the contrary, it is generally held that the institution of a suit, before award, by one of the parties, the cause of action being the same subject matter as that submitted to arbitration, revokes, by implication of law, the agreement to arbitrate. However, the institution of suit has no such effect, unless the action covers the subject matter submitted; and, until a complaint has been filed by a party to the submission, an adverse party has no legal notice of the cause of action, and the arbitrators may proceed with the arbitration and render their award, although a summons has been issued.

52. The judgment in the case of *Malarky Enterprises (US) (Plaintiff)* v. *Healthcare Technology Ltd (UK) (Defendant)* (United Slates District Court, District of Kansas, 25 April 1997 Civ. No. 96-2254-GTV) has also been brought to our notice which laid down the following principles for determining whether a party shall be deemed to have waived its right to arbitration:

(1) whether the party's actions are inconsistent with the right to arbitrate;

(2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate;

(3) whether a party either reqested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;

(4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;

(5) whether important intervening steps (e.g. taking advantage of judicial discovery procedure not available in arbitration) had taken place; and

(6) whether the delay affected, misled or prejudiced the opposing party.

53. The said well established principles of law are fully attracted to the facts and circumstances of this case. The termination of the contract was accepted by the appellant on 27 December 1997. It kept quiet up to 24 June 1999 when instead of opting for the alleged choice of seeking arbitration through ICSID of the dispute commenced proceedings in a court of general jurisdiction for the recovery of the amount allegedly due to it. The appeal filed by it before the Swiss Court of justice was dismissed on 23 June 2000. Application under section 20 of the Arbitration Act by the respondent was filed on 7 September 2000. The appeal filed by the appellant before the Swiss Supreme Court on 24 July 2000 was dismissed by the said Court on 23 January 200[1]. Reply to the said application under section 20 was filed by the appellant on 7 April 2001 whereas consent to ICSID arbitration was filed by it on 10 April 2001 whereas formal request for ICSID was made by the appellant on 12 October 2001 which was listed on 21 November 2001.

54. These details of the events also establish that consent to ICSID arbitration was made after filing reply to the application under section 20 of the Arbitration Act before the trial Court in which counter claim

under the agreement was also made seeking recovery of the same amounts which were claimed before the Swiss Court. On the basis of these established facts, it can safely be held that the appellant had not only waived the right to opt if any for ICSID arbitration but even principle of estoppel by conduct would also be attracted for institution of the proceedings before the Swiss Court and filing of reply to the application under section 20 was sufficient to constitute estoppel of conduct of waiver of its right to seek arbitration.

55. The principles of issue estoppel and cause of action are also fully attracted in this case. Learned counsel for the appellant when questioned as to how in the light of the above noted well settled principles of law of international recognition after obtaining decision of the Swiss Court, it could maintain before the trial Court by making application under section 41 that these proceedings should be stayed in view of the ICSID arbitration initiated by it, submitted that decisions of the Swiss Courts are not on merits of the claim of the appellant, therefore, those decisions would not operate as res judicata to debar the appellant from raising the plea that the arbitration Clause in the agreement was subservient to the option of choice given to the appellant under the Bilateral Investment Treaty of ICSID arbitration and that the said Clauses could not be pressed into service by the respondent.

56. We are afraid, the submission is wholly devoid of any force. In order to attract the principles of issue estoppel and cause of action, it is not necessary that the judgment which had previously dealt with the case should be on merits of the claim itself arising from a contract but the merits of the case would be the questions of law raised in those proceedings and decisions rendered by the Courts on them. The merits of the case brought before the Swiss Court by the appellant were whether:

a) Arbitration clause 11.1 in the agreement between the parties was severable;

b) Possibility of fair trial in Pakistan;

c) Sovereign immunity of Pakistan.

57. The judgments of the Swiss Courts on the merits of these points are that arbitration clause 11.(1) of the agreement was severable, for it survived the termination of the agreement. The plea of sovereign immunity of Federation of Pakistan was accepted. It has also been held that fair trial in the Courts of Pakistan was possible. These judgments were passed by the Courts of competent jurisdiction and are of declaratory nature about the merits of the legal points decided therein, therefore, they could be looked into and pressed into service by the Courts in Pakistan as foreign judgments as they satisfy the criteria laid down in section 13 CPC. The argument of learned counsel for the appellant that these judgments had to be tested on the touchstone of provisions of Section 44A CPC has no force, for the said provisions govern the matters relating to execution of such judgments and decrees and not of the judgments and decrees of declaratory in nature. As has already been noticed, the appellant by the act of the institution of the said proceedings shall be deemed to have expressly waived its right if any of making option of arbitration of

ICSID is bound by the said findings on merits of the case on those points which had the effect of operating as res judicata as regards validity and binding nature of arbitration clause 11.1 of the agreement as such it could not claim stay of proceedings commenced under section 20 of the Arbitration Act on the ground that it had approached the ICSID for arbitration which right it had already waived and was no longer available to it. Besides the claim of the appellant on the date when it filed request for arbitration before ICSID had already become barred by time, for the period of limitation started running from 23 December 1997.

58. Mr K. M. A. Samdani, learned counsel for the appellant, submitted that application under section 20 of the Arbitration Act was filed on 7 September 2000 whereas contract was terminated on 12 December 1996, therefore, the principle of delay if any, is also applicable to these proceedings.

59. This plea if considered in isolation appeared to have some substance but keeping in view the established facts and circumstances of this case, the same is found to be not available to the appellant. The appellant on 12 January 1998 commenced proceedings in the matter before the Court of first instance at Geneva and raised a plea that Arbitration Clause 11.1 of the Agreement did not survive or that fair trial was not possible thereunder which was finally decided by the Swiss Supreme Court on 23 January 2000, as such, the respondent cannot be held guilty of laches as such, cannot be non-suited on the ground of delay.

60. Before parting with this part of the judgment, we may observe here that the conduct of the appellant SGS is not above board, for it did not disclose before ICSID while filing consent and request for arbitration that it previously had approached the Court in Geneva and failed up to the Supreme Court and the decision on the issues regarding applicability of Arbitration Clause 11.1 and fair trial in Pakistan in pursuance thereof had been decided against it.

61. We are of the firm opinion that in case, those decisions had been brought to the notice of the ICSID Tribunal it would not have entertained the request for arbitration. The appellant did not approach ICSID with clean hands and is guilty of deliberate concealment and suppression of material facts relevant for taking a decision by the said Tribunal whether the request should be entertained and notice issued.

62. The next question which falls for decision is as to what will be the governing law of the arbitration proceedings under arbitration clause 11.1 of the agreement between the parties, the said clause reads as under:

> 11.1 *Arbitration* Any dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination [or] invalidity thereof, shall as far as it is possible, be settled amicably. Failing such amicable settlement, any such dispute shall be settled by arbitration in accordance with the Arbitration Act of the Territory as presently in force. The place of arbitration

shall be Islamabad, Pakistan and the language to be used in the arbitration proceedings shall be the English language.

63. It is clear that the parties had agreed that the seat of arbitration shall be Islamabad, Pakistan. It also provides that the arbitration shall be in accordance with the Arbitration Act of the Territory as presently in force.

64. Learned Attorney General in view of these terms of the arbitration clause argued that choice of seat was capable of being determinative of the choice of the governing law of the performance obligations, therefore, the Arbitration Act 1940 will be the governing law. He referred to Commentary by Russell on Arbitration, Twenty First Edition by David St John Sutton. The relevant portion of the commentary reads as under:

> Before the Contracts (Applicable Law) Act 1990 if there was no express choice of a proper law of the performance obligations, an agreement to arbitrate in a particular venue, such as London, was highly relevant to the investigation. The venue and jurisdiction is often referred to as the "seat" of an arbitration. If the parties expressly chose a seat, but make no express choice of the law which is to govern the performance obligations under the contract, that choice of seat was capable of being determinative of the choice of the governing law of the performance obligations. An agreement to refer disputes to arbitration in a particular country may carry with it, and is capable of carrying with it, an implication or inference that the parties have further agreed that the law governing the contract (as well as the law governing the arbitration procedure) is to be the law of that country. But I cannot agree that this is a necessary or irresistible inference or implication.

65. Mr K. M. A. Samdani, learned counsel for the appellant, did not seriously dispute the correctness of the contention raised by learned Attorney General that seat of the arbitration being Islamabad and part performance of the obligations of the agreement was also to be made in the territory of Pakistan and the agreement having been executed in Pakistan, therefore, these factors were sufficient to hold that the parties intended that the governing law of the arbitration would be the law of Pakistan.

66. Reverting to the merits of Civil Appeal No. 460 of 2002 filed by the respondent directed against the order of the learned Judge in Chamber of the Lahore High Court dismissing its application praying that SGS may be restrained from pursuing the remedy through arbitration of International Centre for Settlement of Investment Disputes (ICSID), it may be observed that the relief claimed has been declined on a ground not tenable in law. In the opinion of the learned Judge in Chamber, such a relief could only be claimed and granted in a regular civil suit and not in the present proceedings. It may be mentioned here that according to section 20 of the Arbitration Act, the application has the legal status of a suit. Apart from that, under section 41 of the Arbitration Act, the Court in which proceedings are pending is competent and vested with the jurisdiction to pass interim orders as could be passed in a regular civil suit in the form of temporary injunction or otherwise. The view taken by the learned Judge in Chamber has not only resulted in miscarriage of justice but also failure to exercise jurisdiction vested in the Court to pass interim orders of

the nature prayed for. Even otherwise it has also been overlooked that after having held that the arbitration proceedings initiated by the respondent before the trial Court were competent and maintainable for the reasons that arbitration clause 11.1 of the agreement was holding the field and was binding on the parties and its legal efficacy and enforceability had not been in any manner adversely affected by Bilateral Investment Treaty and ICSID arbitration Clause, the legal consequences to follow were that ICSID arbitration was not maintainable and should not have been allowed to be prosecuted any further.

67. Mr K. M. A. Samdani, learned counsel for the appellant, submitted that the trial Court before deciding the application by passing formal express order as envisaged under section 20 of the Arbitration Act of filing the agreement in the Court, after disposal of the application of the appellant for stay of proceedings directly, proceeded to pass order mechanically calling upon the parties to propose a panel of arbitrators for appointment to proceed with arbitration. This contention has been raised on the assumption that it was mandatory to pass express order of filing of arbitration agreement whereas according to settled law, it was not necessary to do so for execution of agreement in question had not been disputed, therefore, the order calling upon the parties to propose panel of arbitrators can safely be construed to be an order of acceptance of the said application of the respondent. Reference may be made to the case of *M/s Ama Corporation, Madras, appellant* v. *Food Corporation of India, respondent* (AJR 1981 Madras 121) in support of this view. It has been held in this case that if the Court passes an order for reference of the matter to arbitrators, it would amount to acceptance of the application and no formal order of filing of arbitration agreement is necessary, for the Court while passing such an order would be deemed to have taken the agreement on the file. A perusal of memo of appeal filed by the appellant before the High Court also reveals that the appellant was itself not in doubt about this legal position as the appeal was directed against the order dated 7 January 2002 of the trial Court treating it as an order of acceptance of application made under section 20 of the Arbitration Act.

68. Faced with this situation, Mr K. M. A. Samdani, learned counsel for the appellant, submitted that the High Court did not advert to this aspect of the case, though ground had been raised that formal order of acceptance of the said application was to precede the direction of calling upon the parties to propose panel of arbitrators or making order for reference to the arbitrators. Nothing turns on it, for such an argument did not deserve any serious consideration or attention as it has been held that no such formal order was necessary and the order passed by the Court on 7 January 2002 did constitute acceptance of the application of the Federation of Pakistan because, as observed above, there was no dispute about execution of the agreement and other objections raised in the application made under section 41 had already been rejected.

70.[2] For what has gone before, the appellant is debarred from raising objection against arbitration

[2 Paragraph numbering as in the original text.]

Clause 11.1 of the agreement and maintaining and continuing with the ICSID arbitration which has been commenced and being pursued as counterblast to the present arbitration proceedings and as such lacked bona fide.

71. Mr K. M. A. Samdani, learned counsel for the appellant, submitted that by subsequent order dated 4 March 2000, the trial Court appointed the arbitrator after having received no response from the appellant, therefore, the said order would be deemed to be an order of disposal of application filed by the respondent under section 20 of the Arbitration Act against which appeal could still be filed as period of limitation prescribed under the law had not run out.

72. The argument has no substance. The said order is a subsequent order of appointment of arbitrator and not an order of disposal of the application which shall be deemed to have been accepted by the order dated 7 January 2002 when the objection against these proceedings raised by the appellant was rejected and the parties called upon to propose panel of arbitrators.

73. Mr K. M. A. Samdani, learned counsel for the appellant, submitted that the arbitrator appointed by the trial Court issued notices to the parties on 6 March 2002, therefore, legally the arbitration proceedings shall be deemed to have commenced from the said date which being later in point of time than the date when the appellant filed consent to ICSID arbitration on 10 October 2001, therefore, these proceedings were liable to be stayed instead of proceedings of ICSID arbitration.

74. The argument in our considered view is devoid of any force apart from being plainly unsound. It is also based on the erroneous assumption as if mere act of consenting to ICSID arbitration of the appellant had the effect of commencement of ICSID arbitration which is not the legal position. Application under section 20 of the Arbitration Act from which these appeals have arisen was filed by the respondent on 7 September 2000 to which reply was filed by the appellant on 7 April 2001. If the filing of the said application on 7 September 2000 by the respondent is treated at par with the filing of consent to ICSID arbitration on 10 October 2001 by the appellant and formal request for ICSID arbitration by it on 12 October 2001 as the dates of institution of both the proceedings, the proceedings commenced by the respondent before the trial Court are earlier in time. If according to the criteria on the basis of which these arguments have been advanced, i.e. notice issued by the arbitrator on 6 March 2002 in those proceedings, is to be taken as the date of commencement of arbitration proceedings, in the same manner, formal notice issued by the ICSID to the respondent on 17 April 2002 is to be treated as the date of commencement of those proceedings; even then the date of commencement of arbitration proceedings initiated by the respondent is earlier, as such, seen from whatever angle, the proceedings initiated by the respondent are earlier in time, therefore, the argument is hereby repelled.

75. Mr K. M. A. Samdani, learned counsel for the appellant, before the conclusion of his arguments feebly argued that the respondent was simultaneously pursuing the remedy in Switzerland for the recovery of specified amounts evidenced by copy of an order dated 26 January 2001 placed on the record of the trial Court issued in this behalf by Swiss Authorities directing the appellant to pay the said amounts for which reason the respondent was legally debarred from maintaining the present proceedings.

76. We summoned the record of the trial Court which is available and find that order of payment issued by the Swiss Authorities relates to recovery of amounts in connection with judgment passed by the Swiss Supreme Court in the appeal filed by the appellant and has no nexus with the amount which according to the respondent Federation is due to it under the agreement in question.

77. Before parting with this judgment, we would like to dispose of another contention raised by Mr K. M. A. Samdani, learned counsel for the appellant, which was to the effect that in these proceedings, the Court should have refrained from expressing any opinion on the questions relating to the merits of ICSID arbitration, its maintainability and the right of the appellant to invoke ICSID arbitration which may be left to be decided by the ICSID if any objection raised in those proceedings by the respondent. The contention in the facts and circumstances of this case is not tenable. It was the appellant who approached the trial Court through application under section 41 of the Arbitration Act objecting to the maintainability of the proceedings under section 20 of the Arbitration Act mainly on the grounds that ICSID arbitration had supremacy over the arbitration clause in the agreement which had become subservient to the Bilateral Investment Treaty, therefore, all these questions inclusive of the legal effect of the judgments of the Swiss Courts, were directly and substantially in issue as such, it was necessary to decide the same for the disposal of the said objections raised by the appellant who had submitted to the jurisdiction of the Court.

78. The appellant did not file the names of the proposed arbitrators in response to the directions given by the trial Court whereas the respondent proposed the names of Mr Justice Nasir Aslam Zahid and Mr Justice Shafi-ur-Rehman of this Court. There is nothing on the record that any of the parties raised any objection to the appointment of any of the two learned retired Judges proposed by the respondent as sole arbitrator but the trial Court proceeded to appoint Mr Justice Khalil ur Rehman Khan of this Court as arbitrator by observing that in its view, he was impartial person. We would not countenance this act of the trial Court which should be very careful while expressing any opinion about impartiality or otherwise of any of the learned retired Judges of this Court. The order of appointment of Mr Justice Khalil ur Rehman Khan as sole arbitrator is set aside and we hereby direct the trial Court to nominate any one of the two learned retired Judges proposed by the respondent as sole arbitrator.

79. We may also before closing the judgment express our appreciation to the valuable assistance rendered by the learned Attorney General and Mr K. M. A. Samdani and their Associates who assisted

them due to which we were able to decide intricate questions of law involved in this case.

80. For the foregoing reasons, Civil Appeal No. 459 of 2002 filed by SGS is hereby dismissed with the direction that the respondent Federation shall neither be allowed to file any claim based on the allegations as contained in paragraph 3 of the application made under section 20 reproduced in the earlier part of the judgment as regards bribes, commission and kick backs allegedly received in connection with the agreement nor raise any plea which has been held to be not arbitrable in *HUBCO* case (supra) and allow it to lead any evidence in relation thereto meaning thereby that arbitration proceedings shall be confirmed to the claims based on the terms and conditions of the agreement in question. However, the respondent Federation may seek independent remedy if available to it under the law qua those allegations.

82.[3] Civil Appeal No. 460 of 2002 filed by the Federation of Pakistan is accepted and the SGS (appellant in CA 459 of 2002) is hereby restrained from taking any step, action or measure to pursue or participate or to continue to pursue or participate in the ICSID arbitration.

83. The parties are, however, left to bear their costs.