التحكيم في عقود البترول من خلال اتفاقيات استثماره

"بالإنكليزية و العربية "

تأليف

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Petroleum investment agreements

There are various types of oil agreements and requirements for each type of excellence and that were the following:

(A) Traditional prerogatives:

One of the reasons for international conflict over oil was the oil companies compete with American and European sources on oil in foreign countries, particularly third world countries most of which were under colonial The direct or independent, but weak and subject to influence foreign

What concerns us that the competition is that it did not have the predictable result of the competition is to offer attractive conditions of contract to third world countries which owns the sources of oil and contrary to what is expected, that competition was organized by agreements between the Governments of States that follow the oil companies have American and European

With regard to the contractual relationship with those companies with the three countries of the world on those companies found in the non-completion of those States and complete ignorance of the affairs of the oil window of opportunity to get paid for oil my name, I have found those companies in coordination among the traditional concession agreements are the appropriate legal tool to achieve this purpose Perhaps that is the primary reason that all oil agreements signed between oil companies and third world countries which owns the sources of oil since the end of the last century to the beginning of this century were, without exception, is a traditional concession agreements.

Specifically concession agreements appeared initially in Indonesia and some other countries at the end of the last century, and the privileges of the Middle East, it began the British concession (concession Darcy), which was concluded in Iran in 1901 while in the rest of the world, the franchise system has emerged between the warlords of the global.

In spite of that type of oil agreements have ceased to exist in most parts of the world because of unfair terms, but it is still used in a limited number of developing countries, and many of the leases and licenses of oil currently in effect in many States carry some of the features of traditional Alamitazat and summarized the main characteristics of the traditional privileges in the following:

*Enlarge the concession area to cover, in some cases every area of the country concerned and in many cases do not include the abandonment of the Convention is mandatory for some areas as The case today.

*The length of the duration of the concession, ranging between 60 and 75 years in the case of Kuwait was 92 years old.

Lack of financial returns to the host government is the amount of royalty is simple and consistent and not linked to the value of petroleum product and the profits that accrue to the company excavating (for example, 4 shillings per ton oil is produced.)

- Excavating company controls Tampaly control all operations, including research program and select the fields productive and identify Sagova production and pricing.
- Funds are paid by the company excavating petroleum operations contribute directly to capital expenses and not recovered from the production according to a particular program.

And summarize our review of the traditional privileges suspended an American writer who said that it did not happen in modern history that any government acted in its natural resources so that generosity and that long for a fraction of the proceeds

(B)Modern privileges:

The days pass, and climate conditions that have made third world countries agree to sign the franchise appeared in the traditional world of exploration for oil what is known as the privileges of modern Perhaps the best description of the privileges of modern traditional privileges they had been introduced some amendments in favor of the host countries.

And may be modified with respect to an area where the license provides the privilege to talk less space and on a schedule to give up that space as an example, Article 9 of the oil resources of the Year 1972 stipulates that it shall not exceed the license 800 square kilometers, Article 10 it states that does not exceed the lease 250 square kilometers, only with the consent of head of state and leave the subject of Altkhaliat Act to deal in the agreement concluded between the parties.

A modification may be in force as regards the duration of the concession provided for the duration of the talk on a much shorter duration of the concession of the

traditional that were mentioned in this regard, we find that Article 9 of the abovementioned law stipulates that no more than a license for four years and may be extended for an additional period not exceeding two years.

Perhaps the biggest difference between the traditional prerogatives and privileges of modern is that the latter provides an additional fiscal revenue, whether in the form of royalty or a tax on profits or the granting of exploration of the host country paid upon signature or upon the discovery of oil, or when access to the production of certain rates and payments are is in the form of royalty or taxes are the most important types of financial returns provided by the privileges of modern therefore

Seen to touch the history of royalty and taxes in some detail in the following paragraphs:

*That) royalty) or (rent) payments or contributions are the names of the meaning of one in the petroleum concession agreements which means payments in cash or in kind which it is bound to the performance of the concessionaire Aldop host and for each unit of output obtained by the petroleum.

The Government is a stakeholder to receive Alotaop in Arab countries due to the fact that ownership of the ground back to the state (not the owner of the surface of the earth, as is the case in the United States of America), it follows that the State becomes entitled to payment of royalty and tax together for that reason considered companies oil royalties that are complementary to the tax did not succeed in producing state Tiq Alotaop account the expenses of operating only at a later date.

There are two criteria to determine Alotaop, they are either a certain amount for each unit of net production was common to use the standard conventions before the war (Second World) with the difference in estimating the amount of the agreement to another As to be a certain percentage of annual production, has adopted the majority of the post-war standard, where the latter that the first criterion is arbitrary, as the disconnectedness oil prices of the product and quantity and has identified many of that percentage to 12.5, although some conventions have raised that figure to 40% In contrast to pay extortion fees relieved of all agreements concluded in the period before the war by the concessionaire to submit to national tax laws.

During 1947 1949 – by Iran's first attempt to modify the privileges as before the war and shows the principle of equitable participation in the profits but the attempt failed and ended nationalized the oil industry in Iran in1951

We have managed Venezuela in Iran, where it failed in 1948 issued a law imposing a tax on the profits of oil companies so that at least the government's share of 50% of

the net profits of those companies and that Venezuela will be the first to recognize the principle of equal shares of profits Venezuela has abandoned that principle for the better while in 1958 passed a law (action by one) provides that at least 605 on the government's share of net profits without the need to modify the concession.

In 1949, the United Nations Secretariat has prepared a study has adopted the report of the economists who discuss the problems of economic development of emerging growth which states that the right of those countries to obtain tax revenue from foreign investment is profitable and that it can avoid double taxation, the conclusion of bilateral tax agreements between the exporting countries of capital and host countries, could also be of the latter States at the time to raise taxes to the extent that the foreign investor does not carry an extra burden

In Saudi Arabia, held talks with Saudi Aramco ended with Msomin on 4 / 11 / 1950, 26/12/1950 imposed income tax of 50% and in 30/12/1950

Signed a supplementary agreement between the government and Saudi Aramco Aramco whereby subject to income tax due in the decrees and the government pledged not to impose higher taxes and perhaps the reason why Saudi Arabia imposed a tax of one side is a desire to establish a legal precedent on which future Libya also amended the conventions Petroleum Decree of 22/11/1965 and approved by Parliament on 9.12.1965 text on the basis of profits equally, and so we see that in the wake of the precedent set by the Saudi ban most Arab countries, laws that impose a tax on income so that if Added Alotaop for income tax amounted to total payments to the concessionaire for 50% of its net profits after the introduction of the system of participation in the Middle East over the principle of equal shares some of the conventions of profits and now provides a greater proportion of the State.

And outside the Middle East, Indonesia has adopted the same approach to Venezuela, where he issued Law No. 440 of 1960, which abandoned the principle whereby the profits equally which stipulates that at least a quorum of 60% government and companies have objected to that law as if it were modified by one, but then relented and agreed upon later. On the other hand, we find that since the adoption of the tax system in the concession agreements in the Arab region, a problem arose regarding the nature of Alotaop and whether it should be treated as a loan from the Tax Benefit, or as production expenses deducted from income as is the case in all the major oil-producing countries outside the Arab region (After long negotiations with the Arab oil-producing companies bowed (Geneva, 12.11.1964) and accepted the amendment to its agreements and the introduction of the concession Alotaop among the elements of expenditure. And required for companies that receive a discount on list prices, as stipulated in the use of compulsory arbitration in the event of any dispute between them and the government has agreed that Saudi Arabia, Libya, Qatar, Kuwait and

Iran to the proposals of firms But Iraq has rejected the offer companies because of non-financial conditions coupled with the offerAccordingly, the OPEC decision was taken at No. 49 Seventh Conference, held in Jakarta during the period November 26 to 28, saying Alotaop part of the expenditure on certain conditions, leaving States free to accept or reject the offer companies Governments have applied to amend the resolution conventions as follows — :Qatar in 1964, Iran in 1965 Saudi Arabia in 1965, Libya 1965, Kuwait in 1967

(C) joint ventures

Common Projects (signed contract) is an agreement between the government or Petroleum CorporationNational) and the Company, Company shall excavating under the contract involved the search costs alone in the absence of the discovery of commercial and contract required the company to participate excavating drilling program of a particular investment program and certain amounts Tkhaliat, may provide a participating company would bear the cost of excavating all stages of research and development to recover the value of production according to percentages specified annual deducted from the value of production for income tax purposes, may be limited to costs incurred by the company excavating on the research phase only. In some cases, does not give a company involved excavating the right to recover the costs of research, for example, we find that all the agreements concluded in Norway after 1973 do not give the company excavating the right to recover the costs of research, even in the case of the discovery of oil in commercial quantities (16)The government pays its share in the capital of a participating one or more of the following ways:

- The granting of research and development and production in the oil field.
 - Granting the right to use the infrastructure and facilities that possess them the government.
 - To give information.
 - Granting banking facilities
 - Delay Ooaafa royalties and taxes
 - Grant investment incentives in determining the rate of consumption or cost recovery.
 - Contribute to the payment of cash after the discovery of trade.

Influenced the government's share in the contract of participation UTEC excavating assess the risk of search and quantity of production and the expected development and operational costs, etc. .. and with us, vary Ä on the government's share in the contract of participation varies greatly from country to another.

Participate and take one form of the following administrative⁽¹⁷⁾

- -- 1Formation of an artificial person to be owned by a joint venture between the government) National Petroleum Corporation) and excavating company and are subject to personal taxes and is entrusted with the production of oil and marketed as contract provides participation In that case, divide the net profits made by those personal Oomwssp between the government and the national oil company excavating in proportion to the participation of all them in the capital of a legal person is called a Type Italian Approach
- -- 2That each of the government (or the National Petroleum Corporation) and the company's share is Mffersrp excavating in the area of research, including petroleum product without the need to configure a separate legal personality, where the company would do all the excavating operations and the arrangement in place, for example, in Norway and the United Kingdom.
- -- 3Form a partnership with a non-profit Nyukl is the implementation of all development processes and production for a sum certain and the government (or the National Petroleum Corporation) and excavating company provide the sum

The company required that are configured to hand over oil produced to the government or National Petroleum Corporation and the company as provided for excavating partnership agreement, U.S. companies prefer that kind of deal, it agreed an ambitious host governments in the formation of a legal person called the local and The Approach Approach (19) As is the case in the franchise system, we find that the advantages it holds contracts for the company excavating the financial risks related to research and in some cases the risk of development as well as developing countries are sharing contracts as a means to gain managerial and technical skills required by the oil operations and find that some of these contracts provides that the institution which National Petroleum recovery operations as soon as the company excavating the amounts disbursed .And contracts for participation means participation in the capital and management and the requirement of the profit share (by equity) as a return of invested capital and not as a tax on the income of the company excavating, and perhaps this is the fundamental difference between the privileges of modern (shared profits) and contracts involved. It should be noted that the financial returns to the government in case of contracts for the right to be adversely affected by excavating company to sell discounted oil to its subsidiary companies and the right company to determine the selling prices are his mother, is also affected adversely the benefits of such proceeds of the loans obtained by excavating the company of its affiliated companies and limited This is true for oil agreements which the Government's financial return is the income tax on net profits, while inflating costs (recoverable) in which the excavating company had incurred in the research, otherwise it can occur under any type of oil agreements.

Historically appeared participation contracts in the period following World War II to maintain the Rgbtin: the Government's desire to control the oil wealth and the greatest financial return and the desire of small oil companies (whether owned by government such as the son of Italian or owned by the global private sector companies such as American and Japanese small) in securing foreign sources of crude oil.

The idea of replacing the franchise contract participation, an idea that followed the idea of increasing fiscal revenue through the imposition of taxes on corporate income, the Raidtha Iran in the Middle East, and that was in 1957 when it entered the National Iranian Oil Company NIOC The province, which has forced oil companies to them when the nationalization of the oil industry in Iran in 1951 to allow the continued operations of oil companies under concession agreements in the joint venture with oil company Agip, the Italian Government in the same year and Italy's ENI signed (the parent company commissioned to answer) a joint venture with another Arab Republic of Egypt. In Sudan, the law of oil wealth for the year in 1972 gave a contract to participate in the exploitation of petroleum in the case of discovery of commercial quantities not exceeding contributing 50% of the excavating company's capital (Article 11) but did not make participation mandatory, where the law provided for a system privilege (profits equally) as an alternative to it (Article 14 m – a)The first participation in the existing concessions which it has verified the existence of oil in commercial quantities is done by the Government of Algeria 19.10.1968 On that date, Algeria amended concession already granted to Getty and got national petroleum company (Sonatrach) 51% of the interests of the company Getty in Algeria as of 31.12.1967 was compensated Getty Bpetrol crude delivers on payments for a period of four years (20) Not overlook the fact that the oldest franchises in the Middle East (For example: age of privilege Darcy 1901 and Irag's oil concession in 1925, had provided the government's involvement in the capital of the company excavating only that these provisions were a sham was not implemented particularly with respect to the subject of participation in the management operations and supervision of the.

And I had the idea of modifying existing concessions to the introduction of participatory interest of OPEC, as its resolution No. 16/90 issued in June 196 recognize the regime of participation as one of the goals the organization is trying to achieve and Nassaly follows: "Since the concession agreements currently in force has come free of the bar to ensure government participation in the ownership of the concessionaire is entitled to the government - based on the principle of changing circumstances - to get a reasonable participation in the this property and whether such a condition may actually contained in some agreements but that the companies concerned may have avoided its implementation, which should therefore be suspected participation rate provided for in those agreements the minimum of what should be obtained from the participation of

OPEC did not stop once the Declaration of desire to apply the system of participation, but followed the story that came to study the special session of the Conference of the twenty-fifth OPEC meeting in Beirut on 22/9/1971, which the Conference adopted two important resolutions: the first is a special price adjustment following a reassessment of the U.S. dollar, and has was resolved that subject to the Convention on final prices after the re-evaluation of the U.S. dollar and has been a final resolution of that issue regarding the amendments to the Geneva Convention, signed in cash 20.1.1972 has concluded that the agreement between the oil producing countries and companies and raise the price of raw materials ruled Gulf Arab eastern Mediterranean by 8.49% has also developed a Convention as the basis to avoid future fluctuations in prices when the volatility of exchange rates, which would pay taxes to the governments concerned and the second is interested in came under number 25/135 provided for the participation of oil-producing countries in the oil concessions of the list.

On 21.1.1972 and implementation of that resolution 25/135 and entered the oil ministers of Member States of the Organization negotiations with representatives of a dozen oil companies. At a later stage, the organization announced that the Gulf countries have entrusted to Heikk Ahmed Zaki Yamani to negotiate on their behalf After nine months of negotiations, Sheikh Yamani to reach an agreement to amend the New York franchise Alqaimpvi Gulf states. He had been the negotiations on behalf of the Group of oil companies, George Percy, First Deputy Chairman of the Board of Directors of Standard Oil of Inojursi, had ratified the agreement by Saudi Arabia, Abu Dhabi and Qatar, while Orvdth Iraq, Libya, Algeria, Iran, Nigeria and Venezuela.

With regard to proportions posts before and after the New York agreement, it has varied significantly, depending on the circumstances of each state, and that figure was %51 in the partnership agreement points Kuwait National Company HSPA Noel in 1967 while it reached 50% in agreement Petromin and Agip in 1967 did not

exceed the ratio is 10% agreement in Saudi Arabia and the Japanese company in 1957, and reached 20% agreement in Kuwait and Shell Group of Companies in 1961 and 40% in agreement Petromin F. Ksirab, 1965

(D) production-sharing

The careful in the legislative system of prospecting for oil in Sudan, which is the law of the petroleum wealth finds that the law when it is published in 1972 has committed to be hiring officials with oil companies either modern franchise agreements (providing for a royalty and tax on the profits of the company) or partnership agreements in the header excavating company money

It should be noted that Chevron had begun exploratory activity in the Sudan under licenses issued under that law, and in 1975 was to amend the law mentioned above were added to a new article 35, which states

Notwithstanding the provisions of this Act, the Minister for Energy and mining approval of the President of the Republic to hold any agreements for oil development and exploitation and provides for the apportionment of production between the government and the other Contracting Party in accordance with the conditions obligations and provisions contained in those agreements or provide for oil exploration and development and exploitation of any other are agreed upon and conventions governing those rights and interests and obligations of the Contracting Parties, prevail texts to any contrary provision of this Act to the extent that removes the conflict between them.

Thus, the amendment opened the door for a contract in accordance with any type of oil agreements after the contract was limited to the recent conclusion of privileges or participation contracts, and Chevron have benefited from such flexibility 'where consolidated all licenses granted to them in the production sharing agreement with a single subject of the Convention This study, which concluded in '1975 on the other hand, we find that all the other oil agreements concluded in the Sudan is a production sharing agreements.

Historically 'we find that Indonesia is a leader in the production sharing agreements

The world and was in the sixties of this century.

And get rid of the main features of these conventions as follows--:

Obtained the contractor (the company excavating) the risks of operations research as is the case in decades to participate.

Production is divided into two parts, "oil costs" to meet the costs and oil profits, which divides between the government (or the National Petroleum Corporation) and the contractor in accordance with rates set by the Convention.

Although the production-sharing agreements that did not provide for payment of royalty at the beginning of the deal, but some production-sharing agreements signed in recent years imposed on the contractors to pay royalty to the Government.

It is a fortunate production sharing agreements for the host countries is that they enable those countries to obtain financial return since the start of production through the disposition of the share of oil product. The agreements, which make a return state is part of the company's profits, it commits the state to wait until the company's accounts in addition to, the definition of the word (costs (in production-sharing agreements do not include in many cases, financing costs as is the case in the conventions which take the system income tax.

On the other hand, production sharing agreements may provide for increasing the government share in the event of increased production rates, high oil prices and Malaysia have devised a sensible way to solve the problem of increasing prices, the contractor has committed to pay 70% of this increase to the Government in the form of additional profits tax and in line with the Indonesia in the direction concluded in 1974 an agreement with Phelps and Tengku Olzimthma the additional profits to pay a tax of 85% in the case of an increase in oil prices

Pros and production sharing agreements as well as all the oil discovered remains owned by the government until the point of export, including Almquaos share of the oil and the situation reflects the state Piedp Li petroleum resources as it gives them the right to dispose of oil produced and compensate the contractor for its share in cash if necessary, In addition, we find that Indonesia has taken a production-sharing agreements is another step forward as guaranteed by the text makes the ownership of the equipment purchased by the contractor shall devolve to the National Petroleum Company, upon the arrival of such equipment to Indonesia (30(With regard to taxes of production sharing agreements are not simply imposed by the government share of production, but in recent years and because of the presence of text in the U.S. tax code gives U.S. oil companies tax breaks if the company proved that it had paid taxes in the host countries have become production-sharing agreements include a provision required oil companies to pay the income tax paid by the host Government on their behalf and give them a receipt.

The impact of rising oil prices in the early seventies on the content-sharing contracts Output, Libya signed a production sharing Mobil introduced lots of

innovations, so that the contract stipulated that bear all the costs of mobile search and recover if the discovery of oil in commercial quantities and the second important innovation is that the Libyan government paid to Mobil 85% of the cost of Development (on land) to recover those amounts Mobil (with interest) on an annual premium of twenty while ago to inform the quantities produced 80 million barrels, but after three years of commencement of production (whichever comes earlier) The Marine With reference to the Libyan government to pay Mobil 305 of the cost of development) without interest) and 305 of the cost of development (utility) to recover Mobil under the conditions mentioned above and stipulated by the Convention to take Leyva 85% of production on land and 81% of the production of marine

(E) service contracts

The most significant feature of this fifth type of oil agreements in the retention of government ownership of oil discovered in addition to the power to dispose of it, and trust the government is looking for and development and production to the party, which has sufficient capital and expertise necessary. The launch of that type of oil agreements under different names: employment contracts contracts for the operation ... Etc.. And sometimes covered with those contracts phase one of the stages of exploration may be comprehensive to cover all stages from the stage of geophysical surveys and even the commercialization stage.

It should be noted that some legal experts in the field of oil agreements under production-sharing contracts are classified individually on the basis it is a kind of free-standing oil agreements, a trend of atopic adopted by the United Nations. We wanted to take the production-sharing agreements much of the debate other, that all oil agreements signed in the Sudan is the production-sharing contracts (31 (Whatever is the difference in the classification does not entail any practical results, as there was no difference of opinion on the content of service contracts and the content of production-sharing contracts.

In terms of public service contracts can be classified into two types which are summarized the basic features of type I in that the company is excavating the availability of capital required for research and development to what we plan (with interest)over the specified number of years after Mrahlpalinteg, either in cash or by giving them the right to buy part of the production for a fixed period at a discount, and at the start of production by the Government to pay all operating costs.

I have used this type of service contracts for the first time in the late sixties of this century between oil producers and foreign oil companies that wish to gain

Massadrpetrol foreign firm.

For example the company Airab owned by the French government signed a service contract in Iran and Iraq in 1966 and 1968 respectively, the company was just a French agent acting on a charge and has the burden of providing all the necessary funds for petroleum operations. In the absence of the discovery of petro French company does not recover the amounts disbursed by the search operations in the case of the discovery of oil, the amounts disbursed by the French firm until the discovery phase is a loan (without interest) a five-ten years repay the government in the form of crude oil. Is also the expenses of development loans) interest rate) paid by the government during a shorter period, and the company is French for their services the right to buy part of the petroleum product (35 %40- in Iran and 30% in Iraq) at a reduced price the company is not subject to any French income tax in the host State, as the activities of non-profit, but in the Iraqi agreement, we find that the French company has committed to pay a royalty rate of 13.5 based on list prices, also ordered to pay the grant discovery of 15 million U.S. dollars and the duration of 8-9 years research in Iran, and 6 years in Iraq With regard to production processes, the period was 25 years in Iran and 20 years in Iraq.

The basic features of the second type of service contracts is that the government bears all the risks of research (Oobedha) and leases the excavating for implementation, and we find that the agreement so as to reduce the corresponding government pays the company for services excavating recent being the kind in Saudi Arabia and of fees paid Aramco for its services less than 20 cents a barrel Comparing the service contracts with concessions and production-sharing contracts and contracts for service contracts, we find that yields a larger government, but on the other hand point out that the service contracts could have been used so far in the regions of the world, which sees oil companies that the risks of research with little or suggest that they will discover the oil in large quantities, such as Iran, Nigeria, Brazil, and therefore can be said that the service contracts is not an option available to many countries. That means that if the nations which have those ingredients conclusion of service contracts that may require the improvement of the conditions of such contracts to companies excavating, making revenue from the service contract agreement is no different than the return than other types of oil agreements.

And negative aspects of service contracts is that they do not constitute a sufficient incentive for companies to reduce the cost of excavating operations in the stage of development because the company was worth excavating will return a fixed value without regard to the amounts that were paid.

The impact of high oil prices, which began in 1973 to change the content of service contracts for governments, for example, we find that concluded in Iran in 1974 a

service contract with German company Dinmks committed Dinmks, paying \$ 32 sign up bonusMillion U.S. dollars in addition to payment of a grant and the corresponding production only, obtained by the German company is buying 35-40 of the annual production for 15 years at less than market price raises of 3-5% and the German company committed to return to bear all the risk search operations that recovered in the case of the discovery of oil in commercial quantities

(F) direct the State Oil Operations

Sometimes we find that the producing country bear all the sums required for the operations of oil and all the risks and proceed with all Alamyat and you get in return from the ratio of 1005 of petroleum product and is intended to engage the State Oil Operations.

Does not require that it be made available to the State all the material resources and technical expertise as could be employed and paid the required amounts can assume and find examples in India and Vietnam where he was hired expertise in the case, either with regard to funding, the Government of India will provide the costs of research only and borrowed the amounts needed for the development operations. As for Vietnam, they obtained the costs of research from the Norwegian government part loan and part grant.

At other times, we find that the State petroleum operations are to bear the risks of research in areas where the risk level low.

With regard to areas with high risk, they contracted with a foreign company will bear the risk of the company's research and the method adopted by many of the dual countries such as Italy, India and Vietnam and the countries of Latin America and particularly Mexico, which has a long history in that area.

The fact that the operations of oil through the institution or by national institutions has many benefits smell achieve complete control of that wealth strategy and a return on proper physical and implement all the objectives contained in the petroleum policy of the State, whether in the area of environmental conservation or training of local staff or maintain the reserve or otherwise. But in practice we find that the lack of financial resources and the difficulty of borrowing and the risks facing the amounts invested in the oil field that would prevent many States oil operations.

On the other hand, the attribution of research and development to one side (the national petroleum corporations) prevented the use of technological methods available to other companies and there are many cases where a particular company failed to find oil, while another company has been able to find him in the same area because of the different methods each company's technological

Y after your brief review of the types of oil agreements mention the fact that some States have

Legislation requiring National Petroleum Corporation to contract on two types of oil agreements Perhaps the best example of this is paragraph 2 of the Code of Iran's oil is of August 6, 1974, which obliges contracting Iranian Oil Company on the basis of service. And prevented the conclusion of some other legislation privileges eg Article 3 of the Act Rtm 97 for the year 1967, which prevented the Iraqi oil company to enter into franchise agreements or something like that.

In Sudan, the situation has become more resilient, leaving the door open for the selection of the appropriate type of engagement in that Article 25 of the oil resources of the Year 1972 stipulates that agreements for oil development and exploitation and provides for the sharing of production or to provide for oil and development and exploitation of any Another photo has been agreed upon.

التحكيم في عقود البترول

المستثمر يعني كثيراً بإيجاد وسيلة مستقلة ومحايدة وفعالة لحسم ما قد ثور من منازعات ومن جانب آخر أن الدولة المضيفة نفسها تدرك أهمية وجود جهاز مستقل غير متحيز لحسم المنازعات بين الطرفين لأن ذلك يساهم في خلق مناخ استثماري جيد

أن الأصل حسبما تقضي القواعد العامة في الاختصاص أن ينعقد الاختصاص للقضاء الوطني في الدولة المضيفة لحسم المنازعات الاستثمارية وذلك كام جاء في قانون التحكيم السوري في م 2/2 من القانون رقم 4 عام 2008 والمادة 66 /ب والمادة 51 من قانون العقود الخاص بالجهات العامه السوري ما لم يكن هنالك نص تعاقدية يقضي بخلاف ذلك أو نص في معاهدة بين الدولة المضيفة ودولة المستثمر كما جاء في المادة 66 /ج من قانون 51 العقود الخاص يبالجهات العامه ، إلا أن الأصل في مجال اتفاقيات البترول أصبح هو وجود النص التعاقدي الذي يلزم بالتحكيم وذلك دون أي استثناء . ولعل أهم التبريرات في ذلك الصدد أن إجراءات المحاكم المحلية سوف يطالها مبدأ حصانة الدولة فضلاً عن عدم المام المستثمر بإجراءات المحاكم المحلى والتخوف من أنه لا توجد إجراءات تستوعب منازعات الاستثمار

وتجدر الإشارة إلى أنه لا يوجد في القانون الدولي العرفي ما يلزم أية دولة بقبول اللجوء إلى تحكيم يقع خارج أراضيها برئاسة محكم أجنبي لتسوية منازعاتها مع المستثمرين الأجانب، كما أن لجوء المستثمر الخاص إلى التحكيم والقضاء الدولي لازال أمرا استثنائياص في القانون الدولي المعاصر ولا يتم إلا بموجب قبول صريح من الدولة التي تكون طرفاً في المنازعة ، على الرغم من ذلك نجد أن معظم اتفاقات البترول تتضمن نصا صريحاً بقبول الدولة المضيفة بتسوية المنازعات عن طريق محاكم تحكيم تعقد في الخارج.

ولقد لاقت الوسائل الدولية لتسوية المنازعات والتحكيم الدولي على وجه الخصوص قبولاً متزايداً في السلوك الدولي وانعكست في العديد من الاتفاقيات الجماعية والثنائية وفي التشريعات الوطنية وذلك لأنها تعطي ضمانات للمستثمر الأجنبي وتغنيه عن الانتظار الطويل والتعقيدات التي غالباً ما تتسم بها إجراءات التقاضي والانتقاد الأساسي الذي يوجه لتلك الوسائل الدولية هوأنها تخالف سيادة الدولة المضيفة باعتبار أن إقامة العدالة جزء من عمل الدولة ويجب ألا تعامل الدولة المضيفة كما لو كانت غير قادرة على القيام بتلك الوظيفة الجوهرية

ونشير إلى أنه فيما يتعلق بالوسائل الدولية لتسوية المنازعات الاستثمارية (عدا التحكيم المنصوص عليه صراحة في الاتفاق المبرم بين الطرفين) تكون الوسيلة الوحيدة المتاحة للشخص الخاص (طبيعي أوقانوني) لاتخاذ إجراءات ضد الدولةالمضيفة هي:

موافقة دولة أخرى على تبني مطالبته وتوليها أمر الدعوى أمام القضاء الدولي .

ويعتبر كثير من الفقهاء أن الطرق الودية والمفاوضات والتوفيق وما إلى ذلك هي أفضل الوسائل لتسوية منازعات في التوصل إلى حل كثير من منازعات اتفاقات البترول ،ولعل أهل أهم تلك الحلول كان بشأن المشاركة في الأرباح (مبدأ مناصفة الأرباح) وتنفيق الأتاوة وتنظيم معدلات الانتاج

ومن ناحية أخرى نجد ان منطقة الأمم المتحدة قد اهتمت كذلك بتسوية المنازعات التي تتشأ بين الدول المضيفة والمستثمرين حيث نصت في قرار الجمعية العمومية رقم 1803 في الفقرة (3) على الآتي : ويراعى في حال نشوء أي نزاع حول موضوع التعويض استيفاء الطرق القضائية الوطنية للدولة التي تتخذ تلك الإجراءات ويراعى في ذلك حال توفر الاتفاق بين الدولة ذات السيادة والأطراف المعنيين الآخرين ، تسوية النزاع بطريق التحكيم أو القضاء الدولي.

وتجدر الإشارة إلى أن اتفاقات البترول المصرية دون عداها من الاتفاقيات التي أبرمت في البلاد العربية تبنت اللجوء إلى المحاكم الوطنية للفصل في المنازعات اتي تثور ولقد انعقد الاختصاص للقضاء الوطني في ظل الاتفاقات البترولية الأولى بطريق سلبي حيث خلت الاتفاقات التي أبرمت قبل عام 1938 من أي نص ينظم وسيلة تسوية المنازعات وبذلك تسري القواعد العامة في الاختصاص القضائي والتي مؤداها أن ينعقد للقضاء الوطني الاختصاص بالفعل باعتباره صاحب الاختصاص الأصيل

ويلاحظ أنه منذ عام 1938 اقتصر الأخذ بنظام التحكيم في اتفاقيات البترول التي أبرمتها مصر على المنازعات المتعلقة بمسائل فنية مثل بلوغ الحد الأقصى للاستغلال ، أما المنازعات المتعلقة بتفسير وتنفيذ الاتفاقية فقد ظلت خاضعة بمقتضى نص صريح للمحاكم المصرية ، ومثال ذلك ما ضمنته الاتفاقية المبرمة بين مصر وشركة آبار الزيوت الانجلو مصرية 1938/12/19 حيث نصت المادة 38 منها على الآتي : "كل نزاع يقوم بين الحكومة وبين المستأجر فيما يتعلق بتفسير أي بند من بنود هذا العقد ، أو فيما له ارتباط به يكون الفصل فيه من اختصاص المحاكم المصرية طبقاً للقوانين المعمول بها في مصر في حين نصت المادة 39 على الآتى " تحقيقا لأغراض طرفى هذا العقد وهو العمل على استثمار المنطقة والوصول باستغلالها إلى

حدها الأقصى .. وإذا رأت الحكومة في أي وقت أن المستأجر قد قصر في استغلال المنطقة على الوجه الذي يتفق وهذا العقد ، كان للحكومة الحق في احالة الأمر إلى التحكيم ،ويكون التحكيم لمجلس تصدر قراراته بصفة نهائية وتلزم كلا الطرفين ويتألف المجلس على الوجه التالي :-

مستشار من محكمة الاستئناف الوطنية يختاره رئيسها أو من يقوم مقامه (عضواً)

مندوبان تختار الحكومة أحدهما ويختار المستأجر المندوب الثاني (عضوان).

عضو خامس ينتخبه الأعضاء الاربعة السابقون الذكر في كل حالة تحكيم وتكون له الرئاسة وإذا لم يصل الأعضاء الأربعة إلى اتفاق لاختيار العضو الخامس يكون لوزير المالية الحق في تعيين أحد المرشحين المقترحين بواسطة المحكمة رئيساً

وفي وقت لا حق فطنت بعض الدول العربية الأخرى إلى أهمية عقد الاختصاص بالفصل في بعض المنازعات للقضاء الوطني، ولعل أوضح مثال على ذلك القرار رقم 432 الصادر من مجلس الوزراء السعودي في 25 يونيو سنة 1963م الذي يقضي بمنع احالة المنازعات بين الحكومة وفرد أوشركة أو مؤسسة خاصة إلى التحكيم إلا في حدود ضيقة للغاية تقتضيها المصلحة العامة السعودية وأوضح القرار أنه لايسري على الاتفاقات المبرمة قبل صدوره ، ولقد ورد نفس الموقف في المادة 19 من القانون الليبي رقم 67 لسنة 1970م

وتوضيحاً لتنوع الخيارات المتاحة في مجال التحكيم نشير إلى أن أولى الاتفاقات التي ابرمتها السعوديةة في تاريخ لاحق للقرار المذكور أعلاه هي اتفاقيتها مع شركة أو كسيراب سنة 1965م والتي نصت في المادة 63 على الآتي " إذ نشأ بين الحكومة وصاحب الامتياز خلاف حول تفسير أو تنفيذ هذه الاتفاقية ولم يتم الاتفاق على تسويته بأي طريقة أخرى فإنه يجب احالته إلى لجنة خبراء مكونة من خبيرين تختار الحكومة واحداً منها ويختار صاحب الامتياز الخبير الآخر . وإذا لم تصل لجنة الخبراء إلى اتفاق فيجب طرح النزاع على هيئة تمييز المنازعات المنصوص عليها في المادة 50 من نظام التعدين السعودي (10) ومن الموضوعات ذات الصلة باخضاع المستثمر الأجنبي الخاص للقضاء المحلي موضوع اخضاع الدولة المضيفة للقضاء الأجنبي وفي ذلك الصدد تفيد النظرية التقليدية في القانون العام الانجليزي بعدم جواز خضوع الدولة لاختصاص المحاكم الأجنبية حتى في الحالات التي تشتغل فيها الدولة بالنشاط التجاري إلا أن تلك النظرية التقليدية لا تجد القبول في الوقت الراهن وظهرت بدل تلك الحصانة المطلقة نظرية الحصانة النسبية التي لا تغطي أنشطة الدولة التجارية

ومنذ عام 1952م توسعت الولايات المتحدة الأمريكية في التمسك بمبدأ الحصانة النسبية للدولة وأخرجت أنشطة الدول في مجال التصنيع والتنمية وصناعة السفن والأنشطة المهنية الأخرى بالإضافة إلى النشاط التجاري من منطقة الحصانة ونجد النص صراحة على ذلك في معاهدات الصداقة والتجارة والملاحة التي تعقدها الحكومة الأمريكية

وصفوة القول أن الاتجاه السائد في الدول المتقدمة هو الحد من نظرية الحصانة المطلقة للدولة إذا تعلق النزاع بنشاط تجاري إلا أن هناك العديد من الدول ما زالت تأخذ بالحصانة المطلقة.

ومن الموضوعات الأخرى التي تثار فيما يتعلق بالتحكيم سواء كان في اتفاقات البترول أو خلافها مدى تعارض الاحالة إلى التحكيم مع سيادة الدولة . وفي ذلك الصدد أوضح دكتور الغنيمي أن اللجوء إلى التحكيم لا يتعارض مع سيادة الدولة وذلك لأن امتياز البترول يدخل في نطاق النشاط التجاري ويملك المتعاقدون تقييد نشاطهم بمقتضى الاتفاق ويكون ذلك العقد ملزماً للدولة لأنه يتم برضائها وبمقتضى مالها من سيادة ولقد ورد تدعيم ذلك الرأي في حكم التحكيم الصادر في النزاع بين حكومة المملكة العربية السعودية وشركة أرامكو .

ومن المعارضين لفكرة اللجوء إلى جهاز دولي للتحكيم الفقهاء السوفيت ،وقد أسسوا معارضتهم على أساس أن اللجوء إلى جهاز تحكيم دولي تظهر فيه الدولة والمواطنين الأجانب باعتبارهم أطرافاً متساوين يضفي على أشخاص القانون المحلي (الطبيعين والقانونيين) صفة الشخصية الدولية ، كما أن قيام جهة دولية بالنظر في مثل تلك المنازعات سوف يستدعي بالضرورة مناقشة وتقييم أعمال الدولة وفي ذلك اعتداء جسيم على سيادتها وذهب بعض المعارضين لنظام التحكيم إلى أن كافة الشروط المقررة في عقود البترول التي أبرمتها الدول العربية والتي تفرض إجراء تحكيم في بلد أجنبي تخالف النظام العام ولا يعتد بها لما فيها من خروج على العربية والتي تفوض الإطنية بنظر كافة المنازعات التي تقع داخل إقليم الدولة المعنية ، وأن ما تضمنته شروط التحكيم في بعض الاتفاقيات من تعيين محكم ثالث بواسطة هيئة أجنبية تجاهل من ناحية أخرى للسيادة كما أنه المنازعات نشير إلى أن الحل لا يقتصر على اللجوء إلى الحالات القضائية أو هيئات التحكيم بل أن الدول قد المنازعات نشير إلى أن الحل لا يقتصر على اللجوء إلى الحالات القضائية أو هيئات التحكيم بل أن الدول قد تتذخ دبلوماسياً لحماية أموال مواطنيها ولقد أوضحت محكمة العدل الدولية أن ممارسة الدولة لحق الحماية الدوليها وأموالهم بالخارج دون أن يدل ذلك على ملكية الدولة لتلك الأموال أما فيما يتعلق بحق دولة جمسية حملة أسهم شركة معينة في التدخل دبلوماسياً لرعاية مصالح مواطنيها المساهمين في الشركة المعنية فقد جنسية حملة أسهم شركة معينة في التدخل دبلوماسياً لرعاية مصالح مواطنيها المساهمين في الشركة المعنية فقد

أصدرت محكمة العدل الدولية حكماً واضحاً قررت فيه أنه إذا امتنعت دولة جنسية الشركة عن حمايتها دبلوماسياً أو إذا توقفت عن متابعة الدعوى حتى النهاية أو إذا انهت الدعوى بالاتفاق مع الدولة المعتدية على دفع تعويض غير مناسب في نظر حملة الأسهم . فلا يجوز لدول حملة الأسهم التدخل لحماية مواطنيهم في مواجهة الدولة التي أضرت بالشركة وذلك لأن السماح لدول جنسية حملة الأسهم بتقديم دعوى مؤسسة على نفس الوقائع يخل بالضمان والاستقرار الذي يهدف القانون الدولي إلى إشاعته في العلاقات الدولية وفيما يتعلق بوجهة نظر المنظمات البترولية المختلفة في موضوع التحكيم نشير إلى أن منظمة الأوبك قد دعت إلى الأخذ بنظام التحكيم كوسيلة لتسوية المنازعات البترولية مفضلة أياه على القضاء الوطنى لمرونة إجراءاته واختصاره للوقت فضلاً عن أنه يشجع المستثمرين الأجانب ونشير من ناحية أخرى إلى أنه حتى في حالة الأخذ بنظام التحكيم فإن بعض الفقهاء يرون أن طبيعة اتفاقات البترول القانونية لا تسمح للتحكيم بأن يجري على كافة المنازعات التي تتشأ وتوضيحاً لذلك الرأي يقول أنه نظراً لأن المبادئ العامة للقانون السائدة في الأمم المتحدة تقضى بأن حق استغلال المعادن التي توجد في باطن الأرض إنما يعود إلى الدولة وحدها ولو كان سطح الارض مملوكاً لشخص ما ، فإن استغلال تلك المعادن يحتاج إلى ترخيص بذلك من الدولة بما لها من ولاية ويتصرف من جانبها وحدها وليس لإرادة الشركة أي دور في ذلك واستناداً على ذلك فإن الامتياز البترولي في ذلك الجانب يعتبر رخصة أو بعبارة أخرى قراراً إدارياً فردياً ولكن ويما أن الامتياز البترولي له جانب آخر يتعق بتنظيم ممارسة الشركة لحقها الذي منحها أياه القرار الإداري فإن الامتياز البترولي يعتبر في ذلك الجانب عقداً وصفوه القول أن الامتياز البترولي (او امتياز استغلال أي معادن) عبارة عن تصرف قانوني مزدوج يتضمن بعض النصوص التى تعتبر رخصة وبعض النصوص التى تعتبر عقداً وأهمية توضيح تلك الطبيعة المزدوجة للاتفاقات البترولية تكمن في أن ما يدخل في دائرة التحكيم هو النصوص التعاقدية من الاتفاقية ، أما ما يتعلق برخص الامتياز فلا يجوز عرضها على التحكيم ويجوز للشركة فيما يتعلق بذلك الجانب اللجوء للإجراءات التي يسمح بها القانون الوطني

وفيما يتعلق بطريقة اختيار المحكمين نلاحظ أن بعض الخيارات المتاحة أن يكون النص كما يلي :-

وعلى المحكمين الاثنين أن يختارا محكماً ثالثاً خلال ثلاثين يوماً فإذا أخفقا في ذلك تتولى محكمة التحكيم بغرفة التجارة الدولية بناء على طلب أي من الطرفين تعيين المحكم الثالث وتلك الطريقة في التحكيم تعني أن القرار يصدر بالأغلبية ويشترك الحكم الثالث في اصداره وكثيرا ما تختلط تلك الطريقة بالطريقة التي يخول فيها الحكم الثالث سلطات خاصة بحيث يقع عبء اصدار القرار عند غياب اتفاق المحكمين في الرأي ويسمى في تلك الحالة بالفيصل(Umpire) وتبرز التفرقة بين الحكم الثالث والفيصل في أنه ما لم يضع اتفاق التحكيم على عاتق الحكم الثالث أي سلطات خاصة فإن سلطاته تظل مماثلة لأي من سلطات المحكمين الآخرين ويظل دوره مقتصراً على التصرف بالاشتراك مع أعضاء التحكيم حتى وان قضى الاتفاق بتعيينه رئيساً لمحكمة التحكيم . ومن ذلك يتضح أن دور الفيصل هو القضاء بين الأطراف وليس الفصل بين المحكمين ،ومن ذلك يتضح أن دور الفيصل هو القضاء بين الأطراف وليس الفصل بين المحكمين عن طريق رأي الأغلبية ومن أمثلة اشتراطات التحكيم التي نصت على الحكم الفيصل المادة 31 من اتفاقية السعودية وأرامكو سنة 1933 التي قضت : ويعتبر حكم المحكمين في القضية باتاً ، وأما إذا لم يتفقا بينهما في الرأي فيعتبر حكم الوازع(الفيصل) في القضية نهائياً "ويوجد نص مشابه لذلك في المادة 45 من اتفاقية السعودية وشركة حتى سنة 1949 والى جانب التمييز بين الحكم الثالث والحكم الفيصل (الوازع) يأخذ النظام القارئ بنظام الحكم الخارج عن الخصومة ، ولا يعد ذلك الحكم حكماً ثالثا حيث أنه لا يشترك مع المحكمين الآخرين في اصدار القرار التحكيمي بالأغلبية، كما لا يعد حكماً فيصلاً حيث أنه لا يقضى استغلالاً إنما يقوم بالترجيح بين آراء المحكمين ويختار الأصوب منهما أي أنه يقوم بالفصل بين المحكمين وليس بالفصل بين طرفي النزاع كما يعمل الفيصل وعلى الرغم من وجود تلك التفرقة من الناحية النظرية إلا أن اتفاقيات البترول لا تتحرى الدقة دائماً في التمييز بين الحكم الثالث والحكم الفيصل فقد يستخدم أحد الاصطلاحيين ويقصد به الآخر مثال ذلك ما نصت عليه اتفاقية ايران والكنوسوريتوم سنة 1954 باحالة النزاع آلي مجلس تحكيم يشكل من ثلاثة محكمين يعين كل طرف واحداً منهما ويختار الحكمان حكماً فيصلاً ، وعند عدم اتفاق المحكمين في الرأي يصدر قرار مجلس التحكيم بأغلبية الأصوات ان أعمال مبدأ الرضا الذي يحكم نظام التحكيم ككل يخول أطراف النزاع مطلق الحرية في اختيار القواعد المناسبة التي تحكم إجراءات التحكيم ، ولقد اختلفت نصوص الاتفاقات البترولية في ذلك الجانب اختلافاً كبيراً ففي حين نجد أن بعضها مقتضباً نجد بعضها الآخر أكثر تفصيلاً حيث يحدد مكان انعقاد مجلس التحكيم واللغة المعتمدة وتبادل مذكرات الدفاع والطلبات الاضافية والشهود والأدلة والخبراء والنفقات بالإضافة إلى ذلك الاختلاف يلاحظ أن بعض الاتفاقات البترولية جاء خلواً من تحديد القواعد التي تنظم إجراءات التحكيم ، ولقد ذهب الفقهاء إلى أنه في مثل تلك الحالات على محكمة التحكيم أن تقوم باستخلاص تلك القواعد من النية المشتركة للأطراف. وإذا لم يمكن ذلك تطبق القواعد العامة في القانون الدولي الخاص والتي تقضي بخضوع المسائل الإجرائية لقانون محل الفصل في النزاع أي أنه على محكمة التحكيم أن تتبع الإجراءات المقررة للتحكيم في الدولة التي تعقد فيها جلساتها

ويتطابق رأي الفقهاء المذكور أعلاه مع الممارسات الدولية حيث تضمنته اتفاقية جنيف الصادرة في 24 سبتمبر سنة 1922 الخاصة بالتحكيم واتفاقية نيويورك الموقعة في 10 يونيو 1958 والتي اقرها مؤتمر الأمم المتحدة الخاص بالتحكيم التجاري الدولي

ونشير في ذلك الصدد إلى أنه عندما يكون تنفيذ قرار التحكيم في مواجهة الدولة فإن ذلك يثير عقبات قد تجعل التنفيذيب مستحيلاً على الرغم من وجود ذلك النص في الاتفاقية حيث أنه على الرغم من خضوع الدولة برضائها لاختصاص محكمة التحكيم إلا أن ذلك لا يحول دون تمسكها عند تنفيذ قرار التحكيم على أموالها بحصانة السيادة

إن موضوع التحكيم من ناحية عامة اصبح موضوعاً يستقطب اهتمام كافة الجهات العاملة في مجال الاقتصاد والتجارة مهما اختلف مجال عملها ، ولقد أجمع على ذلك الأمر كافة الشخصيات العالمية البارزة التي شاركت في المؤتمر الثاني للتحكيم العربي الأوربي الذي اختتم أعماله في المنامة بدولة البحرين بتاريخ 29/اكتوبر 1987م ولقد أوضح الشيخ عبد الرحمن بن محمد بن راشد آل خليفة وكيل وزارة العدل والشئون الاسلامية البحريني في افتتاح الجلسة الختامية "إن التحكيم والقضاء رافدان من نهر واحد هو نهر العدالة "وفي نفس المؤتمر أوضح الشيخ صالح الحجيلان الرئيس الأعلى للتحكيم العربي الأوربي في الجلسة الختامية أن الدول العربية ستعمل على دعم التحكيم وتقديم العون له كما أكد على أنه لن يحدث تدخل من الدول العربية المعارضة.

وأشار الشيخ الحجيلان إلى أن بعض رجال القانون العالميين يشككون في قبول أحكام التحكيم في البلدان العربية ونبه إلى ضرورة التصدي لتلك الحملات ، وفي الجلسة قبل الختامية طالب مقدم التقرير الختامي بتلاحم أكبر بين المحامين العرب والأوربيين لتحسين المناخ التحكيمي وبذل مجهود أكبر لتزويد الأوساط العربية وحكومية وأهلية بقدر كاف من المعلومات عن اتفاقية نيويورك لعام 1958م (بشأن الاعتراف وتنفيذ أحكام التحكيم الأجنبية) ومدى أهمية الانضمام إليها وكذلك أهمية تحديث التشريعات الوطنية لتتماشى مع القانون النموذجي الذي أعدته الأمم المتحدة لقانون التجارة الدول(28).

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