学位論文及び審査結果の要旨

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論文の要旨

The rapid evolution of international investment law has occurred over the past decades. New trends and dynamics have emerged, among them the adoption of regional investment agreements (RIAs) within institutionalised regional economic communities (RECs). This new trend upon which this study is based can be traced back to 2006 and consists of the SADC Investment Agreement (SADC IA) of the Southern African Development Community (SADC); the Supplementary Act on Rules on Investment (SARI) of the Economic Community of West African States (ECOWAS), the Cooperation and Facilitation Investment Protocol (CFIP) of the *Mercado Comùn del Sur* (MERCOSUR), the ASEAN Comprehensive Investment Agreement (ACIA) of the Association of Southeast Asian Nations (ASEAN), and the Treaty on the Functioning of the European Union (TFEU). These RIAs interact with existing domestic laws and policies in the same way a community law interacts with the domestic laws of Member States. They, therefore, require an analysis of the relationship between the community legal order and domestic legal order rather than the international legal order and domestic legal order.

This study seeks to analyse these new RIAs and understand their interactions with Member States' domestic investment laws (MS FILs). Scholars stress the need to actively manage the interaction arising from the growing universe of investment treaties to avoid duplication and inconsistency. This study uses ASEAN and SADC as case studies and analyses the impact domestic foreign investment laws have on the applicability and effectiveness of the ASEAN Comprehensive Investment Agreement (ACIA) within the ASEAN and the SADC Investment Agreement (SADC IA) within the SADC.

As set forth above, this study identifies a new trend in IIAs and looks at the emergence of regional frameworks in the field of foreign investment, with particular attention to the ACIA and the SADC IA. The EU is the reference in integration studies. However, it is of little importance when comparing the ASEAN and SADC because RECs adopt different approaches. The trilateral perspectives on community law on foreign investment show that the EU opts for a unifying approach, while the ASEAN and SADC promote coexisting approaches.

The EU rejects the ability for no body of rules but the TFEU to regulate foreign investment. Since the entry into effect of the TFEU, the EU, according to Article 207, bears exclusive competence as regards foreign direct investment (FDI). The Court of Justice of the EU (CJEU) consolidates this approach. It has recently concluded that the preservation of the autonomy and the genuine nature of the EU law precludes the arbitration obligations under the Energy Charter Treaty (ECT) – a multilateral agreement – from being imposed on EU Member States (EU MS) as between themselves. In *Komstroy*, the Court prohibits the inclusion in an agreement between MS of a provision according to which a dispute with the host State may be removed from the EU judicial system such that the full effectiveness of that law is not guaranteed. It even went further – raising a huge controversy in public international law – in deciding that despite the multilateral nature of an international agreement – the ECT in *specie casu* – is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the bilateral investment treaty. In the *Achmea* case, the preliminary ruling of the Court insists that it is for the EU MS courts and tribunals and the CJEU to ensure the full application of EU law in all MS and to ensure judicial protection of the rights of individuals under that law. Accordingly, the EU arbitrations based on the ECT violate EU law. Despite a certain controversy, the above-mentioned CJEU decisions unanimously reject the possibility for any other body of norms but the TFEU to regulate foreign investment within the EU. This is

the unifying approach of the EU towards the community law on foreign investment.

The ASEAN and SADC, on the other hand, promote a coexisting approach, thereby creating a framework where the community investment treaty applies simultaneously with MS FILs. The same the ACIA is applicable in Indonesia for example, the same the Indonesia investment law of 2007 is applicable in Indonesia. Similarly, the same the SADC IA is applicable in Zimbabwe, the same the 2019 Zimbabwe investment law is applicable. This is referred to as "coexistence". Despite the adoption of the RIAs (ACIA and SADC IA), MS continue maintaining or adopting individual MS FILs. This makes the applicability and effectiveness of the RIA substantially tributary to its relationship with MS FILs.

This study undertakes to analyse how, in a context of coexistence, MS FILs impact the applicability and effectiveness of the ACIA and the SADC IA. It particularly discusses the relationship between foreign investment rules of the ACIA and those of Cambodia, Indonesia, Malaysia, Thailand, Philippines, Vietnam, Myanmar, Brunei, Laos, and Singapore. It then replicates the same analytical framework to the relationship between foreign investment rules of the SADC IA and those of the Democratic Republic of Congo (Congo), Zimbabwe, and South Africa.

This study seeks to answer the following questions:

- To what extent do the ACIA and the SADC IA provide for robust and quality normative investment standards which enable them to swiftly regulate foreign investment matters in ASEAN and SADC regions and stand the test of quality in confrontation with MS domestic investment standards?
- Given the similarity in the ASEAN and SADC investment coexistence frameworks, do MS FILs affect the applicability and effectiveness of the ACIA and SADC IA in a comparable manner? If not, what are the theoretical justifications underlying such a contradiction?

To answer these questions, this study introduces the notion of 'distribution of norms' and "quality of norms" as key concepts for the functioning of coexistence frameworks. Foreign investment rules are divided between promotion, facilitation, and protection norms. First, rules on foreign investment promotion stress the formulation of promotion policies and the creation of a favourable investment climate to enable investors to conduct their business in a convenient,

expeditious, transparent, fair, and lawful manner. They mostly consist of the dissemination of investment information through promotion actions such as the organisation of seminars or exhibitions on investment opportunities, laws, regulations, procedures, and policies; the acknowledgment of quotas for disadvantaged or minority groups in certain sectors or industries; the encouragement of growth and development of infant industries; etc. Secondly, rules on foreign investment facilitation seek to encourage new investments and reinvestments. They mostly consist in strengthening the host State's standards of transparency, consistency, and predictability concerning investment laws, policies, and procedures. The simplification of procedures and establishment of one-shop centres is a key feature of the facilitation of investments. Thirdly, rules on foreign investment protection consist of substantive provisions of international investment law. This study emphasises the scope of application (definitions of investor and investment), FET, and ISDS clauses as criteria to determine the applicability of a RIA.

The rules on foreign investment facilitation and promotion are not of huge consequences on the applicability of RIAs in the same way as rules on foreign investment protection. To be applicable and effective, a RIA must either be the sole instrument to guarantee substantive provisions or be the instrument that provides for better standards of protection. This is pertinent because, in a coexistential framework, a RIA does not apply because of its legal nature as a 'treaty' but rather based on the quality of its norms. When it provides for better protection standards; it assures its applicability over existing and/or competing MS FILs. Conversely, a treaty that provides for poorer standards of protection will lose its applicability, thereby dropping any chance to regulate foreign investment and complete its assigned integration objectives in the REC. A domestic norm containing better quality standards will therefore be preferred even though such preference setbacks the economic integration of the region.

Within the ASEAN, the distribution of norms is well carried out making the relationship between the ACIA and MS FILs not contentious. This occurs through a norm's distribution that calibrates ASEAN MS FILs to investment promotion and facilitation while leaving the ACIA the exclusive role of investment protection. When confronting the ACIA provisions with those of ASEAN MS FILs (Cambodia, Indonesia, Malaysia, Thailand, Philippines, Vietnam, Myanmar, Brunei, Laos and Singapore); it appears that, as neo-functionalism suggests, there is a deliberate attitude towards assuring the applicability of the RIA. One can see that, with only a few exceptions, the laws of Brunei, Cambodia, Indonesia, Laos, Myanmar, Philippines, or Vietnam only provide for

generic protection rules, such as the prohibition to nationalise or expropriate except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation. They also include facilities in relation to the repatriation of investments and returns in accordance with the rules and regulations stipulated by host States. Expropriation and free transfer of capital standards are pointless in relation to the ACIA. They either form the raison d'être of international investment law or they have acquired the special status of customary rule or general principle. As such, even though they were not provided for, they would still be otherwise guaranteed. In addition, ASEAN MS FILs are systematically calibrated to norms of foreign investment promotion and facilitation. In providing for standards such as FET, or ISDS, the ACIA retains the exclusivity in foreign investment protection, making it clearer that any foreign investor should rely upon and use only the community treaty to protect its investment. This promotes the harmonisation effect, ensures the applicability of the ACIA in all ASEAN MS jurisdictions, and contributes to the achievement of regional economic integration objectives of the region.

The SADC offers a contradictory outcome. Although the SADC IA constitutes the first attempt by a REC to achieve a common market creation through transforming MS FILs into an integrated investment zone; its relationship with SADC MS FILs is contentious. The relational theory suggests that effective economic integration is the product of properly structuring and managing legal frameworks among States, legal systems, laws, and institutions. As such, a REC must have well-structured and managed relations between itself and MS legal systems as a necessary condition for its effectiveness. Nevertheless, the SADC fails to MS FILs while advancing its regional framework. SADC MS FILs offer an asymmetrical coexistence as they provide different solutions. South Africa stripped foreign investor rights and aligned its FIL to the SADC IA; while Congo and Zimbabwe opted to improve the quality of their domestic standards as additional assurance for foreign investors. This can be explained by the fact that South Africa holds an exceptional well-proven record of rule of law tradition. It, therefore, does not need special rights to assure foreign investors. This is, however, not the case for the other countries. For Zimbabwe, for example, protection standards, although contradictory to the SADC IA, are important as a strategy to revive FDI after decades of turmoil characterised by mass expropriation without compensation. They express additional reassurances towards foreign investors.

The SADC IA provides for poorer investment protection norms. It accords the right to fair and

adequate compensation in case of expropriation. It provides for national treatment and allows the repatriation of capital. It provides for a transparency standard reinforced by the MS' obligation to promote and establish predictability, confidence, trust, and integrity by adhering to and enforcing open and transparent policies, practices, regulations, and procedures related to investment. It, however, does not include the FET and ISDS. Moreover, the scope of application of the SADC IA represents an additional restriction to intra-SADC investments. The SADC IA only covers intra-SADC investors and their investments. However, intra-SADC investment is significantly low. The 2019 attractiveness surveys show that the largest investors are from the United States, France, and the United Kingdom with China being the largest inward capital source. This means that the SADC IA regulates only a tiny percentage of foreign investment. Moreover, extra-SADC investors covered by BITs and favourable domestic laws may provide a competitive advantage against intra-SADC investors and their investments. As such, when comparing the SADC IA with SADC MS FILs, it appears that in this case, SADC investors are likely to favour domestic legal frameworks that offer better protection and put them back on the track of competition with extra-SADC and extra-African investments.

The Congo Investments Code provides for FET and ISDS along with general consent to arbitration. And, the ZIDA guarantees qualified FET, MFN, and ISDS upon agreement with the government. This indicates that the distribution of norms is not well carried out. The SADC IA and SADC MS FILs all provide for norms on foreign investment promotion, facilitation, and protection; but differently. The SADC IA contains poor quality standards as compared to Congo or Zimbabwe investment laws. Consequently, the relationship with SADC MS FILs undermines the treaty applicability and effectiveness, making it clearer that any foreign investor alleging unfair or inequitable treatment in Congo and Zimbabwe cannot, reasonably, invoke or rely on the SADC IA. As such, the SADC IA cannot achieve the assigned regional integration objectives.

These findings are crucial for the perspectives of both the pan-African continental economic integration and other RECs around the globe. The African Union (AU) pursues a full-scale integration through the integration of its building blocks, namely the Arab Maghreb Union (AMU/UMA); Community of Sahel-Saharan States (CEN-SAD); the Common Market for Eastern and Southern Africa (COMESA); East African Community (EAC); Economic

Community of Central African States (ECCAS/CEEAC); Economic Community of West African States (ECOWAS); Inter-Governmental Authority of Development (IGA); and Southern African Development Community (SADC). The SADC is a REC model in the African Union (AU). It has been the first to adopt a RIA – the 2006 SADC IA – aiming at transforming all SADC MS into an "integrated investment zone". As these findings unfold, they offer a possibility for other RECs to recalibrate their legal frameworks, concerning especially the relationship with the upcoming African Continental Free Trade Area (AfCFTA) Investment Protocol.

Also, since the regionalisation of investment laws has surfaced in other corners of the globe, such as ECOWAS and MERCOSUR; lessons from this study offer a mirror for these RECs to look into their frameworks and adjust the interactions between the community and domestic levels of foreign investment protection. This can help reach their assigned integration goals and make their RIAs applicable and effective. Although the EU is the benchmark par excellence in regional integration studies, the ASEAN has succeeded to position itself as the reference in the integration of foreign investment laws for all horizontal integration processes such as MERCOSUR, ECOWAS, or SADC. The ASEAN, like never before, shows positive prospects for its integration process as it succeeded to engineer a coexistence framework that both accommodates the sovereignty of MS and advances regional integration. It can be submitted that the emergence of a 'post-American multipolar world' will bring with it the creation of new regional economic orders, and the ASEAN will serve as a strong reference when MS would decide to move towards regionalising their foreign investment laws and policies.

審査結果の要旨

「東南アジア諸国連合(ASEAN)及び南部アフリカ開発共同体(SADC)における域内国外国投資法と地域投資協定の適用可能性と有効性」と題する本論文は、複数国間で結ばれる投資協定と締約国国内投資法との関係について、特に ASEAN と SADC を分析の対象として取り上げ、比較検討したものである。

本論文は、予備的考察、第 1 部、第 2 部の 3 部構成である。

予備的考察は 2 章から成る。第 1 章の結論は、EU の目指す投資に関する域内統合と ASEAN、SADC が目指す投資に関する域内統合はその方向性が異なっているということである（EU は統合アプローチ、ASEAN・SADC は共存アプローチ)。第 2 章は上記の結論を導き、本論文全体の論旨を明確にするための理論的考察である。

第 1 部は 4 章から成る。第 1 章は、ASEAN の概要と ASEAN 包括投資協定(ACIA)についての紹介である。第 2 章は、投資家保護に関する ACIA の規範構造をより詳細に検討している。第 3 章は、ASEAN

各国の投資法の内容についての検討である。検討の結果、その大宗が投資促進と投資円滑化に関するものであることが明らかにされる。第4章は、第1部の小括である。
第2部も4章から成る。第1章は、SADCの概要とSADC投資協定の紹介である。第2章はSADC投資協定の内容を詳細に検討している。第3章は、SADC構成国中、コンゴ、ジンバブエ、南アフリカの投資法の内容についての検討であり、第4章は第2部の小括である。
これらの検討を通じて明らかになったのは、ASEANでは地域投資協定は投資家保護を目的とし、各国投資法は投資促進・投資円滑化を目的とするという分業が明確であるのに対し、SADCではそのような分業が明確でないということである。その背景にはSADC投資協定における投資家保護規定が各国政府の規制権限を強化する（投資家保護を弱める）方向で修正されたという事情があるが、ASEANのアプローチの方が地域統合を推進する上では有効であると考えられる。
本論文は、これまであまり注目されなかった地域投資協定の制度設計と各国投資法のあり方についての丹念な実証研究として高く評価できる。
以上から、本論文審査委員一同は、Kilele Pierre Muzaliwa氏の学位請求論文「Member States' Foreign Investment Laws and the Applicability and Effectiveness of Regional Investment Agreements within the Association of Southeast Asian Nations (ASEAN) and the Southern African Development Community (SADC)」は、博士(法学)の学位を授与するのにふさわしいものであると判断する。

令和4年6月27日

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参考　Kilele Pierre Muzaliwa氏の指導委員会の構成員は以下のとおりである。

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