STATE IMMUNITY AND INVESTMENT ARBITRATION: CONTRIBUTION TO THE STUDY OF OHADA MEMBER STATES PARTICIPATION TO INVESTOR-STATE ARBITRATION

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ABSTRACT

The participation of member states of the organization for the harmonization of business law in Africa (OHADA) in investment arbitration, although promoted in the recent reform of the OHADA uniform act on arbitration, is heavily limited by state immunity. The latter, considered as a natural law for states, does not allow the effective participation of OHADA member states in investor-state arbitration. However, in this type of Arbitration, which is considered to be a mixed arbitration, the principle of autonomy requires the parties to be bound by their agreement. OHADA law does not specify the fate of State immunity when a State consents to investment arbitration. With a view to taking into account both the public and private interests of the parties to investment arbitration, it is proposed that there should be a limitation of State immunity for a better participation of OHADA member States in investor-state arbitration.

INTRODUCTION

Is it possible to link investment arbitration and state immunity? It is not easy to answer affirmatively regarding the growing concern to involve host states in this type of Arbitration on the one hand, and the even stronger attachment of states to their sovereignty on the other. However, contrary to all expectations, OHADA[i] law seems to affirm a possible conciliation, since for more than a decade it actively promotes the recourse of its member states to arbitration, while recognizing their immunities[ii].

By the Uniform Act of 23 November 2017 on arbitration law, a new form of arbitration is established in OHADA law[iii]. This arbitration, known as investment arbitration, is designed to settle investment disputes in the OHADA zone[iv]. Investment arbitration can be defined as a binding procedure to resolve disputes between foreign investors and host States. The former Uniform Act on arbitration law made no mention of investment arbitration[v]. It simply stated that it shall apply to any arbitration when the seat of the arbitral tribunal is in one of the member States[vi]. However, the ability of OHADA arbitration to resolve investment disputes could be questioned, as OHADA law is not properly speaking an investment law[vii]. This is undoubtedly the reason why it does not provide any definition of investment[viii]. We must refer either to the national laws of the member states or to international legal instruments in order to try to understand what investment is. Unfortunately, even so far, it would be difficult to find a satisfactory definition[ix]. Nevertheless, it may be noted that investment would consist of an economic operation carried out in the territory of a host country, consisting of a capital contribution or a service contribution, carried out over a period of time, involving the taking of a share in the risks incurred[x]. With regard to arbitration, it should be noted that the OHADA uniform act on arbitration law also provides no definition. Arbitration could nevertheless be considered as an amicable mechanism for the resolution of disputes outside the courts by which a person known as an arbitrator renders a binding decision on the parties[xi]. However, under OHADA law, any natural or legal person may resort to arbitration with respect to any rights that may be freely disposed of[xii].

In investment arbitration, the consent of the parties is very often dissociated in the sense that most investment disputes increasingly focus less on the non-performance or improper performance of a contract, but rather on the non-performance of an obligation assumed by the

host state to an investor under a national law or investment treaty. Similarly, every investment operation does not necessarily result in the conclusion of a state contract, since the realization of an investment can be carried out by recourse to unilateral procedures, such as a prior declaration or authorization, without having a direct contract between the state and the foreign investor[xiii]. With these remarks, article 3 of the new OHADA uniform Arbitration Act states that "arbitration may be based on an arbitration agreement[xiv] or on an investment instrument or on a bilateral or multilateral investment treaty[xv]".

This study explores the place of state immunity in investment arbitration according to the revised uniform act of OHADA arbitration law of 2017, and it suggests that OHADA Law should more strictly regulate state immunity for a better participation of States to investment arbitration. Such a position may seem surprising insofar as state immunities originate from natural law[xvi], and therefore cannot be withdrawn. This is probably why the United Nations Convention on Jurisdictional Immunities of States and Their Property is not yet in force. However, it may be pointed out that, the special feature of investment arbitration is that it involves both private and public interests. It would then be inappropriate to sacrifice some interests at the expense of others. The search for a fair balance is a natural necessity. Therefore, after analysing in part I the maintain of state immunity as a hurdle to OHADA member states participation in investment arbitration, part II will be based on the limitation of state immunity to a better participation of OHADA member states in investor-state arbitration.

THE MAINTAIN OF STATE IMMUNITY AS A HURDLE TO OHADA MEMBER STATES PARTICIPATION TO INVESTOR-STATE ARBITRATION

One of the conditions for the effectiveness of arbitration is the equality of the parties[xvii]. This is the fundamental reason for the institutionalization of this form of justice[xviii]. From the moment this equality is broken, the achievement of arbitration becomes doubtful. State immunity appears to be the fundamental cause. While it is true that OHADA law allows any person to have recourse to arbitration, it should be noted that such a possibility only provides for equal access to arbitral justice[xix]. Indeed, the immunity enjoyed by states can be seen as a real obstacle to investor-state arbitration. This can be observed at two different levels: on the

one hand, the typology of State immunity **(A)**, and on the other hand, the effects of state immunity **(B)**.

A- The types of state immunity obstructing investor-State arbitration in OHADA Law

There are several types of immunity granted to States[xx]. State immunity is closely related to but distinct from diplomatic immunity and the immunity of heads of States as well as the immunity of international organizations. However, in the context of investment arbitration, two types of state immunity can fundamentally determine the outcome of the arbitration proceedings. First, immunity from jurisdiction **(1)**, and second, immunity from execution **(2)**.

1- Immunity from jurisdiction

OHADA law is silent on the legal regime of jurisdictional immunities[xxi]. This silence does not mean that OHADA law ignores the existence of jurisdictional immunity. On the contrary, by recognizing the sovereignty of each member state, OHADA affirms its position with regard to the maintenance of immunity from jurisdiction. Thus, OHADA law does not indicate to what extent the host state's immunity from jurisdiction should be limited. The participation of the state in investment arbitration as provided for in the new uniform act on arbitration law shall be without prejudice to the immunity from jurisdiction of the host state[xxii]. This Uniform Act does not mention that the consent of the state to arbitration constitutes a waiver of its immunity from jurisdiction. It simply provides that investment arbitration may be based on an investment contract, a national law or an investment treaty, and that the state may have recourse to it. A state could thus take advantage of this shortcoming in order to avoid investment arbitration[xxiii].

In many cases, states have used their immunity to defeat jurisdictions that are not part of their legal order[xxiv]. The most illustrative case arises from international arbitration insofar as states, after having consented to arbitration through, inter alia, an arbitration agreement, refused to participate in the arbitral proceedings on the ground that they enjoyed state immunity[xxv].

2- Immunity from execution

According to article 30 (1) of the Uniform Act organizing simplified recovery procedures and enforcement measures, “compulsory execution and protective measures shall not apply to persons who enjoy immunity from execution”. Immunity from execution prescribed by this

provision prohibits any coercive measure aimed at removing an asset from the patrimony of certain persons. Beneficiaries of this privilege are legal persons governed by Public Law and public undertakings[xxvi].

Article 30 of the Uniform Act organizing simplified recovery procedures and enforcement measures although providing that compulsory execution and precautionary measures shall not apply to persons who enjoy immunity from execution also recognizes, however, that any debt which is certain, due and owed by state corporations or firms, regardless of their legal form and mission, shall give rise to a set-off against debts which are also certain, due and owed them, subject to an agreement of reciprocity. The debts of the state corporations and firms referred above may only be considered certain where they arise from either from an acknowledgment by the said corporations and firms of the debts or from a writ which is enforceable within the territory of the State where the corporations and firms are located[xxvii].

According to the common Court of justice and arbitration (CCJA), the set-off of debts is a temperament to the immunity from execution. Indeed, in the CCJA, decision n ° 103/2018, 26 April 2018, there is a change of case law on the issue of immunity from execution of Public Undertakings. It is recalled that the contested case-law by which the High Court of the community held, pursuant to article 30 of the Uniform Act, that a public undertaking enjoys immunity from enforcement even if it is constituted as a legal person governed by private law[xxviii].

The legal literature has been quick to criticize this case law, pointing out that the inability of investors to force public companies to pay their debts must be a factor in the reluctance of investors to locate in the OHADA zone. It was in this sense that the OHADA legislature was asked to rewrite article 30 of the Uniform Act, which clearly confuses the concepts of Public Undertakings and public establishments. Thus, according to Professor SAWADOGO, only the latter should benefit from immunity from execution[xxix].

Despite criticism, the High Court had remained faithful to its case law. It had thus held that, pursuant to article 30 of the AUPSRVE, public undertakings in whatever form and for whatever purpose are not subject to compulsory execution or protective measures[xxx]. Companies wholly owned by the state, as well as mixed-economy companies, all of which are incorporated as commercial companies, were also designated as state-owned enterprises by the CCJA, which

granted them immunity from execution. The High Court had even held that the public undertaking constituted as a commercial company should be granted immunity from execution even if national law made it subject to private law[xxxi].

Besides, the CCJA abandoned this rigid position in its decision No. 103/2018 of 26 April 2018. In that case, it pointed out that a public undertaking could not enjoy immunity from execution if it was a mixed economy and was constituted as a legal person governed by private law. A distinction should therefore now be made between public undertakings governed by private law and public undertakings governed by public law, the latter benefiting from immunity from execution[xxxii]. As for public undertakings governed by private law, they will now be subject to the enforcement procedures, even if one may hesitate as to the regime applicable to those whose capital is wholly owned by the state and its dismemberment[xxxiii].

B- The Effects of state immunity in OHADA Investment Arbitration Law

The maintenance of state immunity in OHADA law can produce many effects in investor-state arbitration. These effects can be grouped into positive effect on the one hand **(1)** and negative effect on the other **(2)**.

1- The positive effect

The immunity enjoyed by OHADA member states in investment arbitration is undoubtedly positive[xxxiv]. In general, the immunity guarantees the legal protection of the host State of foreign investments[xxxv]. The explanation comes from the fact that the latter is not involved in investment arbitration as the partner of the foreign investor but as the host State[xxxvi]. This latter cannot be treated as a mere private individual resorting to international arbitration[xxxvii]. If we had to think otherwise, there would undoubtedly be situations in which the host state of foreign investment would be subject to legal rules resulting from private law, whereas it would have acted in its capacity as a sovereign based on its prerogatives as a public authority. It is understandable why disputes between the host state and the foreign investor were initially resolved through diplomatic mechanisms[xxxviii].

In our humble opinion, investment arbitration does not challenge this traditional mechanism of resolving investment disputes. On the contrary, investment arbitration is part of this mechanism as a prerequisite. It is true that recourse to diplomatic resolution of the investment dispute is not conditioned by recourse to investment arbitration. These two modes of dispute resolution

may be distinct. However, the technique of investment treaties teaches that recourse to diplomatic mechanisms in the litigation of foreign private investments is possible when the host state does not respect the commitments entered into in investment contracts[xxxix].

Thus, in investment arbitration, States are in a privileged position vis-à-vis foreign investor. Under OHADA law, immunity from jurisdiction protects the state from the vagaries of investment arbitration. Also, immunity from execution protects against the seizure of property not related to foreign investment. However, these safeguards appear to be excessive and may contain negative points.

2- The negative effect

Basically, arbitration is only effective if the parties who have given their consent can participate and the resulting arbitral awards can be carried out without difficulty[xl]. This can easily be explained in the sense that arbitration is an amicable procedure which would require the parties, in the interests of good cooperation, to make every effort for the speedy resolution of their dispute. Unfortunately, this is not always the case. State immunity is a real obstacle to investment arbitration. While protecting the beneficiary party, state immunity is not favourable to investment arbitration[xli].

Thus, the maintenance of State immunity in investment arbitration under OHADA law poses enormous risks to the resolution of investment disputes. It is in this sense that the arbitration procedure could be frozen as soon as the arbitral proceedings are opened by means of immunity from jurisdiction. Even if this procedure were to continue, it could end at any time. Also, no measure of forced execution could be taken against a state enjoying immunity from execution. The only avenue open is the good faith of that state in the enforcement of the arbitral award[xlii]. The compensation mechanism established under OHADA law does not appear to be effective in every respect. An investor might be awarded compensation through an arbitration award, but still remain unpaid[xliii].

In view of the above, it is clear that the recently instituted OHADA investment arbitration appears to be a haphazard arbitration procedure. State immunity makes uncertain not only the arbitral proceedings, but also the effectiveness of arbitral awards. It would be desirable that measures to relax or even eliminate state immunity be enshrined in OHADA law so that

investment arbitration could effectively be given a prominent place among the means of resolving foreign investment disputes in the OHADA zone.

THE LIMITATION OF STATE IMMUNITY AS A MEANS FOR OHADA STATE MEMBERS TO PARTICIPATE IN INVESTOR-STATE ARBITRATION

As noted above, state immunity is an obstacle to the participation of OHADA member States in investment arbitration. Although protecting states because of their sovereignty, state immunity considerably weakens investment arbitration. Solutions are urgently needed to allow greater participation of OHADA member States in investment arbitration. While waiting for the OHADA legislator to take a position, it is not imprudent to start thinking about some possible solutions **(B)** whose justifications are drawn from the fundamental elements of Arbitration in general **(A)**.

A- The justifications to the limitation of state immunity in OHADA investment arbitration law

Two rules can serve as justifications for the relativity of state immunity in investment arbitration under OHADA law. This is, on the one hand, the *pacta sunt servanda* Rule **(1)** and, on the other, the legal autonomy of the arbitration agreement **(2)**.

1- The *Pacta sunt servanda* rule

The *pacta sunt servanda* rule refers to the idea that, in a convention, the parties are bound to respect the " given word ", that is, to respect their commitment[xliv]. In domestic law, the *pacta sunt servanda* rule is mainly the result of certain provisions of the Civil code applicable in Cameroon, in particular article 1134, which provides that conventions legally formed shall be considered as contracting parties' law. This means that contracting parties must respect their contract as they obey the law. The contract would thus have the force of law, with the only difference that it is binding only on the contracting parties[xlv].

In public international law, the *pacta sunt servanda* rule had long had a customary status before being legally enshrined in the Vienna convention of 23 May 1969 on the law of treaties, which

stipulates in article 26 that " every treaty in force is binding upon the parties to it and must be performed by them in good faith". International trade law is also based on the *pacta sunt servanda* rule, which is considered as a fundamental principle of legal certainty in international trade. This principle requires that the international contract be protected from legal rules derived from state laws and producing its annihilation not justified by the protection of superior interests[xlvi].

The binding force of the arbitration agreement[xlvii] and the primacy of the arbitrator are clearly deduced from the reading of the OHADA arbitration legislation. As an agreement, the arbitration agreement still applies the principles of contract, including the principle of privity of contract. In the doctrine of privity of contract, an agreement is only binding and have legal effect only to the parties, the agreement in principle, cannot provide profit or loss to a third party[xlviii]. The obligatory nature of the arbitration agreement derives from the parties' will[xlix].

Under the principle of binding agreements, the parties have an obligation to refer to arbitrators the disputes defined in the arbitration agreement. Where a dispute, pending before an arbitral tribunal in accordance with an arbitration agreement, is submitted to a national court, the latter shall, upon the request of one of the parties, decline its jurisdiction. Where the dispute has not yet been referred to an arbitral tribunal, the national court shall nonetheless decline jurisdiction unless the arbitration agreement is manifestly null and void.

In that sense, the Supreme Court of Côte d'Ivoire had held that the Court of Appeal, which retained its jurisdiction, was in breach of the law, whereas the parties had agreed, " to submit any dispute or dispute arising from the application or interpretation of this convention to arbitration in accordance with the rules of the International Chamber of Commerce "[l].

If one of the parties were to challenge the arbitrator's powers on the basis of the invalidity of the arbitration agreement, it would be up to the arbitrator to decide the issue. The arbitral tribunal shall rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The *"Kompetenz-Kompetenz*" principle[li] aims at giving arbitrators the possibility to examine and decide in the first instance on any objection to their jurisdiction. An objection that the arbitral tribunal lacks jurisdiction shall be raised before the submission of the statement of defence except the facts on which it is based were revealed subsequently[lii].

2- The legal autonomy of the arbitration agreement

Historically, it was held that an arbitration agreement contained in a contract was accessory to the main contract and that the invalidity of the contract also entailed the invalidity of the arbitration agreement[liii].

The validity of the arbitration agreement is assessed according to a certain number of rules. Where the arbitration agreement is of an internal nature, the rules which determine its validity may only be those of the law from which the arbitration agreement derives its binding force. Where the arbitration agreement has an international character, legal autonomy means, in contemporary arbitration law practice, the exclusion of the adversarial technique from the connection designating a state law for assessing the validity of the arbitration agreement[liv]. This legal autonomy is expressly affirmed by OHADA arbitration law, since it is provided that "The arbitration agreement shall be independent of the main contract. Its validity shall not be affected by the nullity of the contract, and it shall be interpreted in accordance with the common intention of the parties, without necessarily referring to national law"[lv].

B- Possible measures to reduce State immunity in OHADA investment arbitration law

For a better participation of OHADA member states in investment arbitration, it would be desirable to considerably limit state immunity through waiver **(1)**. The exclusion of such immunity from investment arbitration could also be a possible solution **(2)**.

1- The waiver of state immunity in investment arbitration

OHADA law has not provided for the waiver of State immunity in its arbitration system and more specifically in investment arbitration. It only states in Article 10 paragraph 1 of the arbitration rules of the CCJA of 2017 that "when the parties have agreed to have recourse to the arbitration of the court, they thereby submit themselves to the provisions of Title IV of the treaty, to these rules, to the rules of Procedure of the court, to their annexes and to the scale of costs of the arbitration, in their version in force on the date of the commencement of the arbitration procedure indicated in article 5 of these rules". Paragraph (2) of this article states that " if one of the parties refuses or refrains from participating in the arbitration, the arbitration shall take place notwithstanding such refusal or abstention ". Therefore, it can be inferred that

recourse by the parties to investment arbitration in the OHADA space does not constitute a waiver of their immunity. Such a breach of OHADA law is highly regrettable in view of the expansion of this type of Arbitration in the international legal order.

It is long accepted that arbitrators derive their power from the arbitration agreement. Arbitration is an entirely private dispute settlement mechanism, and therefore there is nothing to be immune from[lvi]. Consent to arbitration constitutes an irrevocable waiver of immunity from jurisdiction.

Article 2 (3) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) provides that: " The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed". According to this rule, where the parties to an investment contract agree through an arbitration agreement or a compromise to resort to arbitration as a means of settling any dispute that may arise between them, the arbitrator has jurisdiction and his jurisdiction automatically leads to the divestment of state jurisdiction. The same applies in the context of unilateral arbitration insofar as the consent of the host country pre-constituted in a treaty constitutes a waiver of remedies provided for by its domestic legal order[lvii].

Under NAFTA, for example, article 1121 (1) (b) requires investors and companies covered by Chapter 11 of this treaty to renounce domestic remedies. This provision permits action under Chapter 11 only if: "... The investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party." In ICSID arbitration specifically, the state does not, in principle, act as a trading partner. It acts as the host of foreign investments, whether through the conclusion of an arbitration agreement, a TBI or through the adoption of a general offer of Arbitration in an investment code, the host State waives its immunity from jurisdiction

also in respect of its act's *jure imperii*. Where the complaining investor is not bound to the respondent State by means other than the legal and regulatory framework established by that state, acts which have been adopted in the exercise of its powers of Public Authority. The Washington convention establishing the ICSID, affirm the principle of exclusive jurisdiction of its courts in article 26, first sentence, which provides that: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy[lviii]." However, the same article adds that: "A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." However, immunity from execution is not considered implicitly waived through an arbitration clause[lix].

2- The exclusion of state immunity in investment arbitration

State immunity is not a requirement of investment arbitration[lx]. On the contrary, as noted above, it constitutes an enormous obstacle to the participation of states in investment arbitration. Waiving it, is not sufficient in this type of Arbitration. Unlike International Commercial Arbitration, which barely links a State with a private foreign person, investment arbitration is marked by the constant presence of the host state of investments[lxi]. It is desirable for OHADA Legislature to proceed with the eviction of State immunity in the context of investment arbitration.

Such an operation would not be easy in the sense that OHADA States members did not cede their full sovereignty upon ratification of the founding Treaty of the community[lxii]. Many matters remain subject to the domestic law of each member State. This is the case of the condition and capacity of individuals. The Uniform Act on general commercial law contains a whole chapter devoted to the concept of capacity as a condition for carrying on a commercial activity. But this Uniform Act does not determine this ability. Reference should be made to the domestic law of each State party.

However, the maintenance of the sovereignty of OHADA States party cannot, in our view, justify the maintenance of State immunity in investment arbitration. It is well known that investment arbitration was instituted to prevent foreign private investors from being subjected not only to the vagaries of state courts, but also to the vagaries of international Commercial Arbitration. This may be why transparency and Publicity are fundamental elements of investment arbitration[lxiii]. Unfortunately, OHADA law continues to emphasize confidentiality

known in commercial arbitration[lxiv]. Thus, it is readily apparent that the maintenance of State immunity in OHADA investment arbitration law results from the fact that there is no real separation between investment arbitration and commercial arbitration. Therefore, these two types of Arbitration are quite distinct and should not be confused[lxv].

In order to effectively avoid state immunity in investment arbitration, it would be preferable for the OHADA legislator to make a clear distinction between investment arbitration and commercial arbitration. Therefore, the fundamental principles of investment arbitration need to be taken into account. Finally, the vagaries of sovereignty cannot constitute an absolute obstacle since it is admitted in international commercial arbitration that the State party may renounce its state immunity on a case-by-case basis. This is the case, in particular, of the distinction made regarding the use of the state's property in relation to its immunity from execution. Thus, goods assigned to a public service or acts of public services (act *jure imperii*) are covered by immunity, and goods assigned to an economic or commercial activity or acts of management (act *jure gestionis*) are not[lxvi].

CONCLUSION

The participation of OHADA member states in investment arbitration is not facilitated by the maintenance of State immunity. Despite the ever-increasing innovations in OHADA law to encourage states to resort to arbitration, it is difficult to say that this objective is ready to be achieved. Much remains to be done in the area of State immunity. In the current state of OHADA law, it is not certain that investment arbitration will be as successful as international Commercial Arbitration. While it is true that states cannot really be deprived of their immunity, it is almost certain that those immunity can be restricted. Therefore, it would not be risky for OHADA law to follow the same approach by significantly reducing the immunity of its States party in investment arbitration in order to achieve its own objective of attracting foreign investment. The OHADA arbitration law reform of 2017 was unfortunately a missed opportunity to limit state immunity in investment arbitration. In any case, in view of the competition that will certainly be faced by the OHADA investment arbitration with other investment arbitration bodies, notably the ICSID arbitration, it seems necessary to start

thinking about revising the reform of OHADA uniform act on arbitration law for a better participation its member States.

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[xiv] According to article 7.1 of UNITRAL The Model Law defines the *arbitration agreement* as: "An *agreement* by the parties to submit to *arbitration* all or certain disputes which have arisen or which may arise between them in respect of a defined *legal* relationship, whether contractual or not".

[xv] E. GAILLARD, « L'arbitrage sur le fondement des traités de protection des investissements ». Revue de l'arbitrage 2003- N° 3, p. 854.

[xvi] Natural law is law that is held to exist independently of the positive law of a given political order, society or nation-state. As determined by nature, the law of nature is implied to be objective and universal; it exists independently of human understanding, and of the positive law of a given state, political order, legislature or society at large.

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[xxxv] Ch. TOMUSCHAT, "The International Law of State Immunity and Its Development by National Institutions", op. cit., p. 1113.

[xxxvi] Id.

[xxxvii] B. POULAIN, « L'arbitrage transnational et le droit français des immunités de l'Etat étranger ». In Droit international des investissements et de l'arbitrage transnational, LEBEN (Ch.) (dir.), Paris, Pedone, p. 967.

[xxxviii] J. P. LAVIEC, *Protection et promotion des investissements : Etude de droit international économique*. *Graduate institute publications*, 1985, p. 300.

[xxxix] Id.

[xl] Stephen E. GENT and Megan SHANNON, "The Effectiveness of International Arbitration and Adjudication: Getting Into a Bind ", The University of Chicago Press, Vol. 72, No. 2 (Apr., 2010), p. 368.

[xli] M. FARCHAKH, L'égalité des armes dans le cadre de l'arbitrage Investisseur-Etat, Master thesis, University of Paris 1 Panthéon Sorbonne, 2016, p. 85.

[xlii] M. AZER ZOUARI, Le principe de bonne foi en droit international de l'investissement, Ph. D thesis, University of Carthage, 2018, p. 80.

[xliii] D. GAUKRODGER, "Adjudicator Compensation Systems and Investor-State Dispute Settlement", OECD Working Papers on International Investment, 2017/05, OECD Publishing, Paris., p. 5.

[xliv] J. CAZALA, « La clause de respect des engagements », In Ch. LEBEN (dir.), *Droit international des investissements et de l'arbitrage transnational*, Paris, Pedone, 2015, p. 347.

[xlv] P. ANCEL, « Force obligatoire et contenu obligationnel du contrat », *Revue trimestrielle de droit civil, 1999*. p. 771.

[xlvi] J. WEBB YACKEE, "Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality", Fordham International Law Journal, Volume 32, Issue 5 2008, Article 5., pp. 1551-1552.

[xlvii] Arbitration agreements require that persons who signed them resolve any disputes by binding arbitration, rather than in court before a judge and/or jury. Binding arbitration involves the submission of a dispute to a neutral party who hears the case and makes a decision.

[xlviii] E. GAILLARD, « Convention d'Arbitrage et Immunités de Juridiction et d'Exécution des Etats et des Organisations Internationales », 18 Bull. ASA 471, 2000., p. 472.

[xlix]M. PRYLES, "Limits to Party Autonomy in Arbitral Procedure", https://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf (date visited 10th July 2019).

[l] SOSSOU (C.J.), *L'Acte Uniforme OHADA relatif à l'arbitrage (AUA) à l'épreuve des standards transnationaux de justice arbitrale : approche comparée du droit international privé*, Ph. D thesis, University of Geneva, 2014, p. 121.

[li] Kompetenz-kompetenz, or competence-competence, is a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. The concept arose in the Federal Constitutional Court of Germany.

[lii] J. S. F. M. ZOCK ATARA A NGONN, *Le contentieux judiciaire et arbitral : Des contrats internationaux du Cameroun*, Paris, Harmattan, 2018, p. 192.

[liii] Sunday A. FAGBEMI, "The doctrine of party autonomy in international commercial arbitration: myth or reality?", https://www.ajol.info/index.php/jsdlp%20/article/viewFile%20/128033/117583 (Date visited 10th July 2019).

[liv] Kevin C. Kennedy, Invalidity of Foreign Arbitration Agreement or Arbitral Award, *op. cit.*, § 28., p. 41.

[lv] See Article 4 of the uniform act of OHADA on arbitration law. The origin of this rule is to be found in French case law on international arbitration, in particular the judgement in Hecht, Dalico and, more recently, Zanzi, means that the will of the parties constitutes the ultimate basis for the validity of the arbitration agreement.

[lvi] KAJ HOBÉR, Sovereign Immunity and International Arbitration- Recent developments, Arbitrators' Insights, Essays in Honour of Neil Kaplan (Sweet & Maxwell, 2012), 93.

[lvii] R. BOIVIN, "International Arbitration with States: An Overview of the Risks", 19 J. Intl. Arb. 285, 2002,

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[lix] Carlo De Stefano, "Arbitration Agreements as Waivers to Sovereign Immunity." *Arbitration International*, Volume 30, Issue 1, 1 March 2014, pp. 60-61.

[lx] F. ONANA ETOUNDI, « L'immunité d'exécution des personnes morales de droit public et ses applications jurisprudentielles en droit OHADA », Revue de droit uniforme africain, n°000- 09/08/2010 ; Ohadata D-13-55

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[lxii] H. M. MONEBOULOU MINKADA, « L'expression de la souveraineté des Etats membres de l'OHADA : une solution-problème à l'intégration juridique ». Revue de l'ERSUMA, n°3, 2013, p. 185.

[lxiii] Julie A. MAUPIN, "Transparency in International Investment Law: The Good, the Bad, and the Murky", in Transparency in International Law, Andrea Bianchi and Anne Peters,eds (Cambridge University Press 2013).

[lxiv] C. J. SOSSOU, *L'Acte Uniforme OHADA relatif à l'arbitrage (AUA) à l'épreuve des standards transnationaux de justice arbitrale : approche comparée du droit international privé*, Ph. D thesis, Université of Genève, 2014, p. 75.

[lxv] M. AUDIT, S. BOLLEE et P. CALLE, *Droit du commerce international et des investissements étrangers*, L.G.D.J, 2e éd, 2016, p. 649.

[lxvi] F. ONANA ETOUNDI, « L'immunité d'exécution des personnes morales de droit public et ses applications jurisprudentielles en droit OHADA », *op. cit.* Ohadata D-13-55.