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The State Consent To Investment Arbitration In Maghreb Countries

رضا الدولة في تحكيم الاستثمار في دول المغرب الكبير

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Summary :

As everyone knows, mutual consent is essential issue in arbitration whatever its nature, commercial, maritime or relating to investment.

When we talk about consent in arbitration in general, we mean the way to get it traditionally by the accordance of an offer from one party of a relationship to solve the disputes by arbitrators, accepted by another person who agrees to do so. This accordance could occur in a contracting conference or behalf various means of

communication. It's what I will call: arbitration relying on a specific convention of arbitration, which takes the two following forms:

- ***A clause taking place in a contract relating to a probable dispute in the performance of this contract.***
- ***A convention signed by the contractors relating to a dispute which took place between them after the signature of the convention of arbitration.***

Key Words : State consent ; investment ; arbitration ; Maghreb countries

This last alternative is really rare because of the Impossibility for the litigants to be in accordance on some of the aspects of the arbitral procedure.

Then, the consent to arbitration must touch all aspects of arbitration, as the principle of to solve their dispute behalf arbitration, the choice of the Center of arbitration, the arbitrator or arbitrators, the rules of procedure and the law applicable to the merit.

But finally, the choice of the center solve all those questions behalf the rules of arbitration used by the Center and in particularly in the case of certain arbitration centers, as ICSID working under the international Convention of Washington 1965 (States, 1965).

For this Center particularly, the consent of arbitration had putted several problems which might to blow it out all the Center, concerning the consent of the state host of investment for the choice of the competence of the International Center Settlement of Investment Disputes (CIRDI) , known in the Maghreb as CIRDI (in French).

Those problems hasn't been registered for others Center of arbitration as International Chamber of Commerce (ICC), of Stokholm Center, where particular attention is payed to the consent in the conclusion of a specific convention of arbitration .

A number of reasons stand behind this reality:

- First, is that the investment litigation opposes a state as a body of international public law to a person submitted to private law : a human one or an organization as companies or a public agency.
- Arbitration in this field is organized by the Washington Convention on resolving disputes between a state and a citizen of another state, which creates the ICSID center within the World Bank in 1965. Except Libya, all Maghreb countries are members of the Convention.
- The Convention is sustained by a number of bilateral conventions on protecting investment, about 3500 conventions, others which are multilateral stating arbitration as a mean to settle investment disputes.
- Some of national laws relating to investment referring to the Center.

Those factors had implied that the consent to the Center is not obtained behalf a classical (conventional) way. That means not by contracting a special arbitration convention, which usually intervene not in a written form. This practice had been known as arbitration without privacy.

Then, the question is how the consent intervenes in the context of ICSID arbitration in the absence of a specific written convention of arbitration? And why specifically in the Maghreb countries? And what was the reaction of countries who had been victim of this kind of practice?

We will study at first, how intervenes the arbitration without privacy implying certain Maghreb countries before the ICSID Center which has given some excesses (I), to expose then the reactions observed by certain Maghreb countries and other developing countries to this phenomenon (II).

I- ARBITRATION WITHOUT PRIVACY IN THE CONTEXT OF MAGHREB COUNTRIES

At first, we must know how the consent of the state is obtained in the absence of a special convention of arbitration which has been characterized by exaggeration **(1°)**, to study after the different state reactions registered to this compulsory jurisdiction of the ICSID to settle disputes against the interest of developing countries **(2°)**.

1- How the consent of the investor is obtained

The consent of the investor doesn't put any trouble. It can be obtained classically by the concordance of the solicitation and the acceptance as when the consent concerns an arbitration clause or agreement.

But, the consent could be implicit, as it could be in the absence of a private convention of arbitration when the investor make a request on the basis of an international bi- or multi- lateral convention or a national law which makes reference to the Center, qualified by certain authors unilateral seizure of the ICSID.

2- How the state consent is realized

In some cases, the state doesn't give his consent to go to arbitration under the jurisdiction of the ICSID expressly but implicitly beyond:

- The case one : the notification which is presented by the state party under the article 25/1 of the Washington Convention to clarify its position about submitting or not certain entities depending to it : Departments, agencies, corporations …etc.

  This step is an important matter which leads to extension of the jurisdiction of the ICSID to entities some litigations without any link with investment as public procurements or public partnerships, even if a

commercial contract is signed by big public corporations. This is possible as the concept is not strictly defined in the precedents of ICSID as we can observe that in Salini vs. Morocco case.

- The second case: when an international Convention exists, unilateral or bilateral, referring to the Center. This includes for example the Northern American Free Trade Agreement between America, Canada and Mexico; the Energy Charter which contains dispositions referring to the Centre without need of any arbitration clause included in the investment agreement or an arbitration agreement concluded after the rise of a dispute.

  So, the jurisdiction of the Center is supported by a net of about 3500 bilateral treaties referring to the Center. Maghreb countries have signed some of them with developing countries who have realized investments in those countries. This includes for example the Tunisian-French agreement concluded in 1972 which refers to the Center

- The third case: when a national law relating to protection of investment presents the arbitration of the Center as a warranty to investor without any need of a private convention clause specifically signed between the litigants; even though those acts doesn't specify the ICSID as a compulsory jurisdiction but evoke only the Center to make clear for the investor that the state accepts the competence of the ICSID by transiting by a specific convention.

- The fourth case: when the jurisdiction is decided by applying what we call in the context of the General Agreement on Trade and Tariffs "*the most favored*

nation clause "; which means that a state who grants an advantage to another state must grant the same advantage to all countries members to the agreement, even if there is no specific arbitration clause between this state neither with the investor nor with the state of the investor. It's what really happened in the case Veolia vs. Arab Republic of Egypt, in which it has been considered that by analogy the bilateral treaty between Egypt and Finland, could be extended to France.

Those developments took place in spite of the article 25 which requires that consent must be clear and non equivocal. That makes number of states of the third world to react negatively to such phenomena of what is called the marginalization of the state consent in the investment arbitration, using different ways.

II- STATE REACTIONS TO THE PHENOMEN OF MARGINALISATION OF TNE STATE CONSENT IN NVESTMENT ARBITRATION

The reactions of state ranged from reviewing their domestic legislation (1) to the denouncement and withdrawal of some of Latin-American states from the Washington Convention (2).

1- Review of domestic legislation

The first response comes from Tunisia under the investment act dated of December 1993, 28th relating to the encouragement of investment in his article 67 which attributes jurisdiction in principal to the state tribunals (120, 1993). This reaction was the consequence of the Gaith Pharaon vs. the Republic of Tunisia case, ended with conciliation.

The same reaction could be observed in Algeria where a legislative decree was promulgated in the same year (1993) on

investment (93-12, 1993). The disposition remains until now through all the acts promulgated after this year affirming the principle of jurisdiction attributed to state tribunals.

The fear of certain states of the hegemony of this extension makes certain states to put out of the jurisdiction of the ICSID Center a number of cases obviously relating to investment by eliminating the role of the state and its replacement by another body which is commercial and makes by the same occasion within the jurisdiction of others centers administrating commercial arbitration. In this sense we can cite the example of hydrocarbon contracts in the hydrocarbon law of 2005 (07-05, 2005)and 2019 (19-13, 2019)in Algeria. In this act a commercial organ which is autonomous from Algerian state who conclude de the contract instead of the Algerian state.

It's obvious that the principle of jurisdiction attributed for the state tribunals render the jurisdiction exceptional, but only when domestic tribunals are competent. In the other side the Center and arbitrators continue to interpret the Washington convention very extensively in the favor of another principle of superiority of the treaty on domestic law. This situation pushes certain states to a radical position consisting in denouncing the Washington Convention.

2- **The denouncement movement of the Washington convention by Latin-American countries**

This situation has pushed a country as Bolivia to denounce the convention when president Morales arrived at the head of state in the context of the renationalization of hydrocarbons in 2007.

This position was followed by Equator who had harden its position by a notification according to the article 25 about matters not be judged in the center, before denouncing it in 2009 and its withdrawal definitely out of the convention followed by Venezuela …etc. Even better some of sensitive fields as mining and hydrocarbons and energy … were attributed to domestic tribunals by the force of the Constitution.

Maghreb countries don't intend to do so immediately because they can measure the effect of such attitude on their economy already impacted by the political and pandemic situation.

References

07-05. (2005). *Hydrocarbon Law.* Algies: JORADP.

120. (1993). *Encouragement of investement.* Tunis.

19-13. (2019). *Hydrocarbon activities.* Algies: JORADP.

93-12. (1993). *Law of investement* . Algies: JORADP.

States, C. o. (1965). *The Washington Convention.* Washington.