Doctoral Dissertation

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)

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To …

my Mother, Mukulumanya Muzaliwa;

may you draw pride and love from this work,

and in memory of my Father, Muzaliwa Sunguliya.

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ACRONYMS AND ABBREVIATIONS

ACIA ASEAN Comprehensive Investment Agreement

AEC ASEAN Economic Community

AfCFTA African Continental Free Trade Area

ASEAN MS ASEAN Member State

ASEAN Association of Southeast Asian Nations

AU MS African Union Member State

AU African Union

BIT Bilateral Investment Treaty

CDC Council of the Development of Cambodia

CETA EU – Canada Comprehensive Economic and Trade Agreement

CFIP Cooperation and Facilitation Investment Protocol

CJEU Court of Justice of the European Union

CJK TIA China-Japan-Korea Trilateral Investment Agreement

CPTPP Comprehensive and Progressive Agreement for Trans-Pacific Partnership

DSB Dispute Settlement Body

ECOWAS Economic Community of West African States

ECT Energy Charter Treaty

EU MS European Union Member State

EU European Union

FAT Fair Administrative Treatment

FDI Foreign Direct Investment

FET Fair and Equitable Treatment

GATS General Agreement on Trade in Services

GATT General Agreement on Tariffs and Trade

ICJ International Court of Justice

ICS Investment Court System

ICSID International Centre for the Settlement of Investment Disputes

IIA International Investment Agreement

IISD International Institute for Sustainable Development

IMF International Monetary Fund

ISDS Investor-State Dispute Settlement

MERCOSUR Mercado Comùn del Sur

MFN Most-Favoured Nation

MS FIL Member States' Foreign Investment Law

NAFTA North American Free Trade

OECD Organization for Economic Cooperation and Development

OHADA Organisation for the Harmonisation of Business Law in Africa

PPP Public-Private Partnership

PTA Preferential Trade Agreements

QIP Qualified Investment Project

RCEP Regional Comprehensive Economic Partnership

REC Regional Economic Community

RIA Regional Investment Agreement

SADC FIP SADC Protocol on Finance and Investment

SADC IA SADC Investment Agreement

SADC Model BIT SADC Model Bilateral Investment Treaty Template

SADC MS SADC Member State

SADC Southern African Development Community

SARI Supplementary Act on Community Rules on Investment

TFEU Treaty on the Functioning of the European Union

TPPA Trans-Pacific Partnership Agreement

UNCITRAL United Nations Commission for International Trade Law

UNCTAD United Nations Conference on Trade and Development

USMCA United States-Mexico-Canada Agreement

WJP World Justice Project

WTO World Trade Organisation

ZIDA Zimbabwe Investment and Development Agency (Act)

RESUME – français

Cette étude est unique en son genre en droit international de l'investissement étranger. Elle tire son originalité des questions de coexistence d'ordres juridiques issues des rapports entre les accords régionaux en matière d'investissement (ARI) et les législations des Etats Membres sur l'investissement étranger (LEMI). Elle met en évidence les ordres juridiques national et communautaire, et consacre ainsi la consolidation d'un droit communautaire de l'investissement étranger. Elle se fonde sur les accords d'investissement ci-après : l'accord global sur les investissements de l'Association des Etats d'Asie du Sud-Est (ASEAN), l'accord sur l'investissement de la Communauté de développement des Etats d'Afrique australe (SADC), l'Acte additionnel sur les règles communautaires sur l'investissement de la communauté économique des Etats d'Afrique de l'Ouest (CEDEAO), le protocole sur la coopération et l'investissement du Marché commun sud-américain (Mercosur) et le traité sur le fonctionnement de l'Union européenne (UE). Néanmoins, seules la SADC et l'ASEAN sont abordées.

En vue d'atteindre l'objectif de création d'un marché commun, les communautés économiques régionales (CER) ont adopté des ARI comme de véritables outils vers l'instauration de zones intégrées d'investissements. Néanmoins, nonobstant l'adoption de ces ARI, les Etats Membres au sein de la SADC et l'ASEAN ont continué soit de maintenir ou d'adopter de nouvelles lois sur l'investissement direct étranger. Ceci a été à la base de la création d'un cadre juridique coexistentiel où les traités communautaires d'investissement (l'accord global sur les investissements au sein de l'ASEAN « ACIA » et l'accord sur les investissements au sein de la SADC « SADC IA ») et les lois des Etats Membres sur les investissements s'appliquent concomitamment. Autant l'ACIA est par exemple applicable en Indonésie, autant la loi indonésienne sur l'investissement y est aussi applicable. De même, autant le SADC IA est applicable par exemple au Zimbabwe, autant la loi zimbabwéenne sur l'investissement y est applicable.

Cette étude suggère que dans un tel contexte de coexistence, les accords d'investissements ne sont pas applicables sur base de leur nature juridique en tant que « traités » ou « normes communautaires ». Leur applicabilité et effectivité est substantiellement dépendante des rapports qu'ils entretiennent avec les lois nationales avec lesquelles ils coexistent. Dans un contexte de coexistence de normes juridiques, pour être applicable, la qualité des normes d'un traité – même communautaire – doit prévaloir lorsque celles-ci sont confrontées aux normes domestiques des Etats Membres. Pour cette raison, le SADC IA n'est pas par exemple applicable en République Démocratique du Congo et au Zimbabwe dans la mesure où les lois d'investissement de ces pays offrent des normes de qualité supérieure aux normes contenues dans le traité de la SADC.

Pour être opérationnel, cette étude propose que le cadre coexistentiel soit fondé sur le concept de « distribution des normes ». Ce concept permet de comprendre pourquoi le cadre coexistentiel au sein de l'ASEAN fonctionne alors que celui au sein de la SADC est en lambeau. Au sein de l'ASEAN, les lois nationales et le traité d'investissement coexistent, néanmoins, les lois sont calibrées sur les normes de promotion et facilitation de l'investissement étranger tandis que le traité (ACIA) règlemente exclusivement les normes de protection de l'investissement étranger. Cela contraint tout investisseur étranger de ne faire recours qu'aux provisions de l'ACIA en vue de protéger son investissement. Comme résultat, cela assure l'effet harmonisateur de l'ACIA,

permet son applicabilité et effectivité dans chaque Etat Membre et facilite l'objectif vers la création d'un marché commun.

SUMMARY

This study is among the first of its kind in international investment law. It draws its authenticity from issues of coexistence arising from the relationship between regional investment agreements (RIAs) and Member States' foreign investment laws (MS FILs). It brings together community and domestic legal orders and, consecrates the consolidation of a community law on foreign investment. It is based upon the following regional investment agreements (RIAs): the SADC Investment Agreement of the Southern African Development Community (SADC); the Supplementary Act on Rules on Investment of the Economic Community of West African States (ECOWAS), the Cooperation and Facilitation Investment Protocol of the *Mercado Comùn del Sur* (MERCOSUR), the ASEAN Comprehensive Investment Agreement of the Association of Southeast Asian Nations (ASEAN), and the Treaty on the Functioning of the European Union (EU). Nevertheless, only ASEAN and SADC are used as case studies

To achieve common market objectives, regional economic communities (RECs) adopted RIAs as sophisticated tools towards integrated investment zones. However, despite the adoption of the ASEAN Comprehensive Investment Agreement (ACIA) and the SADC Investment Agreement (SADC IA), ASEAN and SADC Member States continue to either maintain or adopt domestic foreign investment laws.

This creates a coexistence framework where both the community treaties (ACIA and SADC IA) and MS domestic investment legislations apply. 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 ZIDA Act is applicable.

This study suggests that in this case, the RIAs are not applicable based on their legal nature as "treaties" or "community rules". Their applicability and effectiveness is substantially tributary to their relationship with MS FILS. In a co-existential context, to be applicable, treaty norms must stand the quality test when they are confronted with domestic investment standards. In this way, the SADC IA is not applicable in the Democratic Republic of Congo and Zimbabwe for instance because it does not stand the quality test when its norms are confronted to the norms of the Congo and Zimbabwe investment laws.

For a coexistence framework to function, this study introduces the notion of "distribution of norms". This a key concept to comprehend on the one hand the harmonious relationship between the ACIA and ASEAN MS FILs; and on the other hand, the contentious relationship between the SADC IA and SADC MS FILs. ASEAN MS FILs are calibrated to norms on foreign investment promotion and facilitation when the ACIA has the exclusivity of foreign investment protection. This compels foreign investors in ASEAN to use and invoke the ACIA to protect their investments. As a consequence, it assures the harmonisation effect, the applicability and effectiveness of the investment treaty, and the attainment of common market objectives.

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INTRODUCTION

International investment law has evolved and undergone new trends and dynamics over the past decades. The adoption of Regional Investment Agreements (RIA) represents today one of the major developments. It consecrates the consolidation of a community law on foreign investment law as highlighted through a shift towards the regulation of foreign direct investments (FDI) by State groupings within institutionalised regional economic communities (RECs) [1]. These RECs include the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), the *Mercado Comùn del Sur* (MERCOSUR), the Association of Southeast Asian Nations (ASEAN), or the European Union (EU). This study identifies this new trend in international investment agreements (IIAs). It therefore seeks to analyse these new RIAs and determine the way they interact with Member State foreign investment legislations (MS FILs).

Before resorting further on the problem statement, let's distinguish between two categories of RIAs. The first category indicates RIAs adopted outside the framework of REC and pertaining to the international legal order; whereas the second category consists of RIAs adopted within the framework of REC and pertaining the community legal order.

First, RIAs adopted outside the framework of RECs. Since the North American Free Trade Agreement (NAFTA[2]) in 1992; RIAs have been frequently adopted to promote '*ad hoc* or functional[3]' regionalism. They pursue strengthening contracting parties' close economic relationships. Apart from NAFTA – as updated under the United States-Mexico-Canada Agreement (USMCA[4]), other illustrations of these RIAs include the China-Japan-Korea Trilateral Investment Agreement (CJK TIA[5]) and investment chapters in preferential trade agreements (PTA) such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

[1] A REC consists of a grouping of States that seek deep regional integration with the end goal of establishing a supranational entity, such as the European Union (EU).
[2] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 612 (NAFTA)
[3] WOLFGANG ALSCHNER, 'Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?' (2014) 17 Journal of International Economic Law 271
[4] Agreement between the United States of America, the United Mexican States, and Canada (USMCA 2018) <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/00_Preamble.pdf> accessed 10 September 2021
[5] Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment (CJK TIA 2012) accessed <https://www.mofa.go.jp/mofaj/press/release/24/5/pdfs/0513_01_02.pdf> accessed 10 September 2021

(CPTPP[6]), the Energy Charter Treaty (ECT[7]), the Regional Comprehensive Economic Partnership (RCEP[8]), etc. States join these RIAs for varied and diverse purposes[9]. Nevertheless, they do not intend to further economic integration through the creation of a common market like in the EU. This study will not look at this category of traditional RIAs.

Conversely, since 2006[10], a new trend has surfaced, as the regionalisation of investment law takes place intra-regionally as part of an agenda for deep integration[11]. It consists of RIAs adopted within RECs and seeking to achieve a common market in the regions in which they are adopted. RECs have taken a prominent lead in adopting these 'new' RIAs. They consist of the SADC Investment Agreement (SADC IA[12]) adopted in the framework of the SADC; the Supplementary

[6] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP 2018) <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership> accessed 10 September 2021

[7] The Energy Charter Treaty (with incorporated trade amendment) and Related Documents, last updated: 14 July 2014) 'ECT 1994'.

[8] Regional Comprehensive Economic Partnership Agreement (RCEP 2020) <https://www.mofa.go.jp/policy/economy/page2e_000001.html> accessed 10 September 2021

[9] Given that it is neither trade nor tariff but rather investment that is the central issue in economic negotiations in Asia, Japan for instance joined the CJK TIA mostly to secure non-discriminatory investment liberalisation, including the prohibition of performance requirements. see SHINTARO HAMANAKA, 'China-Japan-Korea Trilateral Investment Treaty: Implications for Future Investment Negotiations in Asia' in JULIEN CHAISSE, TOMOKO ISHIKAWA and SUFIAN JUSOH (eds), *Asia's Changing International Investment Regime. Sustainability, Regionalization, and Arbitration* (Springer 2017)

[10] The contemporary trend to adopt RIA within REC started in 2006 with the adoption of the first SADC IA before it was replaced by the current SADC IA in 2016. In 2009, both the Association of Southeast Asian Nations (ASEAN) and the Economic Community of West African States (ECOWAS) countries adopted the ASEAN IA as a unifying investment regime for the realisation of the ASEAN Economic Community (AEC); and the Supplementary Act on Community Rules on Investment for the ECOWAS. This trend was then strengthened by the adoption in 2017 of the *Mercado Común del Sur* (MERCOSUR) Cooperation and Facilitation Investment Protocol.

[11] ALSCHNER (n 3) 271

[12] Agreement Amending Annex 1 – Cooperation on Investment – on the SADC Protocol on Finance and Investment (adopted 31 August 2016, entered into force 24 August 2017). It is hereinafter referred to as "SADC Investment Agreement (SADC IA)". The SADC Finance and Investment Protocol (SADC FIP) comprises 11 Annexes. They are as follows: Cooperation on Investment; Macroeconomic Convergence ; Cooperation in Taxation and Related Matters; Cooperation and Coordination of Exchange Control Policies: Harmonization of Legal and Operational Frameworks; Cooperation on Payment, Clearing and Settlement Systems; Cooperation in the Area of Information and Communications Technology amongst Central Banks; Cooperation and Coordination in the Area of Banking Regulatory and Supervisory Matters; Cooperation in respect to Development Finance Institutions; Cooperation on Non-Banking Financial Institutions and Services ; and Cooperation in SADC Stock Exchanges.
The acronym 'SADC FIP' does not refer to a single Annex, but to the whole Protocol with its 11 Annexes. Only Annex 1 deals with matters relating to Investment. And yet, many scholars refer to Annex 1 using the acronym 'SADC FIP'. See TINASHE KONDO, 'A Comparison with Analysis of the SADC FIP before and after its Amendment' (2017) 20 PER/PELJ; LENNOX TRIVEDI SAMAMBA, 'The Fork-in-the-Road Provision in the Southern Africa Development Community – Protocol on Finance and Investment in Proper Perspective' (2019) <https://ssrn.com/abstract=3496328> accessed 15 June 2020. The author believes such a reference to be misleading. In view of this, in this study, the Annex 1 – Cooperation of Investment will be referred to using the acronym 'SADC IA', meaning 'SADC Investment Agreement'. As of August 2020, 13 of 16 SADC Member States have signed the

Act on Rules on Investment (SARI[13]) adopted within the ECOWAS; the Cooperation and Facilitation Investment Protocol (CFIP[14]) adopted within the MERCOSUR; the ASEAN Comprehensive Investment Agreement (ACIA[15]) adopted in the framework of the ASEAN or the Treaty on the Functioning of the European Union (TFEU[16]) adopted within the framework of the EU. Any mention of RIAs in this study refers to this category of RIAs.

This study uses ASEAN and SADC as case studies. It particularly highlights the coexistence between the ACIA and investment laws of ASEAN Member States (ASEAN MS FILs) on the one hand, and between the SADC IA and investment laws of SADC Member States (SADC MS FILs) on the other hand to provide a critical analytical backdrop on how best to manage them.

Considering the importance of the link between growth, trade and investment[17]; RIAs are carefully designed as sophisticated tools to promote trade, regulate foreign investments, and achieve regional economic integration through transforming the RECs in which they are adopted into "integrated investment areas". Following the European model of integration, Member States (MS) adopt RIAs to function as the community treaty to merge disparate foreign investment laws into a single and unique regime. The regional integration theory suggests that the adoption of such a community or regional investment treaty must result in either the suppression of Member States' foreign investment laws (MS FILs[18]) or their alignment to the RIA. This is indispensable to

SADC IA, namely: Angola, Botswana, Democratic Republic of the Congo (Congo), Eswatini, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Tanzania, Zambia and Zimbabwe.

[13] Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (adopted 19 December 2008, entered into force 19 January 2009)

[14] Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (adopted 07 April 2017, entered into force 30 July 2019). The States Parties of the MERCOSUR are Argentina, Brazil, Paraguay and Uruguay. The Protocol of Intra-Mercosur Investment Cooperation and Facilitation became effective for Brazil and Uruguay, the countries that ratified the document. Argentina and Paraguay are yet to incorporate the deal into their legislations so the accord can be brought into effect for the remaining partners in the South American bloc. <https://agenciabrasil.ebc.com.br/en/internacional/noticia/2019-08/new-protocol-seeks-facilitate-investment-within-mercosur> accessed on 2 February 2021

[15] ASEAN Comprehensive Investment Agreement (adopted 26 February 2009, entered into force 24 February 2012) (ACIA) 2009.

[16] The TFEU was adopted in 2007 and became effective in 2009

[17] In an attempt to rehearse the European integration experience, many regions around the world have pushed for the re-emergence, revitalisation or expansion of regional projects and organisations. See FREDRIK SÖDERBAUM, 'Introduction: Theories of New Regionalism' in FREDRIK SÖDERBAUM and TIMOTHY SHAW (eds), *Theories of New Regionalism* (Palgrave Macmillan 2003) 1; FREDRIK SÖDERBAUM and TIMOTHY SHAW, 'Conclusion: What Futures for New Regionalism? in FREDRIK SÖDERBAUM and TIMOTHY SHAW (eds), *Theories of New Regionalism* (Palgrave Macmillan 2003) 211

[18] The acronym 'MS FILs' to express 'Member States' Foreign Investment Laws' is borrowed from JARROD HEPBURN, 'Domestic Investment Statutes in International Law' (2018) 112 AJIL.

facilitate the harmonisation effect, allow the applicability and effectiveness of the investment treaty in all MS' jurisdictions, and permit the attainment of the common market goals.

In EU Member States (EU MS), FDI are exclusively governed by the TFEU. This treaty promotes a vertical and unifying approach that does not accept the existence of EU MS' competing norms that may impede its applicability and effectiveness.

In contrast with the EU approach, the ASEAN and SADC approach operates in a context in which adherence to notions of national sovereignty is stronger[19], with a lack of hierarchy between the domestic and regional rules which contributes to the confusion on the supremacy of community integration law over domestic law. The existence of the community rules on foreign investment does not *per se* exclude that of MS FILs. This means that, contrary to the EU unifying approach, ASEAN and SADC promote a coexisting approach. Alongside RIAs, MS continue to either maintain or adopt new domestic laws on foreign investment. This creates a framework where RIAs apply simultaneously with MS FILs. This situation can be described as 'coexistence'. The legal pluralism theory defines "coexistence" as a situation where different norms or institutionalised normative orders are meant to apply in the same time-space context[20]. This means that the same the ACIA is applicable for example in Indonesia; the same the 2007 law concerning investment enacted in Indonesia is as well applicable. Similarly, the same the SADC IA is applicable for instance in South Africa; the same the 2015 protection of investment Act is applicable in South Africa.

This research highlights the phenomenon of coexistence as the manifestation of new developments in international investment law. It exceptionally aims to bring the limits of domestic foreign investment law closer to the confines of Community law by highlighting ASEAN and SADC as case studies. Coexistence makes the applicability of RIAs substantially tributary to their relationships with MS FILs. Thus, to explore whether a RIA is applicable, the royal road is to henceforth look at its relationship with investment laws, especially how MS FILs affect its

[19] JAMES THUO GATHII, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press 2011) xxxii

[20] WILLIAM TWINING, 'Legal Pluralism 101' in BRIAN TAMANAHA, CAROLINE SAGE and MICHAEL WOOCOCK (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) 114

applicability and effectiveness through their respective norms. This is the main objective of this study.

1. PROBLEM STATEMENT

Both the ASEAN and SADC share an identical investment coexistence framework. Within the ASEAN, the ACIA was adopted as a common regional framework to regulate foreign investment matters in all the ten ASEAN countries. It constitutes a milestone for ASEAN integration[21] since it is designed to create a free and open investment regime to achieve the end goal of economic integration[22] under the ASEAN Economic Community (AEC)[23]. It thus portrays ASEAN as a stand-alone investment bloc[24]. Nevertheless, the existence of the ACIA does not prevent ASEAN MS from having their individual laws on foreign investment. As a result, the ACIA coexists and applies simultaneously with foreign investment laws (FILs) of Cambodia, Indonesia, Malaysia, Thailand, Philippines, Vietnam, Myanmar, Brunei, Laos and Singapore.

Similarly, within the SADC there exists the SADC IA, a unique instrument that creates legally binding rights for and obligations imposed on foreign investors and SADC host States[25]. Like the ACIA, it is framed as a useful tool for the realisation of the integration objectives in the region[26]. Despite its existence, SADC MS continue to maintain or adopt new individual laws on foreign investment, thereby creating a framework where both the SADC IA and FILs of the Democratic Republic of Congo (Congo), Zimbabwe and South Africa coexist and apply simultaneously.

The relationship with and relevance of domestic investment laws then proves crucial to determining the applicability and effectiveness of both the ACIA and SADC IA since they are

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[21] JULIEN CHAISSE and SUFIAN JUSOH, *The ASEAN Comprehensive Investment Agreement: The Regionalization of Laws and Policy on Foreign Investment* (Edward Elgar 2016) 36

[22] ACIA, article 1

[23] ZEWEI ZHONG, 'The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community' (2011) Vol. 6, Iss. 1 Asian Journal of Comparative Law 16

[24] JULIEN CHAISSE, 'The ACIA: Much More than a BIT of Protection for Foreign Investors?' in PASHA HSIEH and BRYAN MERCURO, *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms* (Cambridge University Press 2019) 232

[25] TINASHE KONDO, 'A Comparison with Analysis of the SADC FIP before and after its Amendment' (2017) PER/PELJ (20) 3

[26] SADC IA, article 17 reads: "State Parties shall pursue harmonisation with the objective of developing the region into a SADC investment zone, which shall, among others, include the harmonisation of investment regimes including policies, laws and practices in accordance with the best practices within the overall strategy towards regional integration".

framed into a coexistence framework in view to creating "integrated investment areas". To meet their objectives, it then becomes clear that both the ACIA and the SADC IA owe their applicability and effectiveness to the way MS FILs impact them. They therefore can be applicable and effective not because of their nature as "investment treaties" or "community rules" but rather because they contain quality standards when their norms are confronted to the norms of the respective domestic investment law.

Considering the above, this study undertakes to answer the following questions:

- To what extent do the ACIA and the SADC IA provide for robust and quality normative 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 foreign investment standards?

- Given the similarity in the ASEAN and SADC investment coexistence frameworks, do MS FILs comparably affect the applicability and effectiveness of the ACIA and SADC IA? If not, what are the theoretical justifications underlying such a contradiction?

2. METHODOLOGY AND RESEARCH JUSTIFICATION

This is a comparative study. It uses ASEAN and SADC as case studies. It first analyses the relationship between ASEAN MS FILs and the ACIA. It especially analyses the way foreign investment rules of Cambodia, Indonesia, Malaysia, Thailand, Philippines, Vietnam, Myanmar, Brunei, Laos and Singapore relate to and affect the applicability and effectiveness of the ACIA. To do so, the study confronts each ASEAN country's investment law with the ACIA to determine whether the treaty remains applicable.

It then moves to analyse the relationship between SADC MS FILs and SADC IA. It replicates the same analytical framework and analyses the way individual foreign investment laws of Congo, Zimbabwe and South Africa relate and affect the applicability of the SADC IA. The SADC encompasses more than three countries. However, it is futile to elaborate on more countries since Congo, Zimbabwe and South Africa show perfect illustrations of an asymmetrical coexistence of investment laws with respect to the SADC IA.

A conclusion brings the ASEAN and SADC situations together and draws the conditions for a successful investment coexistence framework.

Three main "self-executing" provisions are employed as criteria to determine RIA's applicability: (i) the scope of application (definitions of investment and investor), (ii) the provision of a fair and equitable treatment (FET) standard and (iii) the inclusion of an investor-State dispute settlement (ISDS) clause. This study considers that a RIA is applicable and effective when it contains either quality or exclusive foreign investment protection standards or both. One talks about exclusive provisions when only the RIA – and not MS FILs – provides for a wide scope of application, FET and ISDS clauses. On the other hand, a RIA is considered to have quality provisions when both the RIA and MS FILs contain protection norms, but the RIA's offer a better protection, thereby rendering its norms applicable and effective.

The analytical framework consists of confronting these RIA's standards with the standards contained in MS FILs to determine the instrument that provides for quality provisions. When it is the RIA that contains a wide scope of application, FET and ISDS clauses; the RIA is considered applicable and effective. In this case, the coexistence framework between the RIA and MS FILs is successful as it allows to harmonise foreign investment policies and laws, and further deep integration of the region. Conversely, when it is rather the MS FIL that contains a wide scope of application, FET and ISDS clauses, the RIA is not applicable and effective. In this case, the MS FIL undermines the harmonisation effect, the applicability and effectiveness of the RIA as well as the potential to meet common market objectives of the region.

Contrary to the EU, the ASEAN and SADC integration projects accept the coexistence of both the RIA and MS FILs. This is because they remain based on the principle of national sovereignty and lack detailed provisions on the interaction between regional integration law and domestic law. As mentioned before, this contributes to the confusion on the supremacy of community integration law over domestic law. Also, rules on the reception of regional integration law are not clearly defined to depart them from the rules of general international law. The ACIA and SADC IA bring together not the international and domestic legal orders but rather the domestic and community legal orders. Rules on general international law do not apply as the relationship between the ACIA,

SADC IA and their respective MS FILs rather puts in motion the community/regional legal order with the domestic legal order.

The above indicates that this study uses a functionalist method of comparative law[27]. Countries are selected based on the existence of legislation or statute that comprehensively regulates foreign investment. It also accounts for 'State-centralism[28]' since it considers the law by sovereign States and focuses entirely on investment laws and investment agreements fashioned by States and State groupings, in particular ASEAN and SADC.

When considering regional integration around the world, the experience of the EU is a recurrent point of reference[29]. It is by any standard – even imperfectly – the most achieved regional integration project. Despite that, the EU will be of little relevance in this study (see section 1 of Chapter 1 in Part I). The model of community law on foreign investment of the EU has no counterpart. It stands for a unifying approach that leaves no room for competing domestic or international norms. Most importantly, in the EU, there is no community investment treaty such as the ACIA and SADC IA. The TFEU rather includes the investment policy competence (article 207) in the exclusive EU common trade policy. Furthermore, like Japan[30], EU MS are OECD countries and have no specific legislation comprehensively regulating foreign investment. Given

[27] For more details on functionalism in comparative law, see RALF MICHAELS, 'The Functionalist Method of Comparative Law' pp. 339–382 in MATHIAS REIMANN and REINHARD ZIMMERMANN (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006)
[28] cf TWINING (n 20) 115
[29] B. Hettne indicates that most theories of regionalism are based on the European experience since there was little regionalism elsewhere to draw on. See BJÖRN HETTNE, 'The New Regionalism Revisited' in FREDRIK SÖDERBAUM and TIMOTHY SHAW (eds), *Theories of New Regionalism* (Palgrave Macmillan 2003) 27; PIERRE PECASTORE, *The Law of Integration. Emergence of a New Phenomenon in International Relations, based on the Experience of the European Communities* (A.W. Sijthoff – Leiden 1974) 91, 96-97, 107; STEPHEN WEATHERILL, *Law and Integration in the European Union* (Oxford University Press 1995) 97-107
[30] SHOTARO HAMAMOTO and LUKE NOTTAGE, 'Foreign Investment in and Out of Japan: Economic Backdrop, Domestic Law, and International Treat-Based Investor-State Dispute Resolution' (2010) 10/145 Sydney Law School Research Paper 14

that issues under analysis arise from the relationship between a RIA and MS FILs; the EU is, therefore[31] of limited relevance for this study[32].

The *raison d'être* of choosing ASEAN and SADC lies in the fact that they are suitable for comparative studies. They consist of a horizontal model operating in a context in which adherence to notions of national sovereignty is stronger[33]. Also, they are important from the perspective of developing Nations and share a similar coexistence framework.

The study uses case law where available, applicable and necessary.

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[31] Many scholars agree that the EU integration model is *sui generis* and thus of only limited value as a reference for other integration projects. cf JOHN IKENBERRY, 'East Asia and Liberal International Order: Hegemony, Balance, and Consent in the Shaping of East Asian Regional Order' in JOHN IKENBERRY, YOSHINOBU YAMAMOTO and KUMIKO HABA (eds), *The Regional Integration in Asia and Europe: Theoretical and Institutional Comparative Studies and Analysis* (Nakanishi Printing 2011) 19; FRASER CAMERON, 'The European Integration Model – What Relevance for Asia?' in JOHN IKENBERRY, YOSHINOBU YAMAMOTO and KUMIKO HABA (eds), *The Regional Integration in Asia and Europe: Theoretical and Institutional Comparative Studies and Analysis* (Nakanishi Printing 2011) 45-46; YOSHINOBU YAMAMOTO, 'Regional Integration, Regional Institutions, and National Politics: A Theoretical and Empirical Examination of Regional Integration in Asia and Europe' in JOHN IKENBERRY, YOSHINOBU YAMAMOTO and KUMIKO HABA (eds), *The Regional Integration in Asia and Europe: Theoretical and Institutional Comparative Studies and Analysis* (Nakanishi Printing 2011) 50; JOHANNES DÔVELING, HAMUDI MAJAMBA, RICHARD OPPONG and ULRIKE WANITZEK (eds), *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities* (Law Africa Publishing 2018)

[32] The Treaty of Lisbon includes the investment policy competence in the exclusive EU common trade policy. Most academic debate concerns this EU competence in foreign investment; the issue over intra-EU BITs as well as the new 'Investment Court System' introduced in recent investment and trade agreements with Canada (EU–Canada Comprehensive Economic and Trade Agreement 2014), Singapore (EU–Singapore Investment Protection Agreement 2019), Vietnam (EU- Vietnam Investment Protection Agreement 2019), and Mexico (revised EU–Mexico Global Agreement 2018). See ANGELOS DIMOPOULOS, *EU Foreign Investment Law* (Oxford University Press 2011); RUMIANA YOTOVA, 'The New EU Competence in Foreign Direct Investment and intra-EU investment Treaties: Does the Emperor Have New Clothes?' in FREYA BAETENS, (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013).
See also, THOMAS HENQUET, 'International Investment and the European Union: an Uneasy Relationship' in FREYA BAETENS, (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013); FRIEDL WEISS and SILKE STEINER, 'The Investment Regime under Article 207 of the TFEU – a Legal Conundrum: the Scope of 'Foreign Direct Investment' and the Future of intra-EU BITS' in FREYA BAETENS, (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013)

[33] JAMES THUO GATHII, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press 2011) xxxii

3. LITERATURE REVIEW AND RESEARCH ORIGINALITY

This study builds upon the growing literature in international investment law; ASEAN and SADC studies that fail to address the central question under analysis. The reason behind such little attention in the existing literature is because the phenomenon under analysis is itself new[34].

First, from the perspective of the legal order theory, there exist the international, domestic and community legal orders. This study is among the first of its kind to bring together the domestic and community legal orders. In international investment law, most scholarship elaborates on the complex relationships between bilateral investment treaties (BITs) and RIAs – all being treaties. They address the coordination issues arising from the *spaghetti/noodle bowl* effect. Other scholars acknowledge the role of domestic (investment) laws in investment treaty arbitration, therefore bringing together international and domestic legal orders as interconnected orders. Although existing scholarship draws attention to the relationships between international and domestic law, it overlooks other ways in which investment law can interact with other legal orders, chiefly, community law. This study is among the first of its kind to showcase new issues arising from the relationship (coexistence) between RIAs (community legal order) and MS FILs (domestic legal orders). It is at the epicentre of the emergence of a community law on foreign investment.

Secondly, this study will add to the growing legal literature on ASEAN integration studies, especially J. Chaisse and S. Jusoh chef-d'oeuvre on the ACIA and the regionalisation of investment laws in ASEAN[35]. The comparison with the SADC highlights the developing countries' perspective, showcases ASEAN's achievements and presents it – even imperfectly – as one of the RECs with the most harmonious investment coexistence framework. Also, this study puts the most debated investment regime of the EU in a wider picture that includes the ASEAN and SADC and consolidates the idea of the emergence of a community law on foreign investment.

[34] As mentioned before, the contemporary trend started in 2006 following the adoption within SADC of the first SADC IA which was repealed and replaced by the current SADC IA (2016). ASEAN adopted the ACIA in 2009 followed by ECOWAS with the SARI the same year. In the EU, the TFEU was adopted in 2007 and became effective in 2009. The MERCOSUR adopted the CFIP in 2017.

[35] CHAISSE and JUSOH (n 21)

The following development presents this literature review in detail. It first presents the literature review in international investment law. It then turns to specific ASEAN and SADC-related literature.

Most scholarships put much attention on the relationship between BITs and RIAs formed in a *spaghetti/noodle bowl* effect. The reason behind this focus is because these investment agreements have sparked hundreds of investor-State claims and generated a surfeit of commentary and debate[36]. This perspective emphasises the international law order as it exclusively draws attention to the relationships between BITs and RIAs, all treaties, in a sort of investment treaty network. A. Reich for instance highlights the principle of subsidiary as the normative criterion and explanatory tool concerning the multiplicity and coexistence of treaties[37], and W. Alschner[38] suggests

[36] JARROD HEPBURN, 'Domestic Investment Statutes in International Law' (2018) The American Society of International Law 658

[37] A. Reich sets the problem in a broader picture covering international economic law in general in an effort to nuance Baghwati's conclusion that the new bilateralism and regionalism often result in only modest reduction of mutual trade barriers and cause more trade diversion rather than trade creation. The author suggests that bilateralism and regionalism is becoming the rule, and multilateralism an exception in most areas of international economic regulation, including international investment law. Furthermore, it is pointed out that the normative criterion and explanatory tool in relation to the multiplicity and coexistence of treaties is the principle of subsidiary. It is a principle which consists in the allocation of power and authority to the level where the needs of the parties can be the most met. By applying this principle in the same way it is applied in federalism, BITs, PTIAs and RIAs may serve as important building blocks for a better functioning of a multilateral system. See ARIE REICH, 'Bilateralism versus Multilateralism in International Economic Law: Applying the Principles of Subsidiary' (2010) 60 University of Toronto Law Journal.

[38] W. Alschner notes that four treaties are the maximum overlap per country in his dataset. For this author, the treaty overlap is relatively a recent phenomenon in investment law. However, overlapping bilateral and regional treaties have been commonplace in international trade law throughout history. Treaty overlap is mirrored in trade law. This author supports that treaty parallelism is not a problem *per se* as long as the *spaghetti bowl* of overlapping agreements is properly managed. It is submitted that in a situation of increased overlap, international trade law demonstrates that overlapping layers of treaties can coexist without undermining one another. The author notes that only few States use regionalism to *de jure* or *de facto* consolidate their investment treaty network. Mostly, countries make the option of parallel bilateral and regional treaty layers, leading to the fact that they may duplicate or contradict each other increasing the risk of parallel proceedings, double jeopardy and normative conflict. It is mentioned opportunities and challenges of the current turn towards regionalisation of investment protection. On the one hand, regionalism can help consolidate and reduce treaties' complexities by replacing several BITs with one regional investment agreement. On the other hand, it may exacerbate existing problems, leading to a multiplication of treaty layers. As observed to date, regionalism is towards adding to rather replacing existing investment obligations making the network more complex for States as well as investors. Based on State's practice in Africa, Middle East and Central Asia, South and East Asia, and the Americas, approaches towards regionalisation differ not only between States, but also within one country's treaty network. Coexistence of parallel investment treaties may be a result of both rational choice and bounded rationality. Rational choice appears when a treaty sets a minimum standard of investment protection as a reference for existing or future treaties. In this case, parallelism and differentiation rather than consolidation are necessary. Bounded rationality appears as countries underestimate the costs and overestimate the benefits of overlapping treaty layers. In this case, there is room for consolidation. See ALSCHNER (n 3); WOLFGANG ALSCHNER, 'Duplicating the Trade Law 'Spaghetti Bowl'? Increasing Regionalization and Overlap of Investment Treaties: A Review of State Practice' in PHOTINI PAZARTZIS and MARIA GAVOUNELI (eds), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Hart Publishing

mirroring investment treaty overlap in trade law[39]. Guided by the same surfeit of debate generated over the implosion of investor-State claims; other scholars examine international and domestic legal orders as interconnected orders. Despite the significance of FILs for the international investment regime, they have received remarkably little attention[40]. This perspective advances the

2016). See also, WTO, 'World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence' (Geneva: WTO, 2011).

[39] Other scholars elaborate on the commonalities and solutions mainly from international trade law to determine the hybrid foundations of international investment law and the investment arbitration. Since its origins, investment treaty law is viewed with hybrid lenses. Juillard notes that the investor is subject to host State's domestic law but enjoys in the main time rights from conventional treaties it is not party to. Z. Douglas describes investment treaty arbitration as a *sui generis* system that grafts private international law dispute resolution mechanisms onto public international law. This system is described as a hybrid system that draws its features from different competing fields of law. No one says this better than A. Roberts with her paradigm shifts of the investment treaty system. For this author, the investment treaty arbitration system comprises elements of public international law, international commercial arbitration, domestic public law, international trade law, human rights law, and third-party beneficiary doctrine. Most scholarship has been encouraged by the fact that the field is 'new and under-theorized to borrow from related fields to fill gaps, resolve ambiguities or understand the system's nature as the international investment law was going through an adolescent crisis. The public international law paradigm focuses attention on the treaty system basis, thereby putting the treaty parties in a position of relative superiority with investors who are not treaty parties, and investment tribunals that are presented as agents of the treaty parties. Investors are granted the right that the internal law which will govern their investments is compatible with international standards. In contrast, from the commercial arbitration paradigm, presenting the parties as equal disputants has the consequence of downgrading the significance of the State, when upgrading the one of the investor. Illustratively, Jarrod Hepburn paraphrases Roberts' paradigms shifts in investment dispute settlement in the following terms: the public law paradigm to favour admission of *amicus curiae* briefs, while the international commercial paradigm to view it as an intrusion into a confidential dispute between two equal parties to a dispute. The third-party beneficiary paradigm imposes constraints on modalities of amendment or termination of investment treaties, when the public international law can barely permit it. Human rights paradigm posits for States, even if successful, to bear their own legal costs, while for the international commercial arbitration paradigm, the losing party should bear all the parties' costs, and for the public international law paradigm to disfavour any cost-shifting at all. cf PATRICK JUILLARD, 'L'évolution des Sources du Droit des Investissements' in HAGUE ACADEMY OF INTERNATIONAL LAW (ed), *Collected Courses of the the Hague Academy of International Law* (Martinus Nijhoff 1994); ZACHARY DOUGLAS, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) British Yearbook of International Law, Volume 74, Issue 1, 151–289; ZACHARY DOUGLAS, *The International Law of Investment Claims* (Cambridge University Press 2009); ANTHEA ROBERTS, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL; BRIGITTE STERN, 'The Future of International Investment Law: A Balance between the Protection of Investors and the States' Capacity to Regulate' in JOSE ALVAREZ and KARL SAUVANT (eds), *The Evolving International Investment Regime Expectations, Realities, Options* (Oxford University Press 2011); JARROD HEPBURN, 'Domestic Investment Statutes in International Law' (2018) The American Society of International Law

[40] JARROD HEPBURN, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017) 4 P. Juillard notes that the narrative that internal law could never offer sufficient protection to investments dominated the milieu of investment treaty making in capital-exporting countries. While capital-importing countries entered into investment treaties based on the belief that this would increase foreign investment; for FDI-exporting countries it was mostly to ensure the protection of their investors and investments. Capital-exporting States viewed domestic law mostly bearing two original sins: as legal frameworks fundamentally from domestic origins, they are susceptible of unilateral modification or termination; and because it was a developing country's law, it could not sufficiently protect property rights. Juillard qualifies it as a double suspicion at the origin of the implosion of the BIT phenomenon. Treaties grant investors the right for the internal law to be compatible with international treaty standards; however, the contents of host States' obligations are often not specifically clarified. Arbitral tribunals' efforts to clarify investment treaty obligations and the States' attempt to 'recalibrate the specificity of treaty commitments' brought to light the relationship between investment treaties and domestic laws within the investment

role of domestic law in investment treaty arbitration[41]; the impact of investment treaty regimes[42] on domestic law[43]; and attempts to determine the nature of laws on foreign investment in general

treaty arbitration system. cf JESWALD SALACUSE and NICHOLAS SULLIVAN, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain' (2005) 46 HARV. INT'L L.J. 77-78; JUILLARD (n 39); ROBERTS (n 39).

[41] J. Hepburn builds its framework of positive models of domestic law reasoning upon the taxonomy of errors displayed by arbitral tribunals. Different cases underline failure to appreciate the role of domestic law, failure to investigate and engage with available domestic law sources, unreasoned assertions of legality, and reliance on improper sources. The author advocates for arbitral tribunals to follow the principle in *Brazilian loans* case, which, based on the *iura novit curia* obligation, discovered and applied domestic law in its full domestic context. In this view, tribunals must hold investors to comply with all the law of the host State and make an effort to apply domestic law as it would be applied in its home environment. In this vein, Stephen suggests as well that to determine whether a host sovereign behaved in an arbitrary or discriminatory fashion, one must know how it normally behaves. If its conduct, however injurious, corresponds to its well-established past practice, applicable to nationals as much as to foreigners, the case for finding a violation diminishes. Before resorting to this conclusion, the author first identified domestic law issues in investment arbitration. Hepburn sets out a framework for the application of domestic law as law, not fact. The author challenges the under-appreciated reference to the role of domestic law in investment treaty arbitration in three issues. In respect to the determination of the FET standard, the author highlights the contributory role of domestic law illegality for arbitrariness. The existence in a treaty of a relevant domestic law to be complied with shows is the exact role of domestic law in the due process analysis in respect to the analysis of expropriation claims. Compliance with domestic law in remedies determinations is presented as a third illustration of increasing recognition of domestic law in investment arbitration. At the stage of remedies, the monetary remedy is said to be higher when a State breaches its internal law in taking the expropriation measures. Moreover, when a respondent State raises counterclaims, the domestic legality of the investor's conduct becomes at issue, rather than compliance of the respondent conduct to international standards of expropriation.

[42] Depending on one aspect or another, developments are made to view the way arbitral tribunals address issues of international public policy, such as corruption, human development, armed conflicts-related, human rights, trade and sustainable development. cf FREYA BAETENS (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013); FLORIAN HAUGENEDER, 'Corruption in Investor-State Arbitration' (2009) The Journal of World Investment & Trade, 10 (3) vii-339; JASON YACKEE, 'Investment Treaties and Investor Corruption: an Emerging Defense for Host States? <https://www.iisd.org/itn/en/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-defense-for-host-states/> accessed 5 May 2021; ANDREW BULOVSKY, 'Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development' (2019) 118 MICH. L. REV. 117; OLIVIER DE SCHUTTER, JOHAN SWINNEN, and JAN WOUTERS (eds), *Foreign Direct Investment and Human Development: the Law and Economics of International Investment Agreements* (Routledge 2013)

[43] R. Dolzer notes that the enforcement of investment treaties by arbitral tribunals requires a review of host State's domestic law. His study suggests that treaty substantive guarantees constitute a corollary of reduced sovereignty. Investment treaties specify legal obligations that host States have regarding foreign investors. Those duties emanate from treaty language, and thus rest on international law, but at the same time, they refer to the content of municipal law. Investment protection standards essentially apply to all economic activities of foreign investors and are developed in a way that affects virtually all areas of administrative law, ranging from tax law to bankruptcy issues, from the law of governmental immunity to export rules and, in particular, the requirement of permit processes. The appropriate time for filing an appeal, the process of determining a relevant fact and the judicial administration of justice in general have all been subject to review by this growing jurisprudence, creating an emerging body of international rules of administrative law. Based on awards from indirect expropriation, umbrella clause, legitimate expectation, or FET claims, Dolzer shows that the right of the host State to regulate is formatted under significant restrictions. This is not the case only for economic regulations, but also in such domains as environmental, tax, and even labour law. These restrictions are reinforced by vagueness in treaty formulations, and uncertainties following their application by arbitral tribunals. Nevertheless, the path towards the conclusion of investment treaties remains the passport to the global competition for hosting foreign investments. This is true in both developed and developing countries. In the former especially, the debate tends to shift from sovereignty to competition for foreign capital and technology transfer. Investment treaties and their contested application provide a powerful incentive to

international law[44]. J. Hepburn for instance builds a case against a taxonomy of errors displayed by arbitral tribunals and suggests that tribunals must hold investors to comply with all the laws of

review and modernise domestic legal systems; whose enhancement amounts to major ingredients of good governance necessary to promote economic growth and reduce poverty. It is worth mentioning that the Treaty of Paris (1783) – that ended the Revolutionary War – is one of earliest modern attempts to reassure foreign investors and their home States. It contained strong commitments by the U.S to honour the property and contract rights of British subjects. It did not specify a dispute settlement mechanism; that came later with the Jay Treaty, signed in 1794 and ratified in 1795. Rather than waiting for a new treaty to create the institutions that would reassure foreign investors, the U.S reformed its municipal legal institutions. Its 1789 Constitution created the federal courts, a new body that would operate free of local prejudices that disfavoured foreigners. See, RUDOLF DOLZER, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2006) NYUJ Int'l. L. & Pol. See also, PATRICK DUMBERRY, *Fair and Equitable Treatment: Its Interaction with the Minimum Standard and its Customary Status* (Brill Nijhoff 2019); ROLAND KLÄGER, *Fair and Equitable Treatment' in International Investment Law* (Cambridge University Press 2011); TEERAWAT WONGKAEW, *Protection of Legitimate Expectations in Investment Treaty Arbitration: a Theory of Detrimental Reliance* (Cambridge University Press 2019). ORTINO FEDERICO, 'The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come? (2018) Journal of International Economic Law 4; MICHEL POTESTA, 'The Doctrine of Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of a Controversial Concept' (2013) ICSID Review – Foreign Investment Law Journal 28, no. 1: 88 – 122; RUMANA ISLAM, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration. Developing Countries in Context* (Springer 2018); ROBERT THOMAS, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing 2000)

[44] P. Stephen notes that investment treaty arbitration has the effect of being either a substitute or complement to domestic law. His analysis uses the *Yukos* dispute. Through the lens of this case, it demonstrates that the substitution effect may result in the withering of domestic judicial review, whereas complementarity may strengthen both means of holding a government accountable to the law. See, PAUL STEPHAN, 'International Investment law and Municipal Law: Substitutes or Complements? (2014) Capital Markets Law Journal. J. Hepburn acknowledges that it is a fact that the proliferation of domestic investment laws remains unabated. Although in existence since the 1960s, the bulk of claims from both investment laws and investment treaties are noted to arise at around the same time in the 2000s. In spite of their similarities, domestic investment laws are not treaties. They have a two-fold purpose: to encourage foreign investment, and to maintain control over it. States maintain the pace towards adopting rules and regulations on foreign investment in tandem with investment treaties. Nevertheless, because domestic investment laws offer protections similar to investment treaties and they are increasingly applied in investor-state arbitration, it is urgent to understand them as States continue to adopt them as alternatives to lay siege to investment treaties. In this study, the author reveals the hybrid characterisation of domestic investment laws from the perspective of public international law as they imply interaction and allocation of authority between domestic and international law. From arbitral awards, Hepburn approaches domestic investment laws with two conceptual characterisations followed by a variety of consequences: either unilateral act under public international law or ordinary domestic law. As a unilateral act, domestic investment laws inform unilaterally assumed obligations in international law towards investors. Tribunals have taken this approach in reviewing domestic investment laws' consent clauses. It is noted that treating domestic investment laws as acts of public international law restrain rules on their termination. Conversely, in treating them as domestic instruments States retain control over their interpretation and termination, which arbitral tribunals must apply faithfully. Moreover, unlike the unilateral act framing, customary international law defense of necessity does not apply to domestic investment laws as ordinary legislative act. In addition, compensation awards appear to be higher under unilateral act characterization as compared to when arbitral tribunals construed domestic investment laws as ordinary domestic instruments. See, HEPBURN (n 36) See also, MAKANE M. MBENGUE, 'National Legislation and Unilateral Acts'in TARCISIO GAZZINI and ERIC DE BRABANDÈRE (eds), *The Sources of Rights and Obligations in Transnational Investment Law* (Martinus Nijhoff 2012) 183-213; MICHELE POTESTÀ, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' (2011) 27 ARB. INT'L; MICHAEL WAIBEL and MARKUS BURGSTALLER, 'Investment Codes' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011); YULIA ANDREEVA, 'Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions' (2011) 27 ARB. INT'L; DAVID CARON, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts under International Law' in MAHNOUSH ARSANJANI and

the host State and try to apply domestic law as it would be applied in its home environment. L. Johnson and O. Volkov advocate for the legitimacy of arbitral awards in matters requiring a balance between private rights and public interest. Given that investment treaties endow foreign investors with rights beyond what they would enjoy solely under U.S law; arbitral tribunals should consider the doctrine of *unmistakability* on whether and when to hold the State liable for measures of general applicability that detrimentally impact investor-State contractual relationships[45].

From the above, it appears that there are two perspectives in the existing literature. The first perspective broadly addresses investment treaties, especially the way to coordinate them. The second perspective concerns the relations between domestic law and investment treaties bringing together international and domestic legal orders.

In ASEAN, scholars mostly address ASEAN studies in broader terms – including trade and investment altogether – and the way they promote regionalism in ASEAN[46]. The book reference

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OTHERS (eds), *Looking to the Future*: *Essays on International Law in Honor of W. Michael Reisman* (Brill Nijhoff 2011)

[45] L. Johnson and O. Volkov evaluate whether arbitral tribunals grant investors substantive rights that go beyond what they enjoy under domestic law. They use the gap between investment treaty protections and domestic law standards under the law of the United States of America. This study concludes that investment treaties are effectively providing foreign investors with a greater set of substantive rights than they would enjoy solely under U.S law, and that such an expanded set of treaty rights raises significant policy concerns on State liability, and the resulting balance of public and private interests that they strike. The authors advocate for an analytical framework based on analogy and inspired from the U.S doctrine of *unmistakability*. The same the domestic legal systems grapple with issues and tensions between private rights and sovereign powers; the same tribunals should draw from them on whether and when to hold State liable for measures of general applicability that detrimentally impact investor-State contractual relationships. The authors build on this analytical framework to prevent concerns about the legitimacy of arbitral awards. cf LISE JOHNSON and OLEKSANDR VOLKOV, 'Investor-State Contracts, Host-State 'Commitments' and the Myth of Stability in International Law' (2014) The American Review of International Arbitration Volume 24, No 3, 361-415; LISE JOHNSON, 'How Protections under International Investment Law Expand Investors' Rights and States' Potential Liabilities as Compared to US Law' (2014) Columbia Center on Sustainable Investment; MAVLUDA SATTOROVA, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart Publishing 2018).

[46] See, PAKITTAH NIPAWAN, 'Legal Pluralism in ASEAN Investment Law: Will a Dynamic Regionalisation Induce More Legal Certainty? in MAURIZO ARCARI and LOUIS BALMOND (eds), *Judicial Dialogue in the International Legal Order: Between Pluralism and Legal Certainty* (Editoriale Scientifica 2014); DIANE DESIERTO, 'Monitoring and Implementing AEC Investment Policy in ASEAN's Regional Treaties (2018) USAID; JULIEN CHAISE, TOMOKO ISHIKAWA, and SUFIAN JUSOH (ed), *Asia's Changing International Investment Regime: Sustainability, Regionalization and Arbitration* (Springer 2017); PASHA HSIEH and BRYAN MERCURO, *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms* (Cambridge University Press 2019); SAADIA PEKKANEN, 'Investment Regionalism in Asia: New Directions in Law and Policy?' (2012) World Trade Review, 119-154; ASEAN Briefing Magazine, 'ASEAN's FTAs and Opportunities for Foreign Businesses' (2017) <https://www.aseanbriefing.com/news/2017/12/07/aseans-free-trade-agreements-an-overview.html> accessed 15 June 2020. See also, CHAISSE and JUSOH (N 21).

by J. Chaisse and S. Jusoh[47] also coins trade and investment altogether. The particularity of this study is to be specific to foreign investment matters. In SADC literature, it will be among the rare works to highlight legal deficiencies between MS FILs and the SADC IA[48]. It will extend to foreign investment matters F. Oppong's conclusion that effective economic integration is about properly structuring and well-defined legal frameworks and less about socio-economic, political and infrastructural challenges[49].

Considering the above, this research examines a topic which, to the best of my knowledge, no previous work in book or article form has attempted to do. Some reasons can be advanced for this. As mentioned before, the phenomenon of coexistence arising from the relationship between RIAs and MS FILs within RECs is new. Also, given that the EU is the reference in integration studies; because these issues have yet to emerge in it, they have received little attention arising in regions where it is already known that integration is failing.

4. RESEARCH STRUCTURE

This study is divided into two Part I and Part II along with a Preliminary Part bearing theoretical considerations. It starts with an introduction and ends with a conclusion. It is organised as follows:

The Preliminary Part indicates the state of the art of the debate on the relationship between domestic and community investment law. It is divided into two chapters. It presents trilateral

[47] J. Chaise and S. Jusoh present a legal analysis of the ACIA's substantive provisions while describing the layer of national policies, rules on admission, liberalisation, and the role of promotion agencies. The book analyses the scope of the agreement, the principle of non-discrimination, the standards of protection and other substantive rules including the balance of payment, transparency, and so forth. Beyond these investment aspects, the authors comprehensively present the relationship between the ACIA and ASEAN Agreement in Trade in Goods (ATIGA) and ASEAN Framework Agreement on Trade in Services (AFAS) in the promotion of regional integration within ASEAN. They suggest that collective commitment to a common standard of the ACIA contributes to the regionalisation of investment laws and policy and allows the ASEAN to project itself as a key investment destination. Moreover, it helps depoliticise any potential conflict between individual investors and host States, making the ACIA particularly crucial to discussions involving ASEAN MS and between ASEAN and Dialogue Partners. The ACIA is projected in the wider global trend in relation with the RCEP, CJK trilateral investment agreement, TPP as well as other IIAs concluded by ASEAN Member States or the ASEAN itself. See, JULIEN CHAISSE and SUFIAN JUSOH, *The ASEAN Comprehensive Investment Agreement: The Regionalization of Laws and Policy on Foreign Investment* (Edward Elgar 2016)

[48] T. Ngobeni provides an attempt in this regard. His study is however limited to expropriation. See, TINYIKO NGOBENI, 'A Critical Analysis of the Security of Foreign Investments in the Southern African Development Community (SADC) Region' (2018) Ph.D dissertation, University of South Africa.

[49] RICHARD FRIMPONG OPPONG, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011)

perspectives on community law on foreign investment with regards to the EU, the ASEAN and the SADC; thereby highlighting different approaches towards foreign investment thereto. It stresses the idea of the emergence of community law on foreign investment. It advances that the EU pursues a unifying approach while coexistence is the approach in both ASEAN and SADC. This argument is fully developed in chapter I providing the general framework on the relations between domestic and community law on foreign investment. Chapter 2 briefly presents the theories employed in the study. It highlights the norm-based conceptual framework developed from the legal nom theory and the neo-functionalism in the EU integration context. It then associates it with the relational framework developed in the African Union (AU) integration context.

Part I discusses the ASEAN coexistence framework. It analyses the relationship between the ASEAN Comprehensive Investment Agreement (ACIA) and ASEAN Member States' laws on foreign investment. It is divided into four chapters.

Chapters 2 and 3 introduce the concept of norm distribution to ensure the functioning of a coexistence framework. The concept looks to ascertain the manner in which foreign investment norms are distributed between the treaty and domestic laws. This is crucial to establish the applicability and effectiveness of the treaty in a context of coexistence. Chapter 2 discusses substantive provisions of the ACIA and shows the exclusivity reserved to this treaty regarding foreign investment protection norms, thereby making it certain that any foreign investor seeking to protect its investments can only invoke and rely on the treaty. Nothing says this better than the provisions of the treaty, which provide for an asset-based definition of an investment, fair and equitable treatment and investment arbitration clauses. Chapter 3 consolidates this argument and brings to light the way ASEAN individual laws are calibrated to norms on foreign investment promotion and facilitation. Chapter 1 is an overview of ASEAN and ACIA. Chapter 4 concludes Part I of this study as it shows that the ASEAN coexistence framework is well functioning.

Part II examines the SADC coexistence framework as it analyses the relationship between the SADC Investment Agreement (SADC IA) and SADC Member States' laws on foreign investment. It is divided into four chapters. Chapter 2 goes throughout the SADC IA and draws attention to the poorer foreign investment protection standards. The treaty lacks both the FET and ISDS clauses. In addition, it provides for an enterprise-based definition of an investment. Nothing

shows this better than the idea to curl up and recognise only intra-SADC investors and investments in the treaty scope of application.

Chapter 3 builds upon this observation to lay bare the fact that the norm distribution is not well carried out between the treaty and domestic investment laws. It reveals contentious relationships between the SADC IA and investment laws of the Democratic Republic of Congo (Congo) and Zimbabwe. The Congo investments Code guarantees both the FET and ISDS along with a general consent clause. The Zimbabwe Investment Act provides for FET – although a qualified one – and offers ISDS upon agreement with the government. In addition, it provides for the most-favoured-nation clause (MFN). This situation makes it certain that a foreign investor alleging unfair or inequitable treatment in Congo or Zimbabwe will reasonably not invoke or rely on the treaty for the protection of its investment. As a consequence, it undermines the applicability and effectiveness of the SADC IA in both Congo and Zimbabwe. South Africa's alignment with the SADC IA confirms the asymmetrical coexistence as different laws on foreign investment provide for contradictory norms.

Chapter 1 presents a brief overview of the SADC and the SADC investment framework. Chapter 4 concludes Part II of this study and consolidates the argument that the ASEAN coexistence framework is a model from which one could draw lessons.

PRELIMINARY PART: THEORETICAL CONSIDERATIONS

This preliminary part is divided into two chapters. Chapter 1 presents the current state of the debate on and outlines the general framework on the relations between domestic and community investment regimes. Chapter 2 discusses the theoretical approaches employed in this study. It highlights the norm-based conceptual approach, the relational framework as well as neo-functionalism.

CHAPTER 1: GENERAL FRAMEWORK ON THE RELATIONSHIP BETWEEN DOMESTIC AND COMMUNITY INVESTMENT LAW

This chapter presents the current debate on the community investment regime. Given that there exist three legal orders (the domestic legal order, the community legal order and the international legal order); it is important to as well as show the interactions with both the domestic and international investment law. In this way, the first section points out the current state of the debate on the relationship between domestic and community investment law. This section relies upon community legal order's principles enshrined in the European Union (EU) legal framework. It draws on recent rulings by the Court of Justice of the European Union (CJEU) in *Achmea*[50] (2018), *Komstroy*[51] (2021) and *PL Holdings*[52] (2021). The next section briefly discusses the coordination approach in the relationship between treaties in international investment law. It is based on the coordination approach developed by W. Alschner to deal with increased overlap of investment treaties, as previously observed in international trade law. Finally, the third section briefly presents the generalities on the relationship between domestic and international investment law. It briefly discusses J. Hepburn's taxonomy of errors and highlights the little attention given to domestic law in investment arbitration. It so does by drawing on the development by Y. Iwasawa of the impact of the general international law in domestic law[53].

[50] Slovak Republic v. Achmea B.V. (Case C-284/16) EU:C:2018:158

[51] Republic of Moldova v. Komstroy LLC (Case C-741/19) EU:C:2021:655

[52] Republic of Poland v. PL Holdings Sarl (C-109/20) EU:C:2021:875

[53] Although this book is contextualised to the Japan legal system and human rights, Y. Iwasawa develops as well general principles guiding the relationship between international law and domestic law. See YUJI IWASAWA, *International Law, Human Rights, and Japanese Law: the Impact of International Law on Japanese Law* (Oxford University Press 1998)

Section 1 CURRENT DEBATE ON DOMESTIC AND COMMUNITY INVESTMENT LAW

This section first shows the emergence of the community legal order as it started with the EU integration project. It then turns to present the current state of the debate in international investment law on the relationship between domestic and community investment law.

1. Emergence of the Community Legal Order

The European integration project is the benchmark par excellence in regional integration studies. Even though imperfectly, it is closer to the stage of super-nationality[54] or supranationality, as described by Haas[55]. Since there was little regionalism elsewhere, many analytical concepts that are used for analysing integration processes largely derive from the European experience[56]. The treaties establishing the European Communities in 1957 – today EU – have created the 'community legal order[57]', a *sui generis* legal order distinct from domestic and international orders[58]. W. Diebold expresses it in clearer terms when he writes 'resemblance is not identity[59]'. The community is far from having the unity of a national state, and it is quite different from

[54] YAMAMOTO (n 31) 50

[55] ERNST HAAS, *The Uniting of Europe: Political, Social, and Economic Forces 1950 – 1957* (University of Notre Dame Press 2004) 526

[56] HETTNE (n 29) 27

[57] PECASTORE (n 29) 107

[58] D.J. GIJLSTRA and OTHERS, 'The Relationship between Community Law and National Law' in D.J. GIJLSTRA AND OTHERS, *Leading Cases and Materials on the Law of the European Communities* (Springer 1975) 97

[59] Community law and international law can sometimes be referred to as 'international law'. Phooko notes that there is no fundamental difference between community law and international law, as community legal order shares various characteristics with international law. Similarities between the two legal orders are also reflected in most Constitutions in provisions dealing with the reception of international law into internal legal systems. see RETSELISITSOE PHOOKO, 'The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law' (2018) PER/PELJ 6; RICHARD FRIMPONG OPPONG, 'Making Regional Economic Community Laws enforceable in National Legal Systems – Constitutional and Judicial Challenges' (2008) Monitoring Regional Integration in Southern Africa Yearbook 1 Moreover, at the international level, both legal orders recognise the sacrosanct principle *pacta sunt servanda* (VCLT, article 26), which applies interchangeably to international law and community law. In the direction of aforementioned W. Diebold and E. Haas, M. Hildebrant notes that supranational law differs from international law. For example, the reception of community-based norms is not affected in the same way as international law. Addressing it in the EU context, this author notes that supranationality is not merely law between MS as some legal instruments have direct effect for EU citizens, which is not upon MS' discretion or constitutional status. cf MIREILLE HILDEBRANT, 'International and Supranational Law' (2019) Law for Computer Scientists 5, 11 <https://lawforcomputerscientists.pubpub.org/pub/gpk4tqae> accessed 3 September 2020

organisations based solely on intergovernmental cooperation[60]. At the same time, it cannot be neatly ticketed as federal[61] even though its consequences are plainly federating in quality[62]. This supposes that there are three legal orders or 'spheres of laws', as described by Phooko: the international, the community (or regional), and the national (domestic) legal orders[63]. The existence of a community legal order has brought to light its relationship with domestic norms and the way they impact one another. The next section presents this interaction in the perspective of investment law.

2. Current debate on Domestic and Community Investment Law

The model of community law on foreign investment of the EU has no counterpart. In both the ASEAN and SADC, regional investment agreements (RIAs) are adopted as the general framework governing foreign investment. Despite their existence, MS continue to maintain or adopt new individual laws on foreign investment, thereby creating a framework where both the RIA and the foreign investment laws of the Member States (MS FILs) coexist and apply simultaneously. The applicability of the community investment rules does not *per se* exclude that of FILs. The same the ASEAN Comprehensive Investment Agreement (ACIA) is for example applicable in Indonesia; the same the 2007 law concerning investment enacted in Indonesia is as well applicable. Similarly, the same SADC Investment Agreement (SADC IA) is for instance applicable in South Africa; the same the 2015 protection of investment Act enacted is applicable in South Africa.

In the EU, however, the model is vertical and does not accept competing norms. The EU cannot permit a provision according to which a dispute concerning EU law may be removed from the judicial system of the EU to prevent the non-effectiveness of that law[64]. Since the entry into effect of the Treaty of Lisbon, the EU, pursuant to Article 207 of the TFEU, has exclusive competence as regards foreign direct investment (FDI). The autonomy of the EU law lies in the fact that it stems from an independent source of law, the EU treaties, and its primacy over the law of EU

[60] WILLIAM DIEBOLD, 'Theory and Practice of European Integration' (1959) World Politics 621
[61] *id.* 622
[62] HAAS (n 55) 527
[63] see PHOOKO (n 59) 16; HILDEBRANT (n 59) 12
[64] See Republic of Moldova v. Komstroy LLC (Case C-741/19) EU:C:2021:655 para 62

MS[65]. Depending on their relationship to the powers of the MS, the community's competences are subdivided into exclusive competences such as in FDI[66], and non-exclusive competences, again called shared, parallel or concurrent competences[67]. In addition, to consolidate the common market and based on the supplementary competence, the community can take appropriate measures if the treaty has not provided the necessary express or implied powers[68]. The preliminary ruling procedure ensures that EU law operates effectively and uniformly throughout the community to preserve the essential characteristics of the EU legal order[69] which operates completely independently from both international and domestic law[70].

This section first presents the unifying approach of the EU with regards to a multilateral investment agreement – the Energy Charter Treaty (ECT); and then turns to bilateral investment treaties (BIT).

1.1.EU Investment Regime and Multilateral Investment Agreement

Recently, in *Komstroy*, the CJEU upheld that the preservation of the autonomy and the genuine nature of the EU law preclude the arbitration obligations under the ECT from being imposed on EU MS as between themselves[71]. This ruling went extremely far to arouse controversy. It requires any arbitral tribunal seized with an ECT claim to interpret and apply EU law, because the ECT is itself an act of EU law in light of it being an international agreement concluded by the EU competent authority: the Council of the EU. In its quest to decide whether a contract for the supply

[65] *id*. Slovak Republic v. Achmea B.V. (Case C-284/16) EU:C:2018:158, para 32-37; Republic of Moldova v. Komstroy LLC (Case C-741/19) EU:C:2021:655 para 43

[66] Article 207, TFEU

[67] KOEN LENAERTS, PIET VAN NUFFEL and ROBERT BRAY (eds), *Constitutional Law of the European Union* (Max & Maxwell 1999) 95, 97-98
Since the entry into effect of the Treaty of Lisbon, the EU, pursuant to Article 207 of the TFEU, has exclusive competence as regards FDI, and as regards portfolio investments, it has shared competence. See, Republic of Moldova v. Komstroy LLC (Case C-741/19) EU:C:2021:655 para 26. See also, Opinion 2/15 (EU-Singapore Free Trade Agreement) 16 May 2017, EU:C:2017:376, para 82, 238, 243

[68] *id.* 94

[69] Article 267, TFEU

[70] LAURENS ANKERSMIT, 'Achmea: The beginning of the End for ISDS in and with Europe? (2018) IISD <https://www.iisd.org/itn/en/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/> accessed 03 November 2021

[71] Republic of Moldova v. Komstroy LLC (Case C-741/19) EU:C:2021:655 para 65

of electricity constitutes an investment under Article 1(6) and article 26(1) of the ECT[72], the Court stated:

> "The exercise of the EU's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one MS and another MS concerning EU law may be removed from the judicial system of the EU such that the full effectiveness of that law is not guaranteed"[73].

In a reference to the *Achmea* case[74], the Court continues that 'despite the multilateral nature of the international agreement of which it forms part, a provision such as Article 26 ECT 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[75]".

1.2.EU Investment Regime and Bilateral Investment Treaties

In the *Achmea* case, a landmark ruling, the CJEU analysed the relationship and compatibility between the EU investment regime and an intra-EU bilateral investment treaty (BIT). It ruled that that EU arbitrations based on the Energy Charter Treaty (ECT) violate EU law. The CJEU clearly states:

> "It should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently,

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[72] *id.* para 87
The judgement is as follows: "Article 1(6) and Article 26(1) of the Energy Charter Treaty, signed at Lisbon on 17 December 1994, approved on behalf of the European Communities by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997, must be interpreted as meaning that the acquisition, by an undertaking of a Contracting Party to that treaty, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, does not constitute an 'investment' within the meaning of those provisions".

[73] Republic of Moldova v. Komstroy LLC (Case C-741/19) EU:C:2021:655 para 62

[74] The Court notes:
"In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by MS. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the MS but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation". See, Slovak Republic v. Achmea B.V. (Case C-284/16) EU:C:2018:158, para 58

[75] Republic of Moldova v. Komstroy LLC (Case C-741/19) EU:C:2021:655 para 64

> the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the MS undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties"[76].

It continues that 'in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law[77]. In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all MS and to ensure judicial protection of the rights of individuals under that law'[78]. It then concludes that the arbitral tribunal established by the Netherlands – Slovakia BIT (1991) is not part of the judicial system of either the Netherlands or Slovakia. The features of investment arbitration under the 1991 BIT, especially the possibility to interpret EU law, the limited means of review of awards and the fact that this tribunal is not part of the EU judicial system make the CJEU decide:

> "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between the MS, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those MS may, in the event of a dispute concerning investments in the other MS, bring proceedings against the latter MS before an arbitral tribunal whose jurisdiction that MS has undertaken to accept[79]".

While coexistence between RIA and FILs is the principle in both ASEAN and SADC; the EU remains in a hierarchical system placing the community rules above MS'; therefore denying any possibility of coexistence between the EU investment rules and any MS' or even intra-BIT

[76] Slovak Republic v. Achmea B.V. (Case C-284/16) EU:C:2018:158, para 32; Republic of Moldova v. Komstroy LLC (Case C-741/19) EU:C:2021:655 para 42
[77] *id*. para 35
[78] *id*. para 36
[79] *id*. para 62

provisions. To assure unification and harmonisation, the EU law shall be the only applicable law in foreign investment matters within the EU.

Very recently, on 26 October 2021, the CJEU in *PL Holdings* renders invalid an EU MS' legislation which allows a MS to conclude an *ad hoc* arbitration agreement with an investor from another EU MS. It declared as follows:

> "Articles 267 and 344 TFEU must be interpreted as precluding national legislation which allows a MS to conclude an ad hoc arbitration agreement with an investor from another MS that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two MS and is invalid on the ground that it is contrary to those articles[80]".

In reference to *Achmea,* the Court considers that it does not make any difference to replace treaty arbitration with an *ad hoc* contract with a foreign investor allowing the pursuance of proceedings initiated based on the treaty arbitration. It, therefore, attaches the same consequences thereto and concludes that, consistent with articles 267 and 344 of the TFEU, such an *ad hoc* contract is invalid[81].

The likelihood for the CJEU to engage in such a preliminary ruling procedure is unlikely. As *Achmea* cast dark clouds over the future of ISDS in the EU, the EU Commission has taken precautions in recently negotiated agreements such as the Comprehensive Economic and Trade Agreement (CETA) with Canada[82]. As a consequence, the compatibility of the investment court system (ICS)[83] with EU law, especially the principle of autonomy of the EU legal order, has been

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[80] Republic of Poland v. PL Holdings Sarl (C-109/20) EU:C:2021:875 para 70

[81] See also, Slovak Republic v. Achmea B.V. (Case C-284/16) EU:C:2018:158, para 35

[82] ANKERSMIT (n 70)

[83] The Investment Court System is an investor-State dispute resolution mechanism, which constitutes a significant departure from the long-standing investor-State dispute settlement (ISDS) model of party-appointed arbitrators. It institutes permanent and institutionalised investment courts. ICS are provided for by recent investment treaties concluded between the European Union (EU) and third States, such as the agreements with Singapore, Vietnam or Mexico: EU–Singapore Investment Protection Agreement 2019, EU- Vietnam Investment Protection Agreement 2019, and Revised EU–Mexico Global Agreement 2018. It provides for the creation of a permanent first instance tribunal and an appellate tribunal drawn from a pre-selected roster of tribunal members. See DIMOPOULOS (n 32); LUCY WINNINGTON-INGRAM and JIN WOO KIM, 'Investment Court System under EU Trade and Investment Agreements: Enforcement Issues' (2021) <https://www.reedsmith.com/en/perspectives/2021/03/investment-court-

confirmed by the CJEU[84]. L. Ankeersmit notes that CETA Article 8.31 contains several provisions that aim to ensure that investment tribunals under CETA will not interpret EU law[85].

The above shows trilateral perspectives on community law on foreign investment: EU, ASEAN and SADC. The EU pursues a unifying approach[86] compatible with community principles as enshrined in its founding treaties. Its community regime is considered an integral part of the legal order applicable in the territory of each EU MS; it is superior to and has the ability to invalidate a contradictory international[87] and domestic regime[88]. The ASEAN and SADC, on the other hand, prefer the coexisting approach which brings altogether domestic and community investment rules into stiff competition. This study is a comparison between these two coexisting approaches.

Section 2 COORDINATION APPROACH IN THE RELATIONSHIP BETWEEN TREATIES IN INTERNATIONAL INVESTMENT LAW

Some countries differentiate between types of treaties. The Constitution of Japan, for instance, organises a difference between treaties and executive agreements[89]. The term 'treaties' is often used to exclusively refer to agreements that are approved by the Diet; however, under international law, both executive agreements and treaties are treaties under the Vienna Convention on the Law of Treaties (VCLT)[90]. In order to smoothly manage foreign affairs, constitutions around the world recognise to the executive organ the power to conclude international 'executive' agreements without the approval of the legislative body. In Japan, for instance, three categories of international

system-under-eu-trade-and-investment-agreements>; GUILLAUME CROISANT, 'Investment Court System' (2021) <https://jusmundi.com/en/document/wiki/en-investment-court-system> accessed 03 November 2021

[84] See, Opinion 1/17 (EU-Canada Comprehensive Economic and Trade Agreement) 30 April 2019, EU:C:2019:341

[85] ANKERSMIT (n 70); see also, LAURENS ANKERSMIT, 'The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System' (2016) Journal for European Environmental and Planning 13(1) 46-63

[86] Although the EU is the most advanced model in regional integration studies, it will not be of much relevance in this study. Its unifying approach is unique and different from the coexisting approach adopted in both ASEAN and SADC.

[87] The ability of the EU, a party to a multilateral agreement, to unilaterally consider that some obligations under the ECT shall not be imposed on EU MS, also contracting parties to the ECT, is controversial in Public International Law.

[88] STEPHEN WEATHERILL, *Law and Integration in the European Union* (Oxford University Press 1995) 103-104

[89] Customary international law was generally regarded as well as part of the Japanese law. The *Soo-Kil Yoon* case is often mentioned to show that Japanese courts have followed the tradition established under the Meiji Constitution to recognise the domestic legal force of customary international law in Japan. See, IWASAWA (n 53) 31

[90] IWASAWA (n 53) 20

agreements require the approval of the Diet[91]. The first category includes international agreements with statutory matters. They are set in the following three subsets of agreements (i) international agreements which require the enactment of new statutes; (ii) international agreements which require the maintenance of existing statutes; and (iii) international agreements which affect the sovereignty of the State and thus modify the power of the legislature as well. The second category is international agreements that deal with financial matters because no taxpayer contribution shall be expended except as authorised by the Diet[92]. The third category is international agreements which are deemed politically important in the sense that they provide a fundamental legal framework for a relationship between Japan and another State[93]. On the other hand, executive agreements comprise (i) agreements concluded within the scope of a treaty already approved by the Diet; (ii) agreements concluded within the scope of existing domestic laws and regulations; and (iii) agreements concluded within the scope of budgetary appropriations[94]. Despite this, under international law, both executive agreements and treaties are 'treaties'. "*Le Droit international n'est pas formaliste"* is an important way to approach the conclusion of international instruments by sovereign States. This French expression means that international law is less preoccupied by the excessive formalism of internal law, mostly constitutional law or administrative law. In other words, international law looks more to the substance rather than the form[95].

[91] Article 73 (3) of the Constitution of Japan poses the foundation according to which the Cabinet has the authority to conclude treaties provided that it obtains prior, or depending on circumstances, subsequent approval of the Diet. The procedure for the adoption of the budget provided for under article 60 is also to be used for the approval of treaties. This procedure is less rigorous than the one provided for under article 59 for the passage of Statutes. When approving a treaty, there is no accompanying statute. The Cabinet simply request the treaty approval from the Diet, which then either disapproves or approves it by majority vote. Some treaty types are subject to prior approval and others to subsequent approval. However, most support that the government should, in principle, seek prior approval, and that subsequent approval should be allowed only in exceptional circumstances in which the Diet cannot convene and the government cannot afford to wait. There is a consensus among Japanese scholars that the approval should, in principle, be sought in advance. If a treaty requires ratification, the government usually seeks and obtains the approval of the Diet after signing but before ratifying the treaty. In case the treaty is not approved by the Diet, it becomes domestically invalid as it fails to fulfil the constitutional requirements. It is, moreover, suggested that, internationally, the Japan's consent will become invalid without the Diet's subsequent approval. See, IWASAWA (n 53) 12, 13, 14

[92] Article 85, Constitution of Japan

[93] IWASAWA (n 53) 21

[94] *id.* 22

[95] ANTHONY AUST, *Modern Treaty Law and Practice* (Cambridge University Press 2012) 180

The development of international investment law quickly borrowed the *spaghetti/noodle bowl* effect from trade law. In 2014, the number of four treaties was the maximum overlap per country[96]. The treaty overlap is relatively a recent phenomenon in investment law. However, vertical overlapping bilateral, regional or multilateral treaties have been commonplace in international trade law throughout history[97].

W. Alschner suggests a coordination approach to address the relationship between investment treaties in international investment law. Based on trade law, this author notes that in a situation of increased overlap, international trade law demonstrates that overlapping layers of treaties can coexist without undermining one another. In this way, the author supports that treaty parallelism is not a problem *per se* as long as the *spaghetti/noodle bowl* of overlapping agreements is properly managed[98]. Only a few States use regionalism to *de jure* or *de facto* consolidate their investment treaty network. Most countries make the option of parallel bilateral and regional treaty layers, leading to the fact that they may duplicate or contradict each other, thus increasing the risk of parallel proceedings, double jeopardy and normative conflict. The current turn towards the regionalisation of investment laws and policies offer both opportunities and challenges. On the one hand, regionalism can help consolidate and reduce treaties' complexities by replacing several BITs with one regional investment agreement. On the other hand, it may exacerbate existing problems, leading to a multiplication of treaty layers. As observed to date, regionalism is towards adding to rather than replacing existing investment obligations making the network more complex for States as well as investors. As T. Kondo mentions, in the 1960s an investment regime needed to be based largely on bilateral investment treaties (BITs). Not so long after it was also important for a country to conclude regional trade and investment agreements (RTIAs) which focus on regional integration and economic growth. Today, in addition to BITs and RTIAs, States also have to conclude investment contracts and create domestic investment codes making provision for laws relating to foreign investments[99]". Talking about only treaties, the coexistence of parallel investment treaties may be a result of both rational choice and bounded rationality. The rational choice appears when a treaty sets a minimum standard of investment protection as a reference for

[96] ALSCHNER (n 3) 12
[97] *id.* 5
[98] *id.* 18
[99] KONDO (n 25) 3

existing or future treaties. In this case, parallelism and differentiation rather than consolidation are necessary. Bounded rationality appears as countries underestimate the costs and overestimate the benefits of overlapping treaty layers. W. Alschner notes that the existence of the WTO as a multilateral institution provides countries with a common reference for functional differentiation[100]. He then concludes that functional coordination is indispensable when two or more investment treaties govern the matter; because in the absence of purposefully assigned specific roles; these treaties may simply duplicate each other, providing no added value, and their unintended contradictions undermine the objective of either treaty[101].

Section 3 RELATIONSHIPS BETWEEN DOMESTIC AND INTERNATIONAL INVESTMENT LAW

This section presents the relationship between international treaties and domestic statutes; as well as the relationship between international investment law and domestic law.

1. International Treaties and Domestic Statutes

The Vienna Convention on the Law of Treaties is the constitution of the relationship between the international legal order and the domestic legal order. When a country makes commitments on a matter, naturally a desire grows on the part of other parties to ensure that the commitment is implemented at the national level[102]. After setting the principle of *pacta sunt servanda*[103], it asserts that a contracting party may not, in principle, invoke the provisions of its internal law as justification for its failure to perform a treaty[104].

Treaties prevail over domestic statutes. Even when an inconsistent statute is enacted later in time, the treaty is considered to prevail in the relationship with domestic law[105]. Some domestic statutes tend to precise the priority of a treaty[106]. This is can only have a declaratory effect. In addition,

[100] ALSCHNER (n 3) 27
[101] *id.* 26
[102] IWASAWA (n 53) 2
[103] AUST (n 95) 179
[104] Article 27, VCLT; IWASAWA (n 53) 16
[105] AUST (n 95) 198
[106] Since 1945, there has been a proliferation of treaties dealing with matters which are of concern for private individuals. Although Japan had become a major economic player, politically, however, it has kept a relatively low

the VCLT, the constitutions of most countries and case law support that treaties have the force of law and prevail over statutes[107].

International law and domestic law operate on different planes. International law must be applied through domestic legal systems and the guarantees they provide by relying upon the implementation mechanisms peculiar to international law[108]. When a treaty provides for rights and obligations to be conferred on persons, they can usually be given effect provided that they are made part of the domestic law along with enforcement provisions[109]. Y. Iwasawa distinguishes three different constitutional systems employed by various countries around the world. First, there is the system of incorporation by a law of approval. Under this system, the legislative body approves a treaty with a statute which usually provides that the treaty has the force of domestic law. Germany for instance follows this system. Secondly, individual incorporation is a system under which States implement treaties individually through legislation. The United Kingdom for stance follows this system. Thirdly, the system of automatic incorporation makes treaties immediately acquire domestic legal force once they are ratified and published in the official gazette[110]. Japan follows this system[111].

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profile confining its role mostly in a defensive posture; thus its contribution to the development of international law has been relatively insignificant. See, IWASAWA (n 53) 5

[107] See for example the Constitution of Japan; IWASAWA (n 53) 32

[108] BENEDETTO CONFORTI, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff Publishers 1993) 9

See also, MALCOLM N. SHAW, *International Law* (Cambridge University Press 2003) 120-174; John O'Brien, *International Law* (Cavendish Publishing Limited 2001) 107-136; Georges J. Perrin, *Droit International Public: Sources, Sujets , Caractéristiques* (Schulthess Polygraphischer Verlag) 809-841

[109] AUST (n 95) 178

[110] Consistent with article 7 of the Constitution of Japan, with the advice and approval of the Cabinet, the Emperor shall promulgate treaties. After adoption by the Diet and ratification by the Cabinet, a treaty is promulgated in the *Kanpo* in the name of the Emperor and the Cabinet. The treaty authentic text is, in case of multilateral treaties, promulgated together with a Japanese translation. To give force of law to a treaty, the *kofu* incorporates the treaty into Japanese law. It is crucial to note that the treaty retains its character as international law as it is not transformed into national law. Executive agreements are published in the *kanpoo* by way of a *kokuji* which is a ministerial notification from the Minister in charge of foreign affairs. Treaties concluded by Japan and published in the *kanpo* have the force of law and prevail over Japanese statutes. The Cabinet deploys different approaches in dealing with the relationship between international law and Japanese law. It strives to amend the domestic law before it enters into the treaty. In case there is no domestic law giving effect to the treaty, the government usually enacts laws and regulations for this purpose. Unless the treaty is capable of regulating the matter directly in Japan, the government takes no special measures. See, IWASAWA (n 53) 25, 27, 30

[111] *id.* 33

In the same vein, the monist approach suggests that a treaty may, without legislation, become part of domestic law once it has been concluded and has the force of domestic law[112]. Cases are different between monist countries for example in France[113], Switzerland[114], Russia[115], the Netherlands[116]or Germany[117]. Despite that, legislation will be required especially when the treaty is not self-executing. The dualist approach on the other hand accords no special status to treaties. There is a requirement to adopt legislation that gives effect to the treaty to have domestic legal force. Such legislation thus incorporates the treaty provisions into domestic law[118]. The United Kingdom is considered the best illustration of this case[119]. EU law provides that its provisions have a direct effect in the domestic law of all MS, including the United Kingdom before the Brexit. Even in this case, EU law was enforceable only when the United Kingdom legislation made express provision for it[120]. Other countries combine both monist and dualist approaches in an uneasy alliance. The United States and South Africa are illustrative of this state of affairs[121].

The German notions of *unmittelbare* and *geltung* inform the difference between 'a treaty to be directly applied' with 'a treaty to have the force of law' in domestic law. To be directly applied, international law must have the force of law in the domestic legal order. If domestic legal force is a prerequisite for the domestic applicability of a treaty, not all treaties are directly applicable[122]. A rule of international law must be precise and complete in itself to be applied by domestic tribunals and courts[123]. As a matter of principle, the parties determine whether a treaty is directly applicable or not[124]. If the direct applicability of a treaty as a whole is not excluded, then each provision is now examined to determine whether it meets the requirements of being complete and precise in itself.

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[112] AUST (n 95) 183
[113] *ibid.*
[114] *id.* 186
[115] *id.* 185
[116] *ibid.*
[117] *id.* 184
[118] *id.* 187-188
[119] *id.* 189-193
[120] *id.* 194
[121] *id.* 194, 196
[122] IWASAWA (n 53) 45
[123] *id.* 47
[124] *ibid.*

Scholars distinguish between international self-executing and non-self-executing treaties[125]. Treaties whose provisions are precise and complete, and do not require national implementation measures are considered 'self-executing'[126]. The opposite treaties are 'non-self-executing'[127].

Most investment provisions, for instance, are self-executing concerning the protection and treatment of foreign investments. This is M. Kene's conclusion in her study of NAFTA and the ECT as the first major multilateral treaties that impose obligations on host States that are enforceable by private entities[128].

2. Domestic and International Investment Law

Despite the significance of FILs for the international investment regime, they have received remarkably little attention[129]. Arbitral tribunals' efforts to clarify investment treaty obligations and the States' attempt to 'recalibrate the specificity of treaty commitments' brought to light the hide-and-seek game between capital-exporting and capital-importing countries[130]. While capital-importing countries entered into investment treaties based on the belief that this would increase foreign investment; for FDI-exporting countries, it was mostly to ensure the protection of their investors and investments. P. Juillard explains that capital-exporting States viewed domestic law mostly bearing two original sins: as legal frameworks fundamentally from domestic origins, they are susceptible to unilateral modification or termination; and because it was a developing country's law, it could not sufficiently protect property rights[131]. Arbitral awards were rendered mostly in this direction supporting capital-exporting countries' views on international investment law. Little has been done to assess the relationship with domestic law. J. Hepburn builds its framework of

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[125] LORD MCNAIR, *The Law of Treaties* (Oxford University Press 1961) 80

[126] BENEDETTO CONFORTI, 'National Courts and the International Law of Human Rights' in BENEDETTO CONFORTI and FRANCESCO FRANCIONI (eds), *Enforcing International Human Rights in Domestic Courts* (Kluwer Law International 1997) 8-9

[127] IWASAWA (n 53) 45

[128] MIRIAN KENE OMALU, *NAFTA and the Energy Charter Treaty: Compliance with, Implementation and Effectiveness of International Investment Agreements* (Kluwer Law International 1999) 7, 197: see also ALSCHNER (n 3) 38

[129] The use of domestic law analogies in international law, however, has been condemned as a sin. WEILER, 'The Geology of International Law' (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 547, 550 cited by AN HERTOGEN, 'The Persuasiveness of Domestic Law Analogies in International Law' (2018) Vol. 29 No. 4, 1127–1148 EJIL 1128; HEPBURN (n 36) 658-9; HEPBURN (n 40) 4

[130] cf JUILLARD (n 39)

[131] *ibid.*

positive models of domestic law reasoning upon the taxonomy of errors displayed by arbitral tribunals. This author points out that different cases underline failure to appreciate the role of domestic law, failure to investigate and engage with available domestic law sources, unreasoned assertions of legality, and reliance on improper sources[132].

CHAPTER 2: NORM-BASED CONCEPTUAL FRAMEWORK, RELATIONAL FRAMEWORK, AND NEO-FUNCTIONALISM

This chapter presents the norm-based conceptual framework developed by D. Burchardt[133]; the relational framework developed by F. Oppong[134]; and E. Haas'[135] neo-functionalism.

Section 1 D. BURCHARDT'S NORM-BASED CONCEPTUAL FRAMEWORK

The norm-based conceptual framework studies the relationship between the law of the EU and the law of its MS from the perspective of a theory of legal norms[136]. Traditionally, the relationship between the EU law and the law of its MS has been addressed through perspectivism or legal order theory, as pushed forward by the case law of the European Court of Justice and some Constitutional courts. Perspectivism conceptualises the relationship between the EU law and the law of its MS through reference to legal orders as the primary object. The community legal order and the domestic legal orders of EU MS are addressed as to whether they are autonomous, mutually dependent, hierarchical, or in a pluralist coexistence[137]. In this way, the theory of legal order portrays this relationship from the perspective of either the EU legal order or the domestic legal orders. From the perspective of the EU legal order, EU law primacy of application is absolute and

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[132] HEPBURN (N 40) Part II, chapter 7

[133] cf DANA BURCHARDT, 'The Relationship between the Law of the European Union and the Law of its Member States – a Norm-based Conceptual Framework' (2019) European Constitutional Law Review

[134] cf RICHARD FRIMPONG OPPONG, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011)

[135] cf HAAS (n 55)

[136] see BURCHARDT (n 133)

[137] N.W. Barber, 'Legal Pluralism and the European Union', 12 ELJ (2006) 306, 308
See also, Catherine Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law', 16 Law and Philosophy (1997) 377; Theodore Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', 37 Harvard International Law Journal (1996) 38 cited by BURCHARDT (n 133) 74

does not accept exceptions[138]. European courts and tribunals have played a decisive role to promote this approach consistent with the view that EU law, and not domestic law, gets to define the nature of the relationship between the two[139]. This role appeared fruitful. The supremacy and direct effect principles for instance were developed and established as a cornerstone for the realisation of the European integration objectives. S. Weatherill notes: "direct effect might not have been found in the explicit terms of the Treaty, but the European Court regarded its task as dictated by the need to secure the realisation of the overall objectives of the Treaty. And, reasoned the Court, without direct effect those objectives could not effectively be achieved[140]". In an order of 18 October 1967, the constitutional court of Germany concluded: "A new public power has been born which is autonomous and independent in relation to the power of the individual MS; for this reason, its acts do not need to be confirmed by the MS and cannot be revoked by them"[141]. Despite some hesitations by the administrative and lower courts in France and Italy; in the Netherlands and Luxembourg the primacy of community law was firmly recognised[142]. Perspectivism always imposes the view of one legal order on the other; consequently, it cannot frame a legitimate relationship for all legal orders involved. It analyses the relationship between the EU law and the law of EU MS uniformly for the whole order in an absolute manner. As such, for the community legal order to interrelate with domestic legal orders, it so does in an absolute

[138] BURCHARDT (n 133) 75, 76

[139] Most domestic courts and tribunals have adopted the primacy of application of EU law, grounded however on a conceptual supremacy claim of domestic constitutional law. cf *id.* 76
P. Pecastore notes that the contribution of EU courts and tribunals was possible thanks to a direct cooperation set up between the court of the communities and national courts provided for by article 177 of the ECC Treaty. see PECASTORE, (n 31) 91

[140] WEATHERILL (n 88) 97

[141] In Germany, the Bundesfinanzhof in its judgment of 10 July 1968 declared: "by the EEC Treaty the founding States have created a new and autonomous holder of sovereign power within a limited sphere of action: the law imposed by its draws its validity in domestic law from the fact that the MS have submitted their territory to this sovereign power". PECASTORE (n 31) 97

[142] *id.* 96
D. Burchardt also lists few classic landmark decisions involving perspectivist approaches like the ECJ 15 July 1964, Case 6/64, Costa v ENEL; ECJ 17 December 1970, Case 11/70, Internationale Handelsgesellschaft; ECJ 9 March 1978, Case 106/77, Simmenthal II; Polish Constitutional Court, decision of 11 May 2005, Case K 18/04; Czech Constitutional Court, decision of 8 March 2006, Case Pl. US. 50/04; German Constitutional Court, decision of 30 June 2009, Case 2 BvE 2/08; Spanish Constitutional Court, declaration of 13 December 2004, Case DTC 1/2004; Belgian Council of State, decision of 5 November 1996, Case n. 62.922; Italian Constitutional Court, decision of 18 December 1973, Case n. 183/1973; Lithuanian Constitutional Court decision of 14 March 2006, Joint Cases 17/02-24/03-22/04; French Conseil d'État, decision of 3 December 2001, Case n. 226514; cf BURCHARDT (n 133) 75

and integral manner; this resulting in an "either-or scheme of opposing absolutisms with the supremacy claim of either the EU law or the law of EU MS"[143].

Despite being useful to allow substantial progress both towards greater domestic effectiveness of the community law and uniting of disparate national conceptions[144]; perspectivism poses a weak conceptual framework. It stresses the relationship between the community legal order (EU law) and the domestic legal order of EU MS, but it is primarily shaped with reference to only one of these sets of norms[145]. Furthermore, the law of the EU and the domestic law of its MS are closely intertwined. Perspectivism approaches the community legal order as a whole whereas the intertwinement of legal orders occurs through the intertwinement of their individual legal norms. Also, in a case of conflict involving a multipolar relationship between an EU MS domestic norm and various EU law norms; it is clear that the relationship is not internal to either the EU or domestic legal order. As such, the conflict should not be resolved exclusively by either domestic or community norm applying bodies[146].

In view of the above, D. Burchardt suggests the norm-based conceptual framework as a normative shift to understanding the interrelation of both the individual legal norms and the legal orders concerned in the EU context. The legal norm-based approach acknowledges legal orders but insists that the relationship between the community and domestic legal orders occurs through their respective norms. Instead of primarily looking at the legal order as a system to deduce the consequences for the relationship or conflicting legal norms, a norm-based conceptual framework prioritises framing the relationship between legal norms. D. Burchardt introduces the concept of the norm-based compound structure showing that aspects of autonomy and intertwinement, of heterarchy and hierarchy, can coexist. This contributes to strengthening the analytical and normative framework for understanding the interrelations between norms, especially in situations of conflicting norms in an inter-order dimension[147].

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[143] *id.* 77
[144] PECASTORE (n 31) 91
[145] BURCHARDT (n 133) 76
[146] *id.* 102, 103
[147] *id.* 103

The EU is characterised in its very essence by the coexistence of different norms. This theory is developed for and in the EU context, and it allows a fresh look at the relationship between the EU law (community legal order) and the law of the EU MS (domestic legal orders). It is a useful tool for framing different sets of norms between different legal orders in a context of integration. Applying to this study, it will help in analysing the relationship between RIAs (community legal order) and MS FILs (domestic legal orders); especially the way MS FILs' impact the applicability and effectiveness of RIAs of ASEAN and SADC. The RIA will be analysed not as a whole but rather by primarily looking at its foreign investment norms. This will help determine their relationship with MS FILs based not on their rank and legal status as 'community investment treaties' but rather to what extent they provide for robust and quality normative standards in order to stand the confrontation with foreign investment standards in MS FILs. Therefore, this study extends the application of D. Burchardt's legal norm-based theory in investment law and in ASEAN and SADC regional integration processes.

Section 2 F. OPPONG'S RELATIONAL FRAMEWORK

The relational framework is based on the African integration experience. It is grounded on the fact that relational issues are further complicated by Africa's unique approach to achieving continental integration of 54 countries. The approach uses pre-existing RECs as building blocks for the African Economic Community (AEC)[148] which is a continent-wide economic community[149]. F. Oppong developed this theory in 2011 as an attempt to address the complex and perplexing problem of the relationships between the African Union (AU), the AEC and the African different RECs, as well as those between the RECs and MS domestic legal systems. The theory suggests that effective economic integration is the product of properly structuring and managing – within well-defined legal frameworks – vertical, horizontal and vertico-horizontal relations among states, legal systems, laws and institutions. The relational framework analyses how relational issues of law in economic integration are being approached. It stresses that an economic community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness[150]. This theory is close to the norm-based

[148] Treaty Establishing the African Economic Community, 3 June 1991, 30 ILM 1241(AEC Treaty)
[149] OPPONG (n 134) 9
[150] *ibid.* chapter 2

conceptual framework in the sense that it helps confronting norms originating from both the community and domestic legal orders in the context of integration. As such, it can inform the way this study brings together RIAs and MS FILs, and importantly analyses the impact of the MS FILs on the applicability and effectiveness of RIAs within the ASEAN and SADC integration processes.

Section 3 E. HAAS' NEO-FUNCTIONALISM

This study uses also the neo-functionalist approach. Despite its origins in the European context, neo-functionalism has proven particularly useful to analyse regional integration processes around the world, particularly in Asia and Africa where integration projects unfolded following the success of the European project. E. Haas is one of the pioneers of neo-functionalism. In his chef-d'oeuvre *The Uniting of Europe*[151] first published in 1958, the author developed this theory based on the European Coal and Steel Community (ECSC) which ceased to exist on 1 July 1967, when it merged with the then called the European Communities, now the EU.

The theory places major emphasis on the formation by preferably geographically neighbouring countries of a supranational entity. To be successful, the MS of such an entity must create common institutions towards which they transfer progressively more competence. Modelled after the ESC, it points out that the will of cooperation between governments will not be sufficient to realise integration. Common actions and concrete achievements are indispensable as Nations' citizens, political actors, and economic elites must encourage the rapprochement at the societal level. Modest achievements are deemed to encourage progressively more integration. The economic rapprochement is said to encourage political union. As explained by B. Rosamond, political integration and supranational institutionalisation are side-effects of economic integration[152]. By devolving more authority to the supranational entity, social interests will shift their loyalty and expectations towards the new supranational entity. The theory introduces the notion of *spill over*. It is deemed to be the most important driving process of integration. It holds that an initial commitment to integrating a vital sector of a national economy with those of other States will inevitably lead to decisions to integrate additional sectors. Activities associated with sectors integrated initially would 'spill over' into neighbouring sectors not yet integrated, but now

[151] cf HAAS (n 55)

[152] BEN ROSAMOND, *Theories of European Integration* (Palgrave MacMillan 2000) 51-2

becoming the focus of demands for more integration. The integration of particular economic sectors across nations will then create functional pressures for the integration of related economic sectors. From coal and steel, European countries have succeeded to include almost all tariffs, rules of competition for industry, subsidisation of agriculture, until the creation of political unity. The *spillover* effect explains the deepening of integration in one sector that is expected to create pressures within and beyond that sector. It thus leads to functional needs for a supranational European authority[153]. The above forms the essence of the neo-functionalist approach. Originally, neo-functionalism assumed that integration would proceed quasi-automatically. In the edition of 2004, E. Haas nuances and includes *inter alia* a 'soft' rational choice approach in a revised neo-functionalism theory. It points out that by seeking to realise their value-derived interests, social actors will choose whatever means that are available. And if thwarted, they will rethink their values, redefine their interests, and choose new means[154].

Neo-functionalism suggests that integration is a continuous process. It studies and puts forward initial conditions allowing integration to unfold. It is thus necessary to assess whether 'background conditions' or similar conditions to those in Europe at the beginning exist. The political will or the common feeling for a shared future and legitimacy is indispensable. If it is lacking, the whole process may be blocked or encapsulated. The historical reconciliation between France and Germany is a fundamental basis for the success of the EU while in ASEAN and SADC, MS have made little effort to definitively settle their disputes, especially security and territorial disputes. Despite its enlargement eastward, the EU is founded on a socio-culturally and economically homogeneous space[155], in stark contrast with ASEAN and SADC. The following aspects are also important: i) a vision based on a supranational entity rather than the failed balance of power approach, ii) growing economic interdependence, iii) common institutions and legal regime, iv) capacity to resolve regional disputes, v) supranational market rules that replace national regulatory

[153] Critics highlight *inter alia* the implausibility of the neo-functionalist approach. They stress that neo-functionalism is based on the formation of a supranational entity, nevertheless States continue to remain relevant. In addition to that, its dangerousness is put forward as neo-functionalism would risk causing the withering-away of liberal democratic States that guarantee justice and liberty. cf ROSAMOND (n 152). E. Haas himself acknowledges that many challenges have been articulated to neo-functionalism over the years. HAAS (n 55) xv

[154] HAAS (n 55) xv

[155] KEN ENDO, 'Is Comparative Regionalism Possible? The Security-Economy-Normative Nexus in Europe and East Asia' in JOHN IKENBERRY, YOSHINOBU YAMAMOTO and KUMIKO HABA (eds), *The Regional Integration in Asia and Europe: Theoretical and Institutional Comparative Studies and Analysis* (Nakanishi Printing 2011) 111

regimes, vi) mutual perceptions and common political and social values, vii) leadership, solidarity, and the support from the United States which took over responsibility for European security enabling EU MS to concentrate on economic recovery[156].

1. ASEAN Integration

The ASEAN IA applies as community law in the territory of ASEAN MS. It was signed on 26 February 2009. It consolidates different previous investment regimes, in *specie casu* the 1987 Agreement for Promotion and Protection of Investments which had a purely investment protective focus, and the 1998 ASEAN Investment Area which positioned the region as an alternative host of FDI that would normally flow out of China.

When the ASEAN embarked on the ASEAN Vision 2020 in 1997, the ASEAN GDP was USD 694 billion. In 2006, ASEAN became a USD 1 trillion economy, and passed the USD 2 trillion benchmark in 2011, nine years earlier than anticipated. P. Intal shows that, although the growth of capital was modest for the Philippines in 1971–1979, the large contribution of capital to economic growth was particularly noteworthy for Singapore and Malaysia in 1971–1985; Viet Nam, in 1996–2014; Indonesia, in 1975–1985; and Thailand, in 1991–1995[157]. FDI has been the most important driver of economic growth for the ASEAN region. In 2018 for example, ASEAN attracted USD 154.7 billion worth of investment – the highest in history – and a 30.4% increase from total FDI inflows of USD 118.7 billion in 2015. ASEAN economic integration continues to contribute towards the region's emerging position as a global growth driver, with intra-ASEAN accounting for the largest share of ASEAN's total trade and FDI inflows in 2018 at 23.0% and 15.9%, respectively[158]. With a combined GDP of USD 3 trillion in 2018, ASEAN is the fifth-largest economy in the world[159].

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[156] CAMERON (n 31) 39-41

[157] PONCIANO INTAL JR, 'The Economic Transformation of the ASEAN Region in Comparative Perspective' in PONCIANO INTAL JR and CHEN LURONG (eds), *ASEAN and Member States: Transformation and Integration (*Economic Research Institute for ASEAN and East Asia 2017) 7

[158] see ASEAN Integration Report 2019, para 5, 38-39

[159] ASEAN Integration Report 2019, 6
See also, <https://www.statista.com/statistics/796245/gdp-of-the-asean-countries/#:~:text=In%202020%2C%20the%20estimated%20total,increase%20from%20the%20previous%20years.>; <https://www.usasean.org/why-asean/what-is-asean> accessed 15 February 2021

In order to consolidate or expand their gains in trade, ASEAN MS resorted to adopting the ACIA to create a free and open investment regime with a view to achieving the end goal of economic integration under the ASEAN Economic Community in accordance with the AEC Blueprint[160]. As the neo-functionalist approach suggests, once the integration is achieved in one area, the spill-over effect spreads it towards other related areas[161]. In other words, modest achievements in specific areas trigger reforms requiring rapprochement or integration in further areas[162]. The progress in trade created spill over for integration of foreign investment laws and policies.

The implementation of the AEC Blueprint 2015[163] has substantially achieved tariffs elimination and trade facilitation, advancement of the services trade liberalisation agenda, investment liberalisation and facilitation, capital market regulatory frameworks and platforms streamline and harmonisation, skilled labour mobility facilitation, development of regional frameworks in competition policy, consumer protection and intellectual property rights promotion, connectivity promotion, narrowing of development gap, and strengthening of ASEAN's relationship with its external parties[164]. The establishment of the AEC Blueprint was a major milestone in the regional integration agenda. On 22 November 2015, ASEAN countries adopted the AEC Blueprint 2025 to cover the period from 2016 to 2025 along with the ASEAN Community Vision 2025. It succeeded the AEC Blueprint (2008-2015), which was adopted in 2007[165].

In spite of these slow but outstanding achievements, the ASEAN integration process still lacks a regional supranational entity, a fact that constitutes a major setback for regional integration from the neo-functionalist approach. Moreover, in the case of the European experience, EU MS benefited from the security umbrella of the United States allowing them to concentrate on economic recovery[166]. This is not the case in ASEAN although a number of its countries still heavily depend on the US in terms of security[167]. ASEAN seems to promote peace in the region

[160] ACIA, article 1
[161] HAAS (n 55) 291-313
[162] *id.* 301, 313
[163] AEC Economic Community Blueprint (2008-2015)
[164] <https://www.asean2019.go.th/en/infographic/from-asean-economic-community-blueprint-2015-to-2025/> accessed 15 February 2021
[165] < https://asean.org/asean-economic-community/> accessed 15 February 2021
[166] CAMERON (n 31) 41
[167] ENDO (n 155) 111

through balancing the interests of the Asian economic giants. Such a détente would be crucial to overcome its security challenges and reduce mistrust in the region, especially between China and India. In 1997, ASEAN established the 'ASEAN + 3' mechanism that brings together ASEAN MS with China, South Korea and Japan, the three leading economies in Asia. ASEAN kept India apart despite its request formulated in 2000 to be included in the mechanism. Instead of including India in an 'ASEAN + 4' formula, ASEAN MS rather decided to create 'ASEAN + India', a completely different mechanism specific to India. An ascending China has become a worrying factor increasing the risk of confrontation in both the economic and political arena. Establishing a specific mechanism for India demonstrates that ASEAN MS consider India, not as simply another major economy but rather an alternate power in appreciating China's ascent in the region.

2. SADC Integration

The SADC is one of the eight regional economic communities (REC) recognised by the African Union (UA[168]) as pillars for the African complete continental integration. Regional integration in Africa faces multiple challenges. T. Gathii and F. Oppong elaborate on some of them[169]. First, variable geometry and multiple memberships encouraged by an open-door policy. Congo is a perfect example of multiple memberships. It is at the same time a member in different groupings: the SADC, COMESA, ECCAS, EAC, CEPGL, ICGLR, and the Tripartite FTA designed to rationalise commitments under the COMESA, EAC and SADC. The variable geometry feature is also challenging. In the SADC for example, the Protocol on Trade was created in 1996 with the objectives of furthering the liberalisation of intra-regional trade in goods and economic development and forming an FTA in the SADC region. Twelve members of the SADC have ratified the Protocol, but Angola and Congo have yet to join the SADC FTA at a later stage. Second, regional integration in Africa is not exclusively framed on a market-led integration vision.

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[168] These RTA or REC consist of 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; and Southern African Development Community (SADC). Beyond these eight, there are many other groupings such as the Economic and Monetary Community of Central Africa (CEMAC); West African Economic and Monetary Zone (UEMOA); West African Monetary Zone (WAMZ); Southern African Customs Union (SACU); Mano River Union (MRU); Economic Community of Great Lakes Countries (CEPGL); International Conference on the Great Lakes Region (ICGLR/CIRGL); and the Indian Ocean Commission (IOC).

[169] see GATHII (n 33); OPPONG (n 134)

It shows a preference for multiple objectives alongside trade liberalisation commitments pursuing a vision of development integration that has sometimes little to do with trade and may be in tension with trade liberalisation grounded on WTO rules of non-discrimination. The promotion of a variety of initiatives beyond trade makes it difficult to assess their overall effectiveness. It is worth mentioning that African integration is also regarded as a necessary step for shaking off external economic dependence and increasing the continent's participation in the global trading system. Last, the ownership of integration programmes is questioned.

The SADC is the most prominent REC in central and southern Africa[170]. The main objectives of the SADC are to achieve development, peace and security, and economic growth, to alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through regional integration, built on democratic principles and equitable and sustainable development[171]. To achieve this goal, the SADC MS agreed to eliminate barriers to the free movement of goods and services, and capital and labour[172].

The SADC has made progress and retreats at the same time. The establishment of the SADC Tribunal as the judicial organ in terms of article 9(7) of the SADC Treaty was one major breakthrough in ensuring compliance of treaty commitments by SADC MS[173]. In the EU, the principle of supremacy and direct effect of community law find no ground in the treaty. However, they have been deduced by the Court as a necessary, albeit inexplicit, element in the practical realisation of the European integration objectives[174]. Likewise, the SADC Tribunal, through

[170] In spite of the widespread unsatisfactory performance of African RECs in intra-regional trade (less than 20%) from 2005 to 2013, the SADC ranks second after the East African Community (EAC). See ALEMAYEHU GEDA and EDRIS HUSSEIN SEID, 'The Potential for International Trade and Regional Integration in Africa' (2015) Issue 1-2 pages 19-50 Journal of African Trade 3

[171] SADC Treaty, article 5

[172] GATHII (n 33) 212

[173] The decisions of the Tribunal are final and binding in the territories of MS party to a dispute before it. The responsibility to ensure that the decisions of the Tribunal are enforced lies with the SADC Summit. The Summit is the supreme policy-making body of the SADC. It comprises the Heads of State or Government of all SADC MS. The decisions of the Summit are binding on all MS and, upon referral from the Tribunal; it has the power to take appropriate action against a MS that refuses to honour a decision of the Tribunal. The SADC Tribunal became operational on 18 August 2005 with the power to entertain both State and individual claims. It however had a short lifespan. Its Protocol was amended in 2014 with the competence to entertain exclusively interstate claims. see RETSELISITSOE PHOOKO, 'The SADC Tribunal: Its Jurisdiction, Enforcement of its Judgments and the Sovereignty of its Member States' (2016) Ph.D thesis, University of South Africa).

[174] WEATHERILL (n 88) 103

In the *Van Gend en Loos* case, the Court of Justice of the European Union ruled that: "the objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in

reliance on the doctrine of implied powers, and the principles and objectives of the SADC, has attempted to follow those steps[175]. Two cases show how SADC countries responded to those attempts with fire and fury: the *Gramara* and the *Fick*[176] cases following SADC Tribunal's decision in the *Campbell* case[177].

In 2007, following the application of land reform in Zimbabwe, 77 'white farmers' filed a complaint challenging the acquisition of agricultural land by the Government without compensation. The applicants alleged that their property rights in agricultural lands had been infringed by the Constitution of Zimbabwe vesting the ownership of all agricultural lands compulsorily acquired under it to the State. The applicants also contended that measure has been adopted and applied on the ground of racial discrimination; and that the impossibility to entertain any case concerning such acquisitions of agricultural land following the denial of jurisdiction of the courts on the matter by the Constitution[178]. The SADC tribunal decided in favour of the applicants on 28 November 2008. Following the SADC Tribunal decision, the applicants in the *Gramara* case then sought an order to register the decision for the purpose of its enforcement in Zimbabwe. However, Zimbabwe courts denied the SADC Tribunal's decision over it. The High

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the Community, implies that this Treaty is more than an agreement, which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty, which refers not only to governments but also to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and their citizens", G. CJEU Case 26/62 (1963). *See* HILDEBRANT (n 59) 12

[175] Supra-nationality of community norms is indispensable to guarantee their effectiveness. Supremacy of SADC law can guarantee the integrity of the integration agenda and observance of international and community obligations by SADC countries. It can also set the foundation for other principles of community law. When community law's superiority is guaranteed, it can become easy to harmonise MS' laws as provided under article 17 of the SADC IA; and to ensure uniform application in the Region to prevent a situation whereby national law and community law regulate similar issues differently. cf PHOOKO (n 59) 20. OHADA law for example (article 10) clearly asserts that OHADA-based law has precedence and is directly applicable in domestic legal systems. A. Cissé notes that this helps to ensure hierarchical relationships with domestic laws susceptible to be unified. cf ABDOULLAH CISSE, 'Harmonisation du Droit des Affaires en Afrique : L'Expérience de l'OHADA à l'Epreuve de sa Première Décennie' (2004) Revue international de droit économique 210. SADC scholars argue that the SADC Treaty does contain clear guidance on supremacy of SADC law over domestic legal systems of its MS. For R. Phooko for instance, only when it is clear that the SADC community law takes precedence over the national law of MS, there will be legal certainty in the Region. Because the SADC Treaty does not clearly provide that, as the EAC Treaty does for example (article 8.4), community law is superior to the domestic laws of MS; its supremacy could be questionable. cf PHOOKO (n 59) 19

[176] Government of the Republic of Zimbabwe v Fick 2013 5 SA 325 (CC)

[177] Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe Case No. SADC(T) 2/2007

[178] <https://www.escr-net.org/caselaw/2010/mike-campbell-and-others-v-republic-zimbabwe-sadc-t-no-22007> accessed 1 September 2020
<http://www.mikecampbellfoundationresources.com/page/the-campbell-case-background-rulings-461> accessed 1 September 2020

Court in Zimbabwe declined to register the decision of the SADC Tribunal. Unsuccessful in Zimbabwe, the claimants went to make the costs orders enforceable against Zimbabwe in South Africa in the *Fick* case.

The *Gramara* case in Zimbabwe shows an example where the supremacy of community law is challenged by a MS. The High Court recognised that Zimbabwe is bound by community values and principles. It stressed the obligation of Zimbabwe to respect, protect and promote human rights and the rule of law, especially the obligation against discrimination and unlawful expropriation. And yet, it decided to dismiss community law over the Constitution and public policy reasons[179]. In contrast to Zimbabwe, in the *Fick* case, South African courts have found that, under the SADC Treaty, South Africa is obliged to take all the necessary measures to ensure that the decisions of the SADC Tribunal are enforced. They then ruled against Zimbabwe. The Constitutional Court agreed to the fact that a South African court has jurisdiction to register and enforce a decision of the SADC Tribunal against Zimbabwe even though the SADC Treaty and the SADC Tribunal Protocol had not been domesticated yet in South African laws. Like direct effect and supremacy, direct applicability is an important principle of community law grounded in the European experience. Direct application of community norms means that community law does not require an additional legislative act to be enacted in order to make it applicable in MS[180]. Like in the EU, immediately after entering into effect, community-based law is binding and applicable in the community space. This is crucial because any legal order asserts itself superior to its subjects; otherwise, it does not exist[181].

[179] Based on the Constitution and public policy reasons, the High Court of Zimbabwe ruled that it was unable to register a decision of the SADC Tribunal. For this court, the SADC Tribunal did not have jurisdiction to receive and adjudicate over the *Campbell* case; thus it could not register and enforce its decision in Zimbabwe. Moreover, even though Zimbabwe was party to the SAD Treaty and SADC Tribunal Protocol, it could not reverse a constitutionally mandated land reform programme that had been endorsed by the Parliament and the Supreme Court. cf PHOOKO (n 59) 7-11; Gramara Enterprises (Pvt) Ltd and Another v Minister of State for National Security Responsible for Lands, Land Reform And Resettlement and Another (HC 6396/08) [2009] ZWHHC 50 (28 April 2009) 9-19

[180] WEATHERILL (n 88) 97-100**;** PHOOKO (n 59) 20

[181] As M. Virally expresses it for international law, it is also true for the community law "any legal order asserts itself superior to its subjects, or else it does not exist. International law is inconceivable other than superior to States, its subjects. To deny its superiority is to deny its existence". MICHEL VIRALLY, 'Sur un Pont aux Ânes : les Rapports entre Droit International et Droits Internes', Mélanges offerts à Henri Rolin (A. Pédone 1964) 497

Finally, in 2014, SADC MS suspended the SADC Tribunal[182] and adopted a new Protocol. In terms of the new Protocol (2014); SADC citizens have been deprived of the right to refer a dispute with a SADC country to the regional body as the jurisdiction of the new SADC Tribunal is limited to interstate disputes[183].

The lack of a judiciary to consolidate community rules constitutes a major problem for the effectiveness of community rules of ASEAN and SADC. This is exacerbated by a complete lack of clear and detailed rules on the hierarchy and relationship between ASEAN and SADC community law and the domestic laws of ASEAN and SADC MS. The principles of community law as enshrined in the EU community law are not fully functioning.

This concludes the Preliminary Part of this study and sends us to Part I.

[182] This is not unique to the SADC. As T Gathii explains, in the leaders of the EAC amended he Treaty Establishing the East African Community as a statement of the disapproval of some controversial decisions of the East African Court of Justice. The ECOWAS Court of Justice had its jurisdiction expanded in 2005to allow cases challenging the conduct of MS with respect to human rights; but this jurisdiction has since not spared in its use. GATHII (n 33) xxxi-ii

[183] see Protocol on the Tribunal in the Southern African Development Community (SADC Tribunal 2014)

PART I: ASEAN COEXISTENCE FRAMEWORK: ANALYSING THE RELATIONSHIP BETWEEN THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT AND ASEAN MEMBER STATES' LAWS ON FOREIGN INVESTMENT

This Part reviews the coexistence arising from the interaction between the ASEAN Comprehensive Investment Agreement (ACIA) and ASEAN Member States' laws on foreign investment (ASEAN MS FILs). It analyses the link between foreign investment norms of each ASEAN country's law with those of the ACIA; and then induces whether the relationship is harmonious and complementary or characterised by competition and conflict of norms capable of thwarting the applicability and effectiveness of the regional investment agreement (RIA). This Part showcases the ASEAN – even though imperfectly – as one of the RECs with the most harmonious investment coexistence framework. This occurs through an effective distribution of foreign investment standards between the investment laws of each ASEAN MS and the ACIA. The coexistence framework is functioning because it ensures exclusivity in protection standards by the ACIA, and calibrates MS FILs to the promotion and facilitation norms; making it clear that any foreign investor should solely rely on and use the community treaty to protect its investment.

To reach this conclusion, this Part proceeds in the following steps. Chapter 1 briefly presents an overview of the ASEAN and the ACIA. It helps to understand the historical background of regional integration in the region. It also put the ACIA in context as a region-specific bargain embedded within ASEAN's wider normative and institutional framework[184]. Chapter 2 introduces the ACIA with its substantive standards. It highlights the ACIA's exclusivity on foreign investment protection norms. This clears the ground for a confrontational association, in chapter 3, with foreign investment standards contained in the laws of Cambodia, Indonesia, Malaysia, the Philippines, Thailand, Myanmar, Vietnam, Brunei, Lao PDR, and Singapore. Chapter 3 shows the calibration of ASEAN MS FILs on foreign investment promotion and facilitation norms. A conclusion closes this Part in chapter 4.

[184] ZHONG (n 23) 6

CHAPTER 1: OVERVIEW OF THE ASEAN AND ASEAN COMPREHENSIVE INVESTMENT AGREEMENT

There are two sections in this chapter. The first section briefly introduces ASEAN, and the second section shows a quick profile of the ACIA.

Section 1 ASEAN OVERVIEW

The Association of Southeast Asian Nations (ASEAN) was formed on 8 August 1967 by the original Members comprising Indonesia, Malaysia, the Philippines, Singapore and Thailand. ASEAN has since expanded to cover most of Southeast Asia including Brunei, Cambodia, Lao PDR, Myanmar and Vietnam. Timor Leste is now an observer country and is waiting for full membership of ASEAN. Like SADC, ASEAN serves the purpose of ensuring the peaceful coexistence of Nations and started as a political organisation. The ASEAN has developed from a mere loose organisation under the Bangkok Declaration known as the ASEAN Declaration[185], into a more structured organisation through various stages and initiatives which include the Bali Accords I[186], II[187] and III[188] and the ASEAN Charter. This section presents the objectives of the ASEAN constitutive Charter as well as the progressive integration and positive prospects.

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[185] The Bangkok Declaration is the instrument establishing the ASEAN. It was signed on 8 August 1967

[186] The Treaty of Amity and Cooperation in Southeast Asia signed on 26 February 1976. This Bali Concord I aimed at promoting peace and stability in the region. Under this Concord, ASEAN MS agreed not to use force but to seek peaceful solutions in settling disputes.
<https://www.asean2020.vn/tai-lieu-asean> accessed 15 February 2021

[187] The Bali Concord II, named after the Declaration of ASEAN Concord, or The Bali Concord, which was produced at the First ASEAN Summit in Bali in 1976, consists of three pillars, namely an ASEAN Security Community (ASC), an ASEAN Economic Community (AEC) and an ASEAN Socio-cultural Community (ASCC) among ASEAN member countries. Of the three pillars of the Bali Concord II, AEC is much more advanced in its end goal, that is, to establish both a single market and a single production base by 2020, so as to enhance ASEAN's credibility and economic weight. It was signed in 2003. <https://www.asean2020.vn/tai-lieu-asean> accessed 15 February 2021

[188] The Bali Declaration on ASEAN Community in a Global Community of Nations was signed in 2011. The Bali Concord III focuses on the three pillars of the ASEAN namely politics and security, economy and socio-culture. For politics and security cooperation, the declaration deals with conflict resolution, transnational crime and piracy eradication, corruption eradication and nuclear disarmament, among others. In the field of economy, it calls for ASEAN's participation in the global economy, the strengthening of the ASEAN economy, adoption of production standards and economic commodity distribution, access improvement and technology application, agricultural investment increase and energy diversification. The socio-cultural pillar covers the issues of natural disaster mitigation and management, climate change, health, education and culture. The declaration also reaffirms the regional bloc's commitment to the purposes and principles of the Charter of the United Nations and international laws that they subscribed to. <https://www.asean2020.vn/tai-lieu-asean> accessed 15 February 2021

1. Objectives of the ASEAN Charter

The ASEAN Charter serves as a firm foundation in achieving the ASEAN Community. It provides new political commitments and a new legal framework for ASEAN MS. It aims at achieving several objectives, including 'creating a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is the free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital'[189].

Although ASEAN was formed in 1967, many factors delayed the integration process. Economic cooperation started around 1992 with the creation of the ASEAN Free Trade Area through the Agreement on Common Effective Preferential Tariff of the ASEAN Free Trade Area, which was replaced by the ASEAN Agreement in Trade in Goods –ATIGA), followed by the ASEAN Framework on Services (AFAS) [190]. Concrete steps towards integration started with the signing of the Bali Accord II.

2. Progressive Integration and Positive Prospects

The implementation of the AEC Blueprint 2015[191] has substantially achieved tariffs elimination and trade facilitation, advancement of the services trade liberalisation agenda, investment liberalisation and facilitation, capital market regulatory frameworks and platforms streamline and harmonisation, skilled labour mobility facilitation, development of regional frameworks in competition policy, consumer protection and intellectual property rights promotion, connectivity promotion, narrowing of development gap, and strengthening of ASEAN's relationship with its external parties[192].

As mentioned before, the establishment of the ASEAN MS adopted the AEC Blueprint was a major milestone in the regional integration agenda. On 22 November 2015, ASEAN countries adopted the AEC Blueprint 2025 to cover the period from 2016 to 2025 along with the ASEAN

[189] ASEAN Charter, article 1.5 (The ASEAN Charter entered into force on 15 December 2008).
[190] CHAISSE and JUSOH (N 21) 2
[191] AEC Economic Community Blueprint (2008-2015)
[192] <https://www.asean2019.go.th/en/infographic/from-asean-economic-community-blueprint-2015-to-2025/> accessed 15 February 2021

Community Vision 2025. It succeeded the AEC Blueprint (2008-2015), which was adopted in 2007[193]. When the ASEAN embarked on the ASEAN Vision 2020 in 1997, the ASEAN GDP was USD 694 billion. It is planned that the ASEAN should reach USD 1 trillion by 2005 and USD 2 trillion by 2020. In 2006, one year later than the predicted date, ASEAN became a USD 1 trillion economy, but passed the USD 2 trillion benchmark in 2011, nine years earlier than anticipated[194]. With a combined GDP of USD 3 trillion in 2018, ASEAN is the fifth-largest economy in the world[195]. The region also attracted USD 154.7 billion worth of investment in 2018 – the highest in history – and a 30.4% increase from total FDI inflows of USD 118.7 billion in 2015[196]. ASEAN economic integration continues to contribute towards the region's emerging position as a global growth driver, with intra-ASEAN accounting for the largest share of ASEAN's total trade and FDI inflows in 2018 at 23.0% and 15.9%, respectively[197].

The ASEAN is a large market, larger than North America or the European Union (EU), with approximately 625 million people, 60% of whom are youths[198]. Since the middle-income class with its disposable income will be two-thirds of the projected population of nearly five billion by 2030, there is a great promise of continued growth[199] as the ASEAN is situated between two major economies, China and India, and lies within the old and new international trade routes, namely the old maritime Silk Road, the South China Sea, the Straits of Malacca and the Straits of Singapore[200]. It constitutes the most rapidly growing economic region in the world, thanks to diversification into more complex manufacturing[201].

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[193] < https://asean.org/asean-economic-community/> accessed 15 February 2021

[194] CHAISSE and JUSOH (N 21) 1

[195] ASEAN Integration Report 2019, 6

See also, <https://www.statista.com/statistics/796245/gdp-of-the-asean-countries/#:~:text=In%202020%2C%20the%20estimated%20total,increase%20from%20the%20previous%20years.>; <https://www.usasean.org/why-asean/what-is-asean> accessed 15 February 2021

[196] ASEAN Integration Report 2019, 38-39

[197] ASEAN Integration Report 2019, para 5

[198] CHAISSE and JUSOH (N 21) 1

[199] RODERICK MACDONALD, 'Southeast Asia and the AEC, an Introduction' in Roderick Macdonald (ed), *Southeast Asia and the ASEAN Economic Community* (Palgrave Macmillan 2019) 18

[200] CHAISSE and JUSOH (N 21) 1

[201] MACDONALD (n 199) 18

Section 2 ASEAN COMPREHENSIVE INVESTMENT AGREEMENT

Internal and external influences have shaped the contours of the ACIA project. The pre-existing BITs of individual ASEAN MS have played a determinant role in framing collective treaty choice within ASEAN as a grouping. The adoption of the 1987 Agreement for Promotion and Protection of Investments, which provided investment protection, can be considered as the first stage. With the formation of the 1998 ASEAN Investment Area, the ASEAN achieved to address altogether protection, promotion, liberalisation and facilitation of investments. It pushed the region towards strategically positioning itself as a single production base[202]. The 1987 agreement had a purely investment protective focus. The 1998 agreement set to establish a competitive ASEAN investment area, indicating a strategic desire to position the region as an alternative host of FDI that would normally flow out of China.

The ACIA was signed on 26 February 2009. It consolidates different previous investment regimes. As pointed out earlier, the previous regime consisted of the 1987 and the 1998 agreements. The 1987 agreement contained protection and promotion elements; whereas the 1998 agreement covered liberalisation, facilitation and promotion elements. It also provided for five sectors and services incidental to these sectors. The ACIA covers all the four pillars, namely liberalisation, protection, facilitation and promotion[203].

Beyond the mere consolidation of earlier regional agreements, the ACIA is more comprehensive and forward-looking, offering several features of modern, best practice, international investment agreements[204] while remaining as well a region-specific bargain embedded within ASEAN's wider

[202] MICHAEL EWING-CHOW and JÜRGEN KURTZ, 'The ASEAN Economic Community – Investment' (2014) Centre for International Law, National University of Singapore 41-42

[203] The ACIA has been continuously improved since its entry into force in 2012. Its first amendment (in 2014) provided a mechanism to facilitate the modification of reservations in the ACIA schedule, including a step-by-step process with prescribed timelines. The Second and Third Protocols to Amend the ACIA signed in September and December 2017 respectively, put in place the decisions of the Ministers on the built-in agenda items in the agreement. These two protocols have been ratified by Brunei Darussalam, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam. The Fourth Protocol to Amend the ACIA, which incorporates World Trade Organization (WTO) Trade-Related Investment Measures plus Prohibition of Performance Requirements obligations into the agreement, has been signed by nine AMS, namely Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Singapore, the Philippines, and Thailand, at the sidelines of the AEM Retreat in Phuket, Thailand on 23 April 2019. The remaining ASEAN MS are expected to sign the Protocol upon completion of their domestic processes. ASEAN INTEGRATION REPORT 2019, para 74

[204] CHAISSE and JUSOH (N 21) 36 ,49

normative and institutional framework[205]. The ACIA is not merely a set of 'multilateralised' investment rules constituted by other international investment agreements (IIAs). ASEAN legal scholars strongly suggest that it is instead a region-specific agreement as several of its provisions can only be understood in light of regional economic integration[206].

The ACIA applies in the territory of all its MS[207]. The term 'territory' commonly comprises not only a State's land and internal waters, but also its air space and territorial sea over which it exercises sovereign rights and other areas over which the country exercises exclusive jurisdiction. This is its geographical scope. In most provisions, it refers to the territories of individual Member States (MS), in some other provisions it refers to ASEAN as a single investment destination[208]. The temporal framework of the ACIA is not retroactive. Article 21.1 of the Japan-Korea BIT of 2002 for example provides that the agreement shall also apply to all investments of investors of either Contracting Party acquired in the territory of the other Contracting Party in accordance with the applicable laws and regulations of that other contracting Party prior to the entry into force of this Agreement. Unlike this provision, the ACIA provides that the agreement only applies to existing investments as at the date of its entry into force as well as investments made after its entry into force[209].

CHAPTER 2: ASEAN COMPREHENSIVE INVESTMENT AGREEMENT AND EXCLUSIVITY ON FOREIGN INVESTMENT PROTECTION

This chapter intends to demonstrate that, despite the existence of some generic provisions on foreign investment protection in ASEAN MS FILs, the ACIA remains the legal instrument to guarantee protection to foreign investment in each ASEAN country. 'Generic' or 'basic'

[205] see ZHONG (n 23)
[206] See for example ZHONG (n 23) 15
[207] The ILC Draft Articles on MFN article 10 provides that "the rights acquired should be those that the granting State extends to a third State within the limits of the subject matter of the MFN clause and only if the beneficiary persons or things belong to the same category of persons or things which benefit from the treatment extended to the third party and have the same relationship with that State. Draft Articles (1978), article 10, Acquisition of rights under a MFN clause.
[208] J. Chaisse and S. Jusoh point out article 24 and 25 as examples of provisions referring to the ASEAN as a whole and not to individual ASEAN MS. CHAISSE and JUSOH (N 21) 72
[209] ACIA, article 3.2

protection standards are those investment protection norms that, even though they were not provided for, they would still be otherwise guaranteed. Therefore, their existence in a text does almost make no difference when this text is being confronted to norms contained with another instrument. Generic investment protection standards either form the *raison d'être* itself of the international investment law or they have acquired a special status of customary rule or general principle. They include rules on expropriation and compensation or freedom of transfer.

This chapter is divided into two sections. The first section extols ACIA's substantive provisions to highlight its exclusivity on foreign investment protection. The second section shows the generic protection norms contained in the ASEAN MS FILs to emphasise the fact that they do not make any difference, and as such the ACIA remains the only guarantor of foreign investments within the ASEAN region.

Section 1 ASEAN COMPREHENSIVE INVESTMENT AGREEMENT AND FOREIGN INVESTMENT PROTECTION

This section displays the scope of application, expropriation and compensation, fair and equitable treatment (FET), most-favoured-nation (MFN), national treatment, transfers, and investor-State dispute settlement (ISDS).

1. Scope of Application

The ACIA applies to investors and their investments. Article 3 reads as follows:

> "This Agreement shall apply to measures adopted or maintained by a MS relating to (a) investors of any other MS; and (b) investments, in its territory, of investors of any other MS"[210].

The ACIA applies to natural persons and juridical persons and covers both intra- and extra-ASEAN investors and their investments.

However, not any activity which might constitute an investment is covered. The ACIA only applies to manufacturing, agriculture, fishery, forestry, mining and quarrying sectors, as well as to

[210] ACIA, Article 3 (1)

the services incidental to these sectors[211]. Additional sectors can be added upon consensus by all ASEAN MS[212]. Furthermore, it is recognised to individual MS the ability to adopt reservations concerning covered sectors[213].

1.1. Definition of 'Investment'

The technique employed to determine the coverage of the ACIA consists of limiting MS' exposure to investment arbitration. This precautionary approach is reflected in the way the agreement distinguishes between different investments and investors with or without substantial business operations. More importantly, it is reflected in the categorisation between 'covered' and 'non-covered' investment, and it reveals itself crucial in determining the scope of the ACIA and the level of liability exposure.

Article 4(c) defines the term 'investment' as follows:

"Investment means every kind of asset, owned or controlled, by an investor, including but not limited to the following:

i) Movable and immovable property and other property rights such as mortgages, liens or pledges;

ii) Shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;

iii) Intellectual property rights which are conferred pursuant to the laws and regulations of each MS;

iv) Claims to money or to any contractual performance related to a business and having financial value;

[211] ACIA, Article 3 (2)
[212] ACIA, Article 3 (2)
[213] ACIA, Article 9
Each Member State submits its reservation list to the ASEAN Secretariat. It mostly covers obligations pertaining to national treatment and senior management and board of directors.

v) Rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and

vi) Business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.

The term 'investment' also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividends, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as an investment[214]".

Article 4 defines what an investment is, and provides characteristics and criteria to determine what an investment is not. This article must be read in line with Footnote 2 and 3 of the ACIA. The Footnote 2 sets features of an investment. It reads as follows: "Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk".

Footnote 3 completes the understanding of the indicative list of investments under Article 4(c). It clarifies some economic transactions and excludes others. It disposes as follows: "For greater certainty, investment does not mean claims to money that arise solely from (a) commercial contracts for the sale of goods or services; or (b) the extension of credit in connection with such commercial contracts[215]".

In investment treaty law, three alternative routes are employed to define an investment. An enterprise-based definition is the narrowest option. This definition requires the establishment or

[214] J. Chaisse and S. Jusoh provide examples of investments covered under this provision. Movable and immovable property and property rights refer to machinery, land, factory buildings, leases, liens, mortgages or charges. Shares, stocks, bonds and debentures, and any other forms of participation by a juridical person and the rights derived therefrom refer to shares and bonds held in a company or corporation, loan stock investment in a company or corporation. Intellectual property rights which are conferred pursuant to the laws and regulations of each Member State, and good will refer to patents, registered trademarks, geographical indications, trade secrets, industrial designs, copyrights, profit-sharing agreement or partnership agreement. Claims to money, Rights under contracts and business concessions refer to turnkey construction agreement, project management, production sharing agreement under mining or oil and gas sectors, hydro-power build, operate and transfer (BOT) contract, expressway BOT concession including the rights to collect toll, mining contract. CHAISSE and JUSOH (N 21) 78

[215] ACIA Footnote 3

acquisition of an enterprise for the purpose of making an investment. The investment is the enterprise, and only assets that constitute part of the enterprise are covered. An opened-list asset-based definition is the opposite of an enterprise-based definition. It covers any asset, and it is mostly drafted encompassing 'every kind of asset' or 'every kind of investment'. In practice, this formulation is followed by an illustrative list of some covered assets which constitute investments. Another way is a closed-list asset-based definition. It is an intermediate definition since it combines aspects of an enterprise-based definition as well aspects of an open-list asset-based definition. It mostly considers investment as an enterprise and then expands covered assets to include assets such as intellectual property rights, whether or not they are associated with an existing enterprise[216].

The ACIA combines approaches that broaden the definition of investment; while providing additional explanatory to limit and include not everything as a covered investment. Article 4 (c) is clear that investment under the agreement should be considered as every kind of asset, owned or controlled, by an investor, including but not limited to the list thereto provided. However, this broadened approach is nuanced by the explanatory footnotes. Moreover, footnote 3 narrows the scope of investment to excluding claims to money arising solely from commercial contracts for the sale of goods or services; while footnote 2 sets the conditions for listed and non-listed assets under article 4 (c) to constitute an investment. The requirements include the commitment of capital, the expectation of profit, and the assumption of risk.

The ICSID case law shows how arbitral tribunals have approached treaties' definitions with the ICSID Convention's definition. In examining whether the requirements for an "investment" have been met, tribunals apply a dual test: whether the activity in question is covered by the parties' consent, and whether it meets the Convention's requirements[217]. The ICSID term "investment" has an objective meaning independent of the parties' disposition[218]. Tribunals first determine whether the claim meets the criteria under ICSID Convention to be considered as an investment. Only after such a performance, tribunals will look into the parties' disposition. Subject to

[216] KONDO (n 25) 6-7
See also, Commentary of art 2 of the SADC Model BIT
[217] CHRISTOPH SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, and ANTHONY SINCLAIR (eds), *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) (Article 25 - Jurisdiction 71–347) para 124.
[218] *id.* para 123.

variations[219], the following criteria are applied by ICSID tribunals in the determination of *ratione materiae* competence: a substantial commitment, a certain duration of an activity, assumption of risk, regularity of profit, and contribution to the host State's development[220].

Considering the above, although the 'contribution to the development of the host State' criterion does not appear in the ACIA, it still can be taken into account in the process of determining the jurisdiction of an ICSID tribunal to the ACIA[221]. Duration does not as well specifically appear in the ACIA. Indeed, FDI requires control and influence over the investment. Duration and stability are key elements to enable the investor to ensure the construction of plantations or manufacturing plants; or the transfer of know-how, technology or specific management skills. However, the fact that the ACIA also covers portfolio investments can justify such an omission. As a feature of the ACIA, the definition of an investment includes both FDI and portfolio investments. Portfolio investment consists of a movement of money made for the purpose of buying shares in a constituted company. It allows for prompt and free movement of shares and stocks, promissory notes and bonds. It thus strengthens the link with FDI and ensures the free flow of capital in the region. This might seem risky in times of economic turmoil even though it makes it possible for sustained inflows of new investments and reinvestments to promote and ensure dynamic development of ASEAN economies. The previous ASEAN investment regime excluded portfolio investments from its scope of application[222].

A reinvestment is equally protected as an investment. There is no additional condition, provided that the reinvestment covers the same substance and is established per the conditions placed on the original investment.

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[219] TRINH HAI YEN, *The Interpretation of Investment Treaties* (Brill Nijhoff 2014) 208

[220] SCHREUER, MALINTOPPI, REINISCH, and SINCLAIR (n 217) 129-134; 153-174

[221] cf *Salini* v. Morocco, ICSID Case No.ARB/00/4, Decision on Jurisdiction, 23 July 2001, paras.52-57; *Patrick Mitchell* v. Democratic Republic of Congo, ICSID Case No.ARB/99/7, Decision on Annulment, 1 Nov 2006, para.33; *Malaysian Historical Salvors* v. Malaysia, ICSID Case No.ARB/05/10, para.143

[222] See WTO, Report of the Working Group on the Relationship between Trade and Investment to the General Council, WT/WGTI/6, 9 December 2002, 21
This document shows the position suggested by developing countries concerning *pre*-establishment and *post*-establishment of investments. The suggested definition proposes a narrow approach for market access and investment liberalization which covers FDI only in the *pre*-establishment of investment; and a broad definition that covers a wide range of assets considered as an investment in the *post*-establishment investment.
The ACIA does not also make it clear on the consequences of an admitted licit investment which might become illicit during the lifetime of the investment.

1.1.1 The privilege of a 'covered investment'

An investment is expansively defined under the ACIA. Nevertheless, not all investments are granted the rights and benefits of the agreement. The privilege includes the right by an investor of a MS to submit to arbitration a claim[223]. A 'covered' and 'non-covered' investment is not put on the same footing. An investor can only submit to arbitration a violation relating to a covered investment[224]. Article 4 defines a 'covered investment', with respect to a MS, as an investment in its territory of an investor of any other MS in existence as of the date of entry into force of the agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing by the competent authority of a MS[225].

This provision arouses three conditions for an investment to be considered as a 'covered investment' to avail of the benefits of the agreement. First, this provision refers to the requirement of the location of the investment. A covered investment, for a MS, is an investment in its territory of an investor of any other MS. An ASEAN MS must have jurisdiction over that investment. Second, the provision refers to the requirement of time. It provides that a covered investment in order to meet this temporal requirement must exist as of the date of entry into force of the agreement or established, acquired or expanded thereafter. Article 29 of the ACIA precludes investors from forum shopping by making it clear that claims arising out of events that occurred, or claims which have been raised prior to the entry into force of the agreement are subjected to the treaty under which the investment was initially made, and not the ACIA. Such investments would be covered by either the 1987 Agreement for the Promotion and Protection of Investments (IGA)

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[223] ACIA, article 32 (a)

[224] Article 32 reads as follows:

"If an investment dispute has not been resolved within 180 days of the receipt by a disputing Member State of a request for consultations, the disputing investor may, subject to this Section, submit to arbitration a claim:

(a) that the disputing Member State has breached an obligation arising under Articles 5 (National Treatment), 6 (Most-Favoured-Nation Treatment), 8 (Senior Management and Board of Directors), 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers) and 14 (Expropriation and Compensation) relating to the management, conduct, operation or sale or other disposition of a covered investment; and

(b) that the disputing investor in relation to its covered investment has incurred loss or damage by reason of or arising out of that breach".

[225] ACIA, Article 4 (a)

or the 1998 Framework Agreement on the ASEAN Investment Area (AIA)[226]. Last, the provision refers to the requirement of admission. In addition to the jurisdictional and temporal requirements, an investment must be admitted according to the laws, regulations, and policies of the concerned ASEAN country. This condition refers to the legality of establishment, acquisition or expansion of investments within an ASEAN country. Each country is thus required to determine the conditions of admission of foreign investments within its jurisdiction. To be legally valid and benefit from the rights and privileges under the ACIA, one will have to look into domestic legislations, rules, and regulations on conditions for the admission of investments. Approval in writing is not a general requirement.

Indeed, conditions on the admission of foreign investments vary from one country to another. Article 4 (a) strengthens this state of affairs and provides for an 'additional' but 'optional' approval in writing in the host State's screening process for the purpose of the ACIA. This provision so provides only where applicable. The incorporation of 'where applicable' is important. It allows avoiding what M. Sornarajah qualifies as 'a coming crisis' in investment treaty arbitration consisting of arbitral interpretations in a manner beyond their actual meanings and not contemplated by the original drafting of the parties[227]. This stipulation authorizes the host State to conduct cautious and case-by-case screening of investments[228]. Where an ASEAN country specifically requires approval in writing for a particular sector or sub-sector, this provision clearly shows that the investment must be so admitted to holding the status of a 'covered investment'. Investment tribunals have highlighted the importance of this condition. In *Gruslin,* the investor was considered to have not satisfied the 'approved project requirement' under a BIT between Malaysia and the Belgo-Luxembourg Economic Union[229]. However, if a country's law prescribes no such a requirement, it thus cannot be taken into account. In a unique claim brought under the

[226] Article 47 of the ACIA provides that upon the entry into force of the ACIA, the ASEAN IGA and the IGA Agreement shall be terminated. In this regard, Z. Zewei notes that one of the ACIA's major achievements is the bringing-together under a single comprehensive treaty of two disparate sets of investment-protection rules previously embodied in the IGA and the AIA. See, ZEWEI ZHONG, 'The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community' (2011) Vol. 6: Iss. 1, Article 4 Asian Journal of Comparative Law 10

[227] MUTHUCUMARASWAMY SORNARAJAH 'A Coming Crisis: Expansionary trends in Investment Treaty Arbitration' in Sauvant Karl and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Cambridge University Press, 2008) 51; MUTHUCUMARASWAMY SORNARAJAH, *The International Law on Foreign Investment* (Cambridge University Press, 2010) 322

[228] YEN (n 219) 206

[229] *Gruslin* v. Malaysia, ICSID Case No. ARB/99/3, Award, 27 November 2000, para 25.5

IGA, the tribunal in *Yaung Chi Oo* recognised the pertinence of approval in writing condition when it is so provided as a prerequisite to availing from an investment agreement[230]. The tribunal noted that if a host State under IGA approved in writing an investment proposal under its internal law, such an investment must be taken to be registered and approved also for the purposes of the agreement; unless it set up a separate register of protected investments[231]. Unless specific prerequisites exist and are published; the sole fact for investments to be constituted in accordance with the laws of the host State is sufficient for them to benefit from the treaty protection[232].

J. Losari notes that the search for approval in writing may be burdensome for investors; and in certain countries, it may potentially be abused by some government officials[233]. To avoid arbitrariness, the Annex 1 'Approval in writing' of the ACIA obliges ASEAN MS to transparency. Article 4 (a) refers to Footnote 1. It further provides that for the purpose of protection, the procedures relating to specific approval in writing shall be as specified in Annex 1: Approval in Writing. The obligation upon MS under this Annex informs the 'approval' in writing condition under article 4 (a). When a country requires in its domestic laws approval in writing but does not comply with the stipulations of Annex 1 to the ACIA, such failure should amount to the absence of domestic laws requiring approval in writing. Consequently, the sole fact that the investment is lawfully constituted is sufficient for it to be considered as a covered investment, and therefore enjoy the community protection under ACIA. Annex 1 requires the MS whose laws bear 'approval in writing condition' to inform through the ASEAN Secretariat all the other MS and provide contact of the competent authority; and inform the applicant in case of incomplete application, approval or denial of application[234].

The aforementioned definition of an investment is broad. Despite that, only an investment that constitutes a covered investment enjoys the privilege of the ACIA. It comes into sight that if an investment consists of a wide range of assets, only an investment that meets the requirements provided under article 4 (a) are protected by the ACIA. The investment must exist within the

[230] *Yaung Chi Oo* v. Myanmar, ASEAN I.D. Case No.ARB/01/1, Award, 31 March 2003, para.54, 55
[231] *Yaung Chi Oo* v. Myanmar, ASEAN I.D. Case No.ARB/01/1, Award, 31 March 2003, para. 59
[232] *Yaung Chi Oo* v. Myanmar, ASEAN I.D. Case No.ARB/01/1, Award, 31 March 2003, para.54, 55, 59
[233] Junianto James Losari 'A Baseline Study for RCEP's Investment Chapter: Picking the Right Protection Standards' in JULIEN CHAISSE, TOMOKO ISHIKAWA and SUFIAN JUSOH (eds), *Asia's Changing International Investment Regime. Sustainability, Regionalization, and Arbitration* (Springer 2017) 147
[234] See Annex 1: Approval in Writing

jurisdiction of a MS, be constituted and admitted in accordance with its laws and regulations; and where applicable be granted approval in writing. The ASEAN as an entity does not have any competence. Individual MS hold the discretionary power to decide which investments should be covered by the ACIA. However, that discretion is limited by the fact that they cannot redefine what investment is; as they are bound by the definition of investment already set under article 4 (c). This means that the ACIA has portrayed ASEAN as a standalone investment front[235]. Its definition of an investment is an ASEAN definition and applies in all ASEAN MS' jurisdictions[236]. Furthermore, their discretion to grant 'covered investment' standing to an investment is nuanced in case domestic laws require approval in writing. Such approval is guided by transparency and good faith principles in international investment law. The absence of internal transparent and accessible procedures amounts to the inexistence of a condition of 'approval in writing'. In this case, an investment is considered to be legally constituted even without being approved in writing since internal procedures are not transparent and accessible.

1.2.Definition of 'Investor'

Not only is the definition of 'Investment' crucial in defining the scope of application of the ACIA. The definition of an 'investor' is vital as well. An investor is defined as follows:

"Investor' means a natural person of a MS or a juridical person of a MS that is making, or has made an investment in the territory of any other MS"[237].

An investor can be either a natural person possessing the nationality of, or right of permanent residence in a MS[238], or an entity duly constituted or otherwise organised under the applicable law of a MS, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship,

[235] JULIEN CHAISSE (n 26) 232

[236] The expansionary attempt through broadly defining 'investment', while limiting it with the associated definition of 'covered investment' can be explained in terms of the search for an overall balance between the rights and the obligations of investors and host States. The ACIA guarantees investment protection while securing host States regulatory space. Although being based on the best practice in international investment law; ASEAN MS preserved an 'ASEAN Way' and the ability to exert sovereignty rights to intervene in foreign investment matters (See ZHONG ZEWEI, 'The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community' (2011) Vol. 6: Iss. 1, Article 4 Asian Journal of Comparative Law 6, 11)

[237] ACIA, Article 4 (d)

[238] ACIA, Article 4 (g)

association, or organisation[239]. This definition implies that an investor within the meaning of the ACIA can be either of ASEAN origin or non-ASEAN origin. It aligns with ASEAN trade bloc design which promotes an outward-oriented integration as the organisation is seeking partnership outside of the region[240] and or covering issues beyond trade and services liberalisation, particularly trade facilitation, investment, government procurement, and competition[241].

A natural investor must hold the nationality of an ASEAN MS to be considered a natural investor within the meaning of the ACIA. As a matter of principle in international law, the nationality of the investor is determined by the national law of the country whose nationality is claimed[242]. Without holding the nationality of a MS, an investor with a right to the permanent residence can be considered as an investor within the meaning of the ASEAN. This alternative definition is however challenging.

A juridical person must be duly constituted or otherwise organised under the applicable law of that MS to be so considered within the terms of the ACIA. Schreuer notes that tribunals have usually refrained from engaging in substantive investigations of a company's control and they have usually adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person[243]. This provision does not provide for additional conditions beyond the two stated above. For instance, the issue of companies that are not managed in the country of incorporation becomes relevant only in denying the agreement's benefits. The location of

[239] ACIA, Article 4 (e)

[240] Apart from the ASEAN Free Trade Area (AFTA) among ASEAN MS, the regional trade bloc has signed several FTAs with some of the major economies in the Asia-Pacific region. These include the 2010 ASEAN-Australia-New Zealand FTA (AANZFTA), the 2005 ASEAN-China FTA (ACFTA), the 2010 ASEAN-India FTA (AIFTA), the 2007 ASEAN-Korea FTA (AKFTA), and the 2008 ASEAN-Japan Comprehensive Economic Partnership (AJCEP). Trade negotiations with other countries out of the Asia-Pacific sphere are under consideration (for example ASEAN-European Union FTA whose negotiations have to start again).

[241] JENNY D. BALBOA and ERLINDA M. MEDALLA 'Regional Economic Integration in East Asia: Progress and Pathways' <https://www.researchgate.net/publication/254441608_Regional_Economic_Integration_in_East_Asia_Progress_and_Pathways> accessed 15 June 2020

[242] OECD, 'International Investment Law: Understanding Concepts and Tracking Innovations' (2008) 10
It is important to note the tribunal's decision in *Nottebohm* that even though a country is entitled and has discretion on the basis of its law to grant nationality to a specific individual, there must be a real connection between the State and the national. The *Nottebohm* case (Liechtenstein v. Guatemala), 2nd phase, Judgment of 6 April 1955, 1955 ICJ Reports 4, at 23. The discretion of the State is also nuanced by the obligation to not encourage statelessness in granting or rejecting people's nationality. cf UN Conventions on Statelessness available at <https://www.unhcr.org/un-conventions-on-statelessness.html>

[243] OECD (2008), International Investment Law: Understanding Concepts and Tracking Innovations, 18

'incorporation/registration in accordance with the law' is the pertinent criteria in determining the nationality of a juridical investor under ACIA.

When it is constituted under the laws of a MS, the juridical person will be considered an investor of that MS. Similarly, when it is otherwise organised – incorporated or registered – under the laws of a MS, the juridical person will be considered as an investor of that MS. Article 4 (e) does not limit the object and form of the constitution of a juridical person. It can be for-profit or otherwise, and privately-owned or governmentally-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship, association, or organisation. It is upon MS' laws to determine the form in which the investment is to be made. Once the investment meets the conditions of constitution under MS' laws, it bears the nationality of that MS and falls within the purview of the ACIA.

In today's globalised world, businesses operate in a way that sometimes makes it improbable to determine their nationality. Taking it into account, the ACIA allows for a denial of benefits on several grounds[244]. T. Yen enumerates three cases of denial of benefits. It should occur when a company is (i) owned or controlled by an investor of a non-MS and has no substantive business operations in the home country; (ii) owned or controlled by an investor of the host State and has no substantive business operations in the home country; (iii) owned or controlled by an investor of a non-MS with whom the host state does not maintain diplomatic relations.

These three cases refer to (i) the absence of ownership or control of the juridical person[245]; (ii) the absence of substantive business operations[246]; and (iii) the absence of diplomatic relations with a non-MS[247]. In other words, they refer to an investor originating from a country that is not an ASEAN Member State, that owns or controls the juridical person which does not, in addition to that, have substantive business operations in the territory where it is established. The right of denial of benefits to investors is a consequence of the broad definition of a juridical person

[244] ACIA, Article 19
[245] ACIA, Article 19.1 (a)
[246] ACIA, Article 19.1 (b)
[247] ACIA, Article 19.1 (c)

provided for in the ACIA. It is relevant to add another case as provided under article 19.2, which is an illegal misrepresentation of the juridical person's ownership in areas of investment that are reserved for natural or juridical persons of the denying MS[248]. In fact, the definition does not consider effective management in determining the nationality of businesses. This makes it easy for businesses to build worthless legal structures to avail themselves of the treaty while maintaining substantive operations out of the ASEAN investment area. This risk of treaty *shopping* is evident. Therefore, MS have found it judicious to retain the right to deny the benefit of the agreement in case an investor 'juridical person' falls under the situations prescribed by article 19. Furthermore, arbitral tribunals generally reject jurisdiction in the presence of nationality planning[249].

The ASEAN addresses the issue of dual nationality. The right to arbitration is not granted to an investor possessing the nationality of the host State[250]. Some scholars are sceptical on the fact that the agreement remains silent on the situation of a dual investor that does not have the citizenship of the host State[251]. The absence of the nationality of the host State is however relevant in determining *ratione personae* competence in the case of dual nationality without a nationality of the host State. In so doing, the situation falls under the definition of the 'investor' as a natural or juridical person possessing the nationality of a MS. Once evidence is brought that the investor possesses the nationality of another MS, the competence *ratione personae* should be considered fulfilled irrespective of whether this investor holds an additional nationality of a thirdcountry.

2. Prohibition of Expropriation without Compensation

Protecting alien properties against expropriation in the host State has long been of central concern. As T. Yen points out, cases of expropriation between the 1960s and 1970s constituted a driving force for the emergence of an obligation to compensate in investment treaty law[252]. Before treaty law improves the standards of protection of alien properties against expropriation, investors could only reach the level of protection of customary international law minimum standard of protection

[248] ACIA, Article 19.2
[249] YEN (n 219) 210
[250] ACIA, Article 29 (2)
[251] YEN (n 219) 209
[252] *id.* 223

of aliens[253]. To date, expropriation and compensation have become like two sides of the same coin. One cannot be invoked without another. As a matter of principle, the host State's right to expropriate is reaffirmed, but conditioned by the requirements of legality: the '*interêt public'* nature of the measure must be clear; the measure must not discriminate or be arbitrary; and the deprivation of investment must be accompanied by a compensation[254], which can be either 'prompt, adequate and effective' or 'adequate and effective'. As Dolzer and Schreuer mention, these requirements are seen to be part of customary international law[255].

1.3.Definition of Expropriation

The ACIA enshrines the right to compensation along with expropriation. It is thus not without relevance that article 14 of the agreement is titled 'Expropriation and Compensation'. This provision recalls the sovereign right to expropriate, subject to conditions. Article 14 protects a covered investment from both direct and indirect expropriation. Even in specific cases when a treaty does not specially mention indirect expropriation, the notion is said to be broad enough to cover relevant measures of public authorities[256]. A direct expropriation is realised through a formal process that ends with the withdrawal of legal title of ownership over investment for the benefit of the State or any other third party designated by the State[257]. It often results in jeopardising the host State's publicity and investment climate. For these reasons, it has become relatively rare[258]. Nowadays, the focus has drifted to what mostly constitutes the result of indirect measures that

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[253] RUDOLF DOLZER and CHRISTOPH SCHREUER, *Principles of International Investment Law* (Oxford University Press 2008), 89

[254] OECD, 'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law' (2004) Working Papers OECD Publishing, 2
The Hull formula – so-called after the United States Secretary of State Cordell Hull – advocated 'prompt, adequate and effective' compensation for the expropriation of foreign investments; following Mexico's nationalisation of American petroleum companies in 1936. The Hull formula was opposed by the Calvo doctrine – supported by developing countries – that required only appropriate compensation over the right of the State to regulate. Contemporary international investment law has bridged the differences between supporters of one and another approach. The Hull formula and its variations are often used and accepted and considered as part of customary international law. On the other hand, the right to regulate foreign properties, especially foreign investments is stressed.

[255] DOLZER and SCHREUER (n 253) 91

[256] UNCTAD, 'Expropriation' (2012) UNCTAD Series on Issues in International Investment Agreements II 8

[257] SUZY NIKÈMA, 'Compensation for Expropriation' (2013) IISD Best Practices Series 4
See also, *SD Myers* v. Canada, Partial Award, 13 November 2000, para. 280.

[258] DOLZER and SCHREUER (n 253) 92

have the equivalent effect of a formal deprivation of an investment[259]. Indirect expropriations have become one of the most important issues in investment treaty arbitration. They consist of sophisticated operations in which an investor still retains legal title over an investment, but its investment no longer has any financial value or no longer effectively exists[260]. As the definition of indirect expropriation remains problematic, it became a concern how to draw the line between indirect expropriation and the right to regulate. Or, simply stating, it is of growing concern to systematically differentiate between compensable indirect expropriations and 'legitimate' non-compensable regulatory measures[261].

Article 14.1 covers both direct and indirect expropriation[262]. It reads as follows:

> "A MS shall not expropriate or nationalize a covered investment either directly or through measures equivalent to expropriation or nationalisation ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law[263]".

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[259] cf *Metalclad Corporation* v. Mexico, ICSID Case No ARB(AF)/97/1 para 103
"Expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in consideration of the host state, but also covert or incidental interference with the use of property which has the effect of depriving the owner; in whole or significant part, of the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State".
See also *Tecmed TécnicasMedioambientalesTecmed, S.A.* v. Mexico, ICSID Case No. ARB(AF)/00/2 para 113
"Expropriation means the forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect".

[260] NIKÈMA (n 257) 4

[261] OECD (n 254) 22

[262] It is generally understood that the term "…equivalent to expropriation…" or "tantamount to expropriation" included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called "indirect expropriation" or "creeping expropriation", as well as to the above-mentioned *de facto* expropriation. *Tecmed TécnicasMedioambientales Tecmed, S.A.* v. Mexico, ICSID Case No. ARB(AF)/00/2 para 114

[263] ACIA, Article 14.1

1.4.Preconditions to Expropriation

It is equally correct to say 'prohibition of expropriation towards an investor' or 'right to expropriation *vis-à-vis* the host State'. It refers to the same reality which is that a taking of an alien property must be handled under prerequisites. Within the terms of the ACIA, these preconditions comprise the aim of the expropriation measure which must be of public interest, the measure must not discriminate among investors, it must be undertaken in accordance with due process, and follow a compensation.

- Public purpose objective

Public purpose '*interêt public'* refers to the final purpose of the measure. An act of expropriation must achieve a public interest objective.

- Non-discrimination

Non-discrimination refers to the prohibition of targeted measures to affect some investments instead of or to the detriment of others. Measures leading to expropriation are to be adopted in good faith.

- Due process

Due process of law refers to procedural requirements that must be met as a condition for expropriation. An expropriation measure must be undertaken consistent with established, accessible and transparent procedures.

- Prompt, adequate and effective compensation

Prompt compensation refers to compensation to be granted to an investor as soon as the expropriation is made. The payment has to occur without delay[264]. The practice refers to a period no longer than six months[265]. There exist different methods of valuation. Adequate compensation refers to the calculation by the fair market value immediately before or at the time when the

[264] ACIA, Article 14.2(a)
[265] UNCTAD, (2012) 'Expropriation' Issues in IIAs II 49

expropriation was publicly announced, or when the expropriation occurred[266]. Effective compensation entails the compensation to be fully realisable and freely transferable[267]. The investor retains the choice of the currency in which the compensation is to be paid. Article 14 relates to either the currency in which the investment was originally made or in a freely usable currency as defined by article 4(b).

The ACIA Footnote 9 informs that article 14 shall be read with Annex 2 (Expropriation and Compensation). This Annex provides crucial guidance, especially for the determination of indirect expropriation. It reads as follows:

> "1. An action or a series of related actions by a MS cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.
>
> 2. Article 14(1) addresses two situations:
>
> (a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
>
> (b) the second situation is where an action or series of related actions by a MS has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> 3. The determination of whether an action or series of actions by a MS, in a specific fact situation, constitutes an expropriation of the type referred to in subparagraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (a) the economic impact of the government action, although the fact that an action or series of actions by a MS has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;
>
> (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal documents; and

[266] ACIA, Article 14.2(b)
[267] ACIA, article 14.2(d)

(c) the character of the government action, including its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1).

4. Non-discriminatory measures of a MS that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b)"[268].

The ACIA asserts against the sole effects doctrine developed in the *Saluka* case. The requirement of stability is relative. ASEAN countries retain the right to exercise sovereign power to adapt their legal system to changing circumstances as recognised in customary international law[269]. Even though these regulatory measures may lead to effects similar to indirect expropriation, they are not categorised as expropriation and do not give rise to the obligation to compensate ASEAN or non-ASEAN investments that are allegedly affected by such measures. Although having based its model on NAFTA and the US Model BIT, the ACIA provisions are very detailed. Here, the 'ASEAN Way' reaffirms the right to regulate and increases predictability for the determination of indirect expropriation. The agreement has used three techniques to that end: (1) exception provisions modelled on the WTO agreements' exceptions; (2) an explanatory annex, and (3) exclusion of some measures out of its scope of application (here article 14). It is worth noting that the agreement is one among a relatively small number of investment treaties to combine all three techniques. The ASEAN Way proposes specific details which give tribunals more concrete guidelines, concretise the concept of the ASEAN investor's expectations, and relieve ASEAN MS from the fear of broad and unframed obligations.

1.5.Covered Rights

The wording in this Annex clears the way tribunals may undertake the interpretation of article 14[270]. This Annex accepts claims that might arise from property rights or property interests in a covered investment.

[268] ACIA, Annex 2 (Expropriation and Compensation)

[269] See *Saluka* (The Netherlands) v. Czech Republic, UNCITRAL Partial Award, March 2006, para 261-63

[270] UNCTAD (n 256) 19-20

Some tribunals have expanded the expropriation clause to consider that it may extend to any right which can be the object of a commercial transaction (See, *Amoco* v. Iran, Award No. 310-56-3, 14 July 1987, para. 108).

- Property interests

Property interests are not defined under the ACIA. Some tribunals have considered that they comprise physical property as well as the right to manage and complete the project[271]. The Tribunal in *Starrett Housing* for example concluded that the property interest must be deemed to comprise the physical property as well as the right to manage the project and to complete the construction and to deliver the apartments and collect the proceeds of the sales[272]. In *Methanex,* the tribunal held that the restrictive notion of property as a material 'thing' is obsolete and has ceded its place to a contemporary conception that includes managerial control over components of a process that is wealth producing[273]. In *Pope & Talbot,* the tribunal concluded that the investor's access to the US market is a property interest subject to protection under Article 1110 of NAFTA. These awards are likely to inform the scope of property interests referred to under Article 14 and its Annex 2.

- Property rights

The property rights can be either tangible or intangible. Besides physical assets, intangible rights include contractual rights, rights under concession agreement or shareholder rights. This list is not exhaustive. Domestic legislations of the host State concerned with expropriation measures can help to determine the kind of intangible rights in a covered investment that is being expropriated. They however encompass intellectual property rights (IPR), except for the licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement[274]. Arbitral tribunals generally admit that rights other than property rights may be expropriated[275]. However, as far as the right to licit expropriation is recognised to property rights and interest, economic interests that do not create property rights are not subject to compensation under the ACIA. Thus,

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In the same vein, in *Chemtura,* the tribunal considered goodwill, customers and market share as part of the overall investment (See, *Chemtura* v. Canada, Award, 2 August 2010, para. 258)

[271] UNCTAD (n 256) 20

[272] cf *Starrett Housing* v. Iran, Interlocutory Award No. ITL 32-24-1, 19 December 1983, 4 Iran-United States Claims Tribunal Reports 122, 156

[273] *Methanex* v. USA, Final Award, 3 August 2005, Part IV, Chapter D, para 17

[274] ACIA, Article 14.5

[275] *SD Myers* v. Canada, Partial Award, 13 November 2000, para. 281

items such as goodwill[276], customers or market share[277] are not covered by the prohibition of illicit deprivation of a covered investment.

3. Fair and Equitable Treatment (FET)

R. Kläger notes that IIAs are adopted under a two-fold objective: (i) IIAs display a State's commitment to the creation and preservation of a good investment climate; and (ii) a State may wish to retain certain flexibility to adopt measure it deems appropriate in light of the public interest[278]. In promoting both a good environment of business and FDI, the FET standard has shown itself to be a key standard in investment treaty protection[279]. Given its general character, it quickly became a prominent cause of action in investment arbitration. It is the most invoked standard in investment disputes – with the highest practical relevance for investors – that has been brought to light since the *Metalclad* and Maffezini cases in 2000[280]. Despite its large application, its exact normative content remains contested, hardly substantiated by State practice, and impossible to narrow down by traditional means of interpretative syllogism. Its undefined nature aroused controversy over its interpretation and application, and States have started to develop strategies to confine the FET standard within specified circumstances. Case law on FET has yielded different elements of FET in an effort to determine its scope and contours. Z. Douglas explains the controversy over the fact that some arbitrators thought it was a broad silence to do equity; when others saw it as a fossilised incarnation of the international minimum standard[281].

The standard is said to originate back to the treaty practice of the United States in the period of treaties on friendship, commerce and navigation (FCN). From there, all the attempts for a global

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[276] The tribunal considered that some interests are relevant only for purposes of valuation, but do not constitute assets that could be expropriated. Methanex has claimed to have lost customer base, goodwill and market share. The USA contended that none of these qualify as investments under Article 1139 and hence are not compensable. (See, *Methanex* v. USA, Final Award, 3 August 2005, Part IV, Chapter D, para. 16, 17)

[277] The tribunal considered that the 'investment's access to the United States market is a property interest subject to protection (See, *Pope & Talbot* v. Canada, Interim Award, 26 June 2000, para. 96)

[278] See, ROLAND KLÄGER, 'Revisiting Treatment Standards – Fair and Equitable Treatment in Light of Sustainable Development' in STEFFEN HINDELAND and MARKUS KRAJEWSKI (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016).

[279] RUDOLF DOLZER, 'Fair and Equitable Treatment: a Key Standard in Investment Treaties' (2005) 39 International Lawyer 87

[280] DOLZER and SCHREUER (n 253) 119

[281] TEERAWAT WONGKAEW, *Protection of Legitimate Expectations in Investment Treaty Arbitration. A Theory of Detrimental Reliance* (Cambridge University Press 2019) xiii

legal framework on foreign investment have included the standard, even though in a sort of heterogeneous treaty language. The concept went through the Havana Charter for an International Trade Organization of 1948, the OECD Draft Convention on Protection of Foreign Property of 1967, the United Nations Code of Conduct on Transnational Corporations, the OECD Draft negotiating text for a Multilateral Agreement on Investment of 1998, until it reaches the NAFTA through which it has evolved by way of investment claims submitted on its basis[282].

The FET standard includes transparency, the protection of legitimate expectations, the protection against arbitrariness and discrimination, abuse treatment, the principles of good faith, denial of justice and due process[283]. Despite that, the meaning and scope of the FET standard rest upon the formulation in each IIA[284]. The drafting approaches reflect the controversies. Some IIAs simply

[282] See DOLZER and SCHREUER (n 253) 119-121

[283] See, PATRICK DUMBERRY, 'The Protection of Investors Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 31 J. Int. Arb 50

[284] The following presents some illustrations of different formulations of the FET standard under the ECT and the USMCA. Article 10 of the ECT reads as follows:
"Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party".
Article 14.6 of the USMCA is equivalent to the article 1105 of NAFTA. It shall be interpreted in accordance with Annex 14-A (Customary International Law). It reads as follows:
"1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:
(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result".
The Annex 14-A regarding customary international Law reads as follows:
"The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 14.6 (Minimum Standard of Treatment) results from a general and consistent practice of States

omit this standard[285]. Other agreements provide for an independent and self-contained standard, sometimes combined with additional standards such as full protection and security, MFN treatment, national treatment or a prohibition against unjustified or discriminatory measures[286]. In other IIAs, the standard is associated with international law or principles of international law[287].

As mentioned above, the FET is the most invoked standard in investment disputes. To reduce exposure to investment arbitration; States also shifted focus to ISDS clauses. A few States have denounced investor-State arbitration entirely, while others have significantly reformed the dispute resolution provisions of their investment agreements[288].

1.6. Autonomous standard

The ACIA guarantees investors against unfair and inequitable treatment. Article 11 on treatment of investment reads as follows:

> "1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security.

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that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens".
Like the Free Trade Commission Notes of Interpretation, the USMCA provides for greater certainty that FET standard – where legitimate expectations derive – do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. See, CHARLES BROWER 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2005) Virginia Journal of International Law 351.
Consistently, the FET standard includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. Moreover, a mere breach of another provision of the USMCA, or a separate international agreement – like the WTO Agreements – is insufficient to establish a breach of the provision under article 14.6 of the USMCA. Also, an act or omission by the host State that may be inconsistent with investors' protected expectations does not suffice to constitute a breach of this provision, without something further, even if the covered investment encountered loss or damage.

[285] See, SADC IA

[286] YEN (n 219) 214-216

[287] cf OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) OECD Working Papers Publishing

[288] RAHUL DONDE and JULIEN CHAISSE, 'The Future of Investor-State Arbitration: Revising the Rules?' in LORETTA MALINTOPPI and CHARIS TAN (eds), *Investment Protection in Southeast Asia: a Country-by-Country Guide on Arbitration Laws and Bilateral Investment Treaties* (Brill Nijhoff 2017) 9
See also, ROLAND KLÄGER 'Revisiting Treatment Standards – Fair and Equitable Treatment in Light of Sustainable Development' in STEFFEN HINDELAND and MARKUS KRAJEWSKI (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016)

2. For greater certainty:

(a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and

(b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article".

This provision does not contain requirements or preconditions for its application. Compared to the treaty's practice on the formulation of the FET standard, article 11.1 provides for an independent, unqualified and self-contained standard. It similarly does not clear concerns over clarity concerning its scope and normative content. The rest of the article is not as well helpful in this regard. It reads that, for greater certainty (i) FET requires each MS not to deny justice in any legal or administrative proceedings in accordance with the principle of due process[289]; and (ii) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.

It is thus not clear whether the ACIA's FET is limited to denial of justice and due process as provided under article 11.2(a). This reasoning is however objectionable. The interpretation of this article must borrow from the existing awards and attempts to define the contours of the FET standard as encompassing transparency, legitimate expectations, arbitrariness and discrimination, good faith, denial of justice, due process or abuse treatment[290]. The minimalist language favoured by the ACIA provides for better protection concerning FET. Considering the vagueness of the

[289] ACIA, Article 11.2(a)

[290] MAHNAZ MALIK, 'Fair and Equitable Treatment' (2009) Best Practices Series IISD 8
The "ordinary meaning" approach is likely to provide limited guidance to tribunals, as the tribunal in *MTD* (2004) found by quoting the Concise Oxford English Dictionary: "In their ordinary meaning, the terms 'fair and equitable' […] mean 'just,' 'even-handed,' 'unbiased,' 'legitimate.'" Thus, the approach leads only to equally broad synonyms. The preambular statements and objectives in IIAs also assume significance in the interpretation pursuant to the Vienna Convention. IIAs typically contain narrow objectives in the preambles focusing on investor protection and economic cooperation between states.

standard, the interpretation in accordance with the VCLT[291] is unlikely to follow the plain or ordinary meaning of the terms. This leaves considerable room for the tribunal's discretion in assessing a wide range of State's conduct that would amount to a violation of fairness and equity. As it can be read in *Pope & Talbot* award, the terms 'fair and equitable treatment' envisage conduct that affords protection to a greater extent and according to a much more objective standard than any previously employed form of word[292]. The autonomous, independent and self-standing formulation under ACIA article 11 is illustrative of this tribunal's conclusion. It thus must be read in isolation of any other treaty standards. The expansive FET formulation imposes a high threshold of protection through the protection of legitimate expectations; prohibition of manifest arbitrariness and targeted discrimination; transparency; due process; good faith; prohibition of abusive treatment and denial of justice. Given the above, without prejudice to the extent of application of the exceptions therein[293], the liability exposure remains high to the point that the existence of detrimental effect suffered as a consequence of the host State's conduct is sufficient to trigger a violation of the FET provision, and liability likely to be established[294].

4. Most-Favoured-Nation (MFN)

The underlined objective of the ACIA is to create a free and open investment regime to transform the ASEAN as a single market and production base[295]. An open regime refers to a regime featured by non-discrimination treatment between ASEAN and non-ASEAN investors and investments. An MFN clause establishes 'pre' and 'post' equal conditions[296] of competition for all foreign investors and their investments irrespective of their country of origin. Article 6 allows investors

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[291] Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980.

[292] Pope and Talbot, Pope & Talbot Inc v Canada, UNCITRAL, Award on the Merits of Phase II, 10 April 2001, p50

[293] See ACIA, articles 17 and 18

See also, EWING-CHOW and KURTZ (n 202) 21-23

[294] For more details on FET and regulatory stability, SEE FEDERICO (n 43) 5

[295] ACIA, article 1

[296] J. Chaisse and S. Jusoh give two examples of pre-establishment and post-establishment. The latter implies that if an ASEAN MS allows foreign equity ownership of 50 per cent in its agricultural sector, for either an investor from an ASEAN Member State or a non-ASEAN Member State, other ASEAN investors in like circumstances will enjoy access to the same level of liberalisation. The former supposes that when strife occurs in an ASEAN Member State, the ASEAN Member State should provide equal protection to all affected investors from other ASEAN MS. *cf* CHAISSE and JUSOH (N 21) 94

protected by an investment agreement to claim preferential treatment granted to investors from other countries in other investment agreements. It reads as follows:

> "Each Member State shall accord to investors and investments of another Member State treatment no less favourable than that it accords, in like circumstances, to investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments"[297].

The increase of ASIA-Pacific PTAs with investment chapters raises an important issue in terms of connections with the ACIA. The scope of the MFN obligation, like any other substantial provision of the ACIA, is limited not only by the overall coverage of the agreement but by the wording and formulation of article 6. This is indispensable to meet contemporary concerns raised by arbitral tribunals in interpreting the MFN standard. MFN clause allowed tribunals to import more favourable provisions, including the arbitration clause, from a third-party treaty into the basic treaty of the protected investor[298]. The tribunal in *Impregilo* concluded that MFN clauses vary depending on their formulation in BITs. To exclude the extension of an MFN to ISDS, the *Salini* tribunal noted that in the BIT before it, the standard does not extend to ISDS nor envisage 'all rights' or 'all matters' covered by the BIT. In fact, in some agreements, the MFN undoubtedly extends to ISDS clauses while in others it refers to 'all rights contained in' or 'all matters covered by' the agreement. It is, therefore, crucial to analyse the specific wording of each MFN provision inasmuch as an *a priori* decision, in general, is not appropriate.[299] This means that when there is

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[297] ACIA, article 6.1 and 6.2

These paragraphs shall not be construed so as to oblige a Member State to extend to investors or investments of other Member States the benefit of any treatment, preference or privilege resulting from:

(a) any sub-regional arrangements between and among Member States. Sub-regional arrangements between and among Member States shall include but not be limited to Greater Mekong Sub-region ("GMS"), ASEAN Mekong Basin Development Cooperation ("AMBDC"), Indonesia-Malaysia-Thailand Growth Triangle ("IMT-GT"), Indonesia-Malaysia-Singapore Growth Triangle ("IMS-GT"), Brunei-Indonesia-Malaysia-Philippines East ASEAN Growth Area ("BIMP-EAGA")

(b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement. This refers to the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America signed in Bangkok, Thailand on 29 May 1966.

[298] SUZY NIKIÈMA, 'The Most-Favoured-Nation Clause in Investment Treaties' (2017) IISD 13, 15.

[299] cf *Impregilo S.p.A.* v. Argentine Republic, ICSID Case No. ARB/07/17, Award, 21 June 2011, 103-107; *Salini Costruttori S.p.A.* v. Hashemite Kingdom of Jordan, ICSID Case No.ARB/02/13, Decision on Jurisdiction, 29 November 2004, 116-118

an MFN standard applying to all matters regulated in a treaty, more favourable dispute settlement clauses in other investment agreements must be incorporated[300]. While traditionally regarded as a standard clause without major implications concerning dispute settlement, the MFN principle has newly been expanded by some arbitral tribunals to include substantive rights such FET[301] or ISDS clause[302]. For these reasons, the ACIA clearly asserts that the MFN clause shall not apply to the ISDS provision.[303]

An MFN provision may also give rise to a 'free-rider' issue when privileges and benefits contained in customs unions, PTAs or RECs are extended to non-Members or non-Contracting Parties. To avoid this, the ASEAN, like other agreements, includes a carve-out from the MFN standard.

5. National Treatment

The national treatment standard is a key treaty obligation that prevents discrimination among investors. It reads as follows:

> "1. Each MS shall accord to investors of any other MS treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
>
> 2. Each MS shall accord to investments of investors of any other MS treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its

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[300] *Impregilo S.p.A.* v. Argentine Republic, ICSID Case No. ARB/07/17, Award, 21 June 2011, 107

[301] *The Bayindir* v. Pakistan and *ATA* v. Jordan tribunals applied an MFN clause to import the FET standard from another treaty entered into effect after the treaty in question. cf *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, para 153-160; *ATA Construction, Industrial and Trading Company* v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, 18 May 2010, footnote 16

[302] CHAISSE and JUSOH (N 21) 89

[303] Footnote of article 6 reads as follows:

"For greater certainty,

(a) This article shall not apply to investor-State dispute settlement procedures that are available in other agreements to which Member States are party; and

(b) In relation to investments falling within the scope of this agreement, any preferential treatment granted by a Member State to investors of any other Member State or a non-Member State and to their investments, under any existing or future agreements or arrangements to which a Member State is a party shall be extended on a most-favoured-nation basis to all Member States".

own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments[304]".

This provision is a comparative standard of treatment as its purpose is to protect foreign investors as compared to domestic investors. A tribunal must first assess whether the investor was in a 'similar situation' to that of other investors. It then must further inquire whether the investor was granted less favourable treatment than other investors[305]. The national treatment standard seeks to eliminate distortions between domestic and foreign investors[306].

Article 5 refers to all dispositions of investments in the territory of an ASEAN MS, including admission, acquisition, expansion, management, conduct, operation and sale. The reference to 'establishment', 'acquisition' and 'expansion' means that foreign investors will be given the same conditions as nationals concerning green-field investments, acquisitions and mergers[307]. As such, an Indonesian manufacturing company in Vietnam will not face additional barriers when entering the manufacturing sector compared to a local Vietnamese investor.

The operation of national treatment obligation applies to both pre and post-establishment phases. Post-establishment national treatment is common practice. Pre-establishment national treatment is however rare. IIAs containing a broad asset-based approach to 'investment' without reference to the asset having already been admitted in accordance with national law, and defining an investor using the expression 'seeks to make' or 'attempts to make' usually grant pre-establishment protection to investors and their investments[308]. The ACIA refers to an investor as a person that is making or has made an investment[309]. It thus grants pre-establishment benefits to foreign investors and their investments.

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[304] ACIA, article 5

[305] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, para 390

[306] CHAISSE and JUSOH (N 21) 83-84

[307] *id.* 85

[308] VRINDA VINAYAK, 'The Pre-Establishment National Treatment Obligation: How Common Is It?' <https://efilablog.org/2019/01/14/the-pre-establishment-national-treatment-obligation-how-common-is-it/> accessed 18 February 2021

[309] ACIA, Article 4 (d)

1.7.Factors of assessment of national treatment

The national treatment standard has a long history in international trade law. It however bears different implications in investment treaty law. The Bayindir tribunal noted that the investment law's national treatment must be interpreted autonomously, independent from trade law considerations[310]. J. Chaisse and S. Jusoh point out that arbitral tribunals repeatedly highlighted this state of affairs[311].

The following factors of assessment are relevant to determine a breach of this obligation: (i) the creation of a disproportionate benefit for nationals over non-nationals as the practical effect of the measure; (ii) and, on the face of the measure, the appearance of favouring nationals over non-nationals that are protected by the relevant treaty. These assessment factors have been revealed by the tribunal in S.D. Myers[312]. The national treatment standard is commonly considered to encompass both *de jure* and *de facto* discrimination, that is, the provision applies not only to laws and regulations that directly address foreign investors, but also those measures that, applied in principle to local and foreign investors alike, have a disproportionate effect on these latter[313]. The practical impact is decisive to yield a breach of a national treatment obligation. In this vein, as long as a measure results in conditions less favourable to foreign businesses, even when this was not primarily the objective, the national treatment standard is breached. The discriminatory intent is not relevant[314].

The national treatment clause first implies the likeness of the comparators. It presupposes that if the claimant belongs to a particular industry or sector, it should be analysed between domestic and foreign investors operating in the same industry or sector. Second, it implies a less favourable treatment within the same industry or sector of the claimant. As pointed out by J. Chaisse and S. Jusoh, this is specific to the experience of the claimant. It does not matter if other domestic investors are also receiving less favourable treatment. The comparison is between the treatment

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[310] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, para 389, 402

[311] CHAISSE and JUSOH (N 21) 88

[312] *S.D. Myers, Inc.* v. Canada, NAFTA Arbitration under UNCITRAL Rules, First Partial Award, 13 November 2000, para 252

[313] CHAISSE and JUSOH (N 21) 84

[314] *S.D. Myers, Inc.* v. Canada, NAFTA Arbitration under UNCITRAL Rules, First Partial Award, 13 November 2000, para 253

being received by the claimant and the best treatment received by a domestic investor operating in like circumstances[315]. Finally, there is the 'like circumstances' exception. Once it is established the likeness and less favourable treatment, it must be equally established that the difference in treatment is not rationally explained as justifiable in the circumstances. In this case, tribunals have turned to the respondent to justify its action irrespective of whether it is discriminatory on the face of it or discriminatory in result or application.

1.8.Limitations to national treatment

The national treatment is a double-edged sword. While it can attract FDI through guaranteeing equal market access and treatment; it can as well pose a threat to regulatory autonomy in formulating domestic policies. As such, ASEAN economies require reservations to the national treatment. Article 9(1)[316] provides that article 5 (National Treatment) shall not apply to:

(a) any existing measure that is maintained by a MS at:

i) the central level of government, as set out by that MS in its reservation list in the Schedule referred to in paragraph 2;

ii) the regional level of government, as set out by that MS in its reservation list in the Schedule referred to in paragraph 2; and

iii) a local level of government;

(b) the continuation or prompt renewal of any reservations referred to subparagraph (a).

The reservation applies as a means to afford an overall balance between openness and protection of legitimate domestic objectives, such as protection of infant industries or promotion of nationals.

6. Freedom of Transfer

It is a common practice in investment treaty law for a host State to commit itself to permit the transfer of funds into and out of its territory. Most treaties do not include an absolute right to

[315] CHAISSE and JUSOH (N 21) 87

[316] This article applies to both article 5 (national treatment) and 8 (Senior Management and Board of Directors)

repatriate funds. A relative obligation on the free transfer of funds enables a host State facing a harsh economic situation to suspend this obligation until the situation improves. Even in a handful of cases where it is recognised an absolute right to transfer of capital, this is unrealistic as in contexts of extreme balance-of-payment difficulties, investors can be opposed the necessity doctrine[317]. The ACIA considers and envisages exceptional circumstances where movements of capital may cause, or threaten to cause, serious economic or financial disturbance in the MS[318]. In these situations, a MS needs to retain policy space to monitor, regulate and in some cases control the flight of capital and to regulate transfers in other circumstances[319].

Article 13 of the ACIA guarantees the freedom to manage and control funds[320]. All transfers relating to a covered investment can be freely and without delay conducted into and out of the territory of an ASEAN country where the covered investment is situated. However, like the SADC IA, the ACIA does not stand for an absolute right to repatriation. There are several limitations to the free repatriation of funds. Article 13.3 is clearer about it. It provides that notwithstanding paragraphs 1 and 2 (providing for free and without delay transfer standard), a MS may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to the following situations: bankruptcy, insolvency, or the protection of

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[317] MUTHUCUMARASWAMY SORNARAJAH, *The International Law on Foreign Investment* (3rd edition: Cambridge University Press 2010) 206-207

[318] ACIA, article 13.4.c

[319] CHAISSE and JUSOH (n 21) 129

[320] The funds include contribution to capital; profits, capital gains, dividends, royalties, licence fees or any other fees, interest or other income from the investment; proceeds from the sale or liquidation of its investments; payments under a contract; payments of compensation in case of expropriation or strife; payments from dispute settlement; earning or other remuneration of personnel employed and allowed to work in relation to the investment. Article 13.1 reads as follows:
1. Each Member State shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
(a) contributions to capital, including the initial contribution;
(b) profits, capital gains, dividends, royalties, license fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment;
(c) proceeds from the total or partial sale or liquidation of any covered investment;
(d) payments made under a contract, including a loan agreement;
(e) payments made pursuant to Articles 12 (Compensation in Cases of Strife) and 14 (Expropriation and Compensation);
(f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the Member States to the dispute; and
(g) earnings and other remuneration of personnel employed and allowed to work in connection with that covered investment in its territory.
2. Each Member State shall allow transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

the rights of creditors; trading in securities, futures, options or derivatives; criminal or penal offences and the recovery of the proceeds of crime; financial reporting or record keeping of transfers where necessary to assist law enforcement or financial regulatory authority; ensuring compliance with orders or judgments in judicial or administrative proceedings; taxation; social security, public retirement, or compulsory savings schemes; severance entitlements of employees; and the requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a MS[321].

7. Investor-State Dispute Settlement (ISDS)

Despite most Asia-Pacific States expanding their network of IIAs, it is said that disputes in the early 2000s remained fewer because the volume of FDI was lower. As of 2015, the ranking of ASEAN countries per number of investor claims appears as follows: Indonesia with 5 claims, Philippines with 4 claims, Vietnam with 3 claims, Lao and Malaysia with 2 claims, and Cambodia, Myanmar and Thailand only 1 claim[322]. The regular increase of FDI is making the likelihood of having to face claims more significant. Generally, there is a constant increase in the number of cases initiated per year against the Asian States from 1997 to 2015[323].

The ACIA accounts for the prospects for investment claims against ASEAN States. As more and more businesses enter the ASEAN market, it is unrealistic to expect that there will never be disagreements between these investors and their respective host States. For this reason, the ACIA contains a detailed chapter on dispute settlement[324].

Unlike the SADC IA, the ACIA does not provide for State-to-State arbitration[325]. Because of their ability to bypass domestic jurisdictions to confront governmental decisions in international fora, and the fact that they are mostly not recognised to domestic investors; ISDS clauses have aroused controversy in many countries. Some countries sought to limit the matters subject to ISDS, while others burdened the process requiring the fulfilment of additional procedures before activating the

[321] CHAISSE and JUSOH (n 21) 130
[322] *id.* 175
[323] *id.* 177
[324] *id.* 162
[325] Matters of interpretation of the ACIA is subject to the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Vientiane, Lao DPR 29 November 2004)

arbitration clause. The ASEAN countries succeeded to put in place an approach that is dispute minimising and sensible to conflicts management[326].

1.9.Minimising disputes approach

The ACIA provides different channels through which investors and host ASEAN MS can settle and manage disputes. Amicable solutions are encouraged through conciliation, mediation and negotiation. These dispute resolution mechanisms can help aggrieved parties to resolve disputes and promote the continuation of investment projects[327]. Besides, the ACIA provides litigation processes, either through domestic courts and tribunals or through investment arbitration. The ACIA encourages amicable solutions, especially conciliation. It is made available to the parties at all stages of dispute resolution, that is, from preliminary negotiations all the way through to the hearing stage of a potential arbitration. This is made possible to avoid disputing parties having to a lengthy and costly process of litigation, either at the domestic court or through arbitration[328]. Article 30 of the ACIA provides that if the disputing parties agree, procedures for conciliation may continue while procedures provided for in Article 33 (Submission of a Claim) are in progress. Given that conciliation is fundamentally complementary to other alternative dispute resolution mechanisms such as mediation or arbitration, this article further underlines that proceedings involving conciliation and positions taken by the disputing parties during these proceedings shall be without prejudice to the rights of either disputing party in any further proceedings[329].

Access to domestic courts and tribunals is guaranteed. It is however not a precondition to launch arbitration. The dispute settlement chapter genuinely combines access to domestic jurisdictions and other dispute resolution mechanisms. Before arbitration becomes indispensable, the ACIA encourages disputing parties to manage conflict so that investment disputes can be avoided wherever possible, either through negotiation, mediation or conciliation[330]. This means that investors are free to choose their preferred method for resolving any particular dispute. To launch

[326] CHAISSE and JUSOH (n 21) 164
[327] For more details on alternative dispute settlement mechanisms, *see* CHUNLEI ZHAO, 'Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking about Being in the Right Place at the Right Time' (2018) 17 Chinese Journal of International Law 113
[328] CHAISSE and JUSOH (n 21) 174
[329] ACIA, article 30.3
[330] CHAISSE and JUSOH (n 21) 165

an arbitration procedure, the investment dispute must remain unresolved within 180 days of receipt of a request for consultation.

1.10. Limitation of claims subject to arbitration

For investors, arbitration is the most preferred dispute resolution mechanism. Under article 32 of the ACIA, not any claim relating to the treaty is *arbitrable*. It reads as follows:

> "If an investment dispute has not been resolved within 180 days of the receipt by a disputing MS of a request for consultations, the disputing investor may, subject to this Section, submit to arbitration a claim:
>
> (a) that the disputing MS has breached an obligation arising under Articles 5 (National Treatment), 6 (Most-Favoured-Nation Treatment), 8 (Senior Management and Board of Directors), 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers) and 14 (Expropriation and Compensation) relating to the management, conduct, operation or sale or other disposition of a covered investment; and
>
> (b) that the disputing investor in relation to its covered investment has incurred loss or damage by reason of or arising out of that breach".

This article clearly shows that the *arbitrability* of a claim must relate to a 'covered investment' and concern a breach by the host State of national treatment, most-favoured-nation treatment, senior management and board of directors, FET, FPS, compensation in cases of strife, transfers, and expropriation and compensation. The disputing investor in relation to its covered investment must have incurred loss or damage by reason of or arising out of that breach.

The precision in article 32 shows that no host State can be held accountable for breaches that occur and result in loss or damage during the pre-establishment phase. It provides that a claim to arbitration on relevant grounds must relate to the management, conduct, operation or sale or other disposition of a covered investment. This means that the ASEAN host State should encounter no responsibility for eventual violations during the pre-establishment phase. This is consecrated by the omission of 'admission'. The MFN and national treatment obligations for instance guarantee no less favourable treatment to investors during both pre and post-establishment. Any behaviour

relating to admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments is covered. However, to launch an arbitration procedure, the breach must solely occur during the post-establishment. This does not mean that an investor that suffers a loss or damage during the pre-establishment phase is left without a forum to seek redress through. An *ab contrario* argument sustains the idea that if arbitration is not available for such an investor, it can make use of access to domestic courts and tribunals[331] as well the other dispute resolution mechanisms other than international arbitration. Equally, this argument should apply for any other claim that does not qualify for arbitration procedures under article 32 of the ACIA.

1.11. Choice of the arbitration forum

Reference to external institutions' rules has become a common treaty practice. An investor can choose to submit a dispute under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN, and under any other arbitration institution if the disputing parties so agree. The ACIA mentions the reference to the ICSID and the UNCITRAL which are well-established arbitration institutions and rules. It, at the same time, promotes ASEAN regional centres for arbitration. Despite the reference to ICSID, UNCITRAL, Kuala Lumpur Centre and other ASEAN centres, article 33 of the ACIA leaves it up to the agreement of the disputing parties to agree otherwise. Consequently, disputing parties might decide to refer their claim to the international chamber of commerce, the permanent court of arbitration, the Stockholm chamber of commerce, the Common Justice and Arbitration Court of the OHADA[332] and so forth.

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[331] ASEAN and SADC regions represent countries with low 'rule of law and democracy' rankings; even though some countries such as South Africa, Namibia or Botswana present a good profile. See THE ECONOMIST, Democracy Index 2018 available at <https://www.eiu.com/topic/democracy-index> and WJP RULE OF LAW INDEX 2017-2018 available at <https://worldjusticeproject.org/our-work/research-anddata/wjp-rule-law-index-2017%E2%80%932018> accessed 15 February 2021

[332] OHADA is the 'Organisation pour l'Harmonisation en Afrique du Droit des Affaires', which translates into 'Organisation for the Harmonisation of Corporate Law in Africa'. The OHADA Treaty was signed in Port Louis, Mauritius in 1993. The OHADA Treaty is made up today of 17 West and Central African countries, which are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Republic of Congo, Senegal and Togo. The Treaty is open to all States, whether or not they are African Union MS.

Ratione temporis, the ACIA sets the limit within which an arbitration claim can be entertained. The claims must arise out of the host State's conduct which occurred after the entry into force of the agreement. They must also take place within three years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under the ACIA[333]. This *temporis* limitation narrows down the scope of the arbitration clause into a reasonable period of awareness of loss or damage to the disputing investor or a covered investment.

Section 2 ASEAN MEMBER STATES' LAWS ON FOREIGN INVESTMENT AND BASIC NORMS ON FOREIGN INVESTMENT PROTECTION

This section displays the basic norms of protection contained in ASEAN MS FILs and stresses the relative importance of incorporating them given the existence of the community investment treaty.

1. The Relative Importance of Incorporating Basic Protection Norms in ASEAN MS FILs

Protecting foreign investment is not the sole responsibility of the ACIA. There is an attempt in MS FILs to address foreign investment protection. This is, however, limited to basic standards of protection that although they have not existed, they would have made almost no difference in the presence of the ACIA as they remain otherwise guaranteed. They either form the *raison d'être* of Investment Law or they have acquired the special status of customary rule or general principle. As such, although ASEAN MS FILs provide for these protection provisions, they are not as useful in the presence of the ACIA.

The freedom of transfer is inextricably associated with the realisation of the investment project. In order for an investor to realise its investment, it needs to bring contributions to capital in the host State. While running its investment, free transfer of profits is necessary to service loans, pay for services and buy equipment and machinery[334], and enjoy profits or any other form of gain it makes. Freedom to manage capital and funds is essential for any business operation[335]. For the

[333] ACIA, article 34.1(a)
[334] SORNARAJAH (n 317) 206
[335] CHAISSE and JUSOH (n 21) 129

investor to operate successfully, it needs to be put on equal footing so that competition with domestic investors does not impair or otherwise lead to the loss of its investment.

Before the investment is made, the investor seeks legal and other guarantees that are deemed necessary in view of the nature and the duration of the investment. Once the investors' resources are sunk into the investment project, the dynamics of influence and power generally shift in the hands of the host State. The central risk then becomes any detrimental change that would alter the scheme of burdens, risks, and benefits which formed the basis of the investors' business plan and the legitimate expectations embodied in it[336]. Mitigating risks of taking of alien's property is at the heart of the international investment law as we currently know it. Foreign investment is made through a long-term relationship between the foreign investor and the host country[337]. Expropriation and compensation standards are crucial for the protection of foreign investments in the host State. *P*rotecting alien properties against expropriation in the host State has long been of central concern. As T. Yen points out, cases of expropriation between the 1960s and 1970s constituted a driving force for the emergence of an obligation to compensate in investment treaty law[338]. Before treaty law improves the standards of protection of alien properties against expropriation, investors could only reach the level of protection of customary international law minimum standard of protection of aliens[339]. To date, expropriation and compensation had become like two sides of the same coin. One cannot be invoked without another. As a matter of principle, the host State's right to expropriate is reaffirmed, but conditioned by the requirements of legality under both international and domestic law: the '*interêt public'* nature of the measure must be clear; the measure must not discriminate or be arbitrary; and the deprivation of investment must be accompanied by a compensation[340], which can be either 'prompt, adequate and effective' or 'adequate and effective'. As Dolzer and Schreuer point out, these requirements are seen to be part of customary international law[341]. Aside from being parties to international frameworks against

[336] DOLZER and SCHREUER (n 253) 4-5
[337] *id.* 3
[338] YEN (n 219) 223
[339] DOLZER and SCHREUER (n 253) 89
[340] OECD (n 254) 2
As mentioned before (see, n 255), the Hull formula was opposed by the Calvo doctrine – supported by developing countries – that required only appropriate compensation over the right of the State to regulate. The Hull formula advocated 'prompt, adequate and effective' compensation following the taking of alien properties.
[341] DOLZER and SCHREUER (n 253) 91

expropriation, countries have 'made efforts at the domestic level at encouraging private foreign capital investment through providing a favourable investment climate'. Nowadays, even in the eventuality of its absence in legislation, it bears repeating that when a State, in the exercise of its sovereign power, takes for a public purpose an alien property situated within its jurisdiction, it is expected that the taking State will provide payment or compensation in accordance with its municipal law or principles of customary international law or both[342].

For all these reasons, the basic protection provisions provided for in ASEAN MS FILs do not make much difference in the presence of the ACIA. A foreign investor alleging unfair or inequitable treatment in an ASEAN country can only use and rely on the ACIA as it is the only one to provide for foreign investment protection norms[343].

2. ASEAN MS FILs and Basic Norms on Foreign Investment Protection

ASEAN MS FILs do not assure investment protection beyond these generic standards. As mentioned before, 'generic' or 'basic' protection standards refer to those protection standards that, even though they were not provided for in MS FILs, it would make no big difference given that they would still be otherwise guaranteed.

2.1.Brunei Darussalam

Brunei does not have a specific investment law dealing with both domestic and foreign investments[344]. The primary legislation on investment in Brunei is the Investment Incentives Order 2001 as amended by the Order in 2010 and 2011[345], which offers incentives such as tax

[342] ADEOYE AKINSANYA, *The Expropriation of Multinational Property in the Third Word* (Praeger 1980) 275

[343] Unless this foreign investor is protected by an additional BIT for example, it cannot have the option between the RIA and MS FILs as only the ACIA provides for protection standards thus allowing it to be applicable and effective in all 10 ASEAN countries. Even in the case of Myanmar Investment Law, the quality of protection standards is lower compared to the standards provided for in the ACIA. Foreign investment is therefore well protected under the community investment treaty.

[344] CHAISSE and JUSOH (n 21) 54

[345] <http://www.agc.gov.bn/SitePages/INVESTMENT%20INCENTIVES%20ORDER,%202001%20-%20AMENDMENT.aspx> accessed 2 March 2021

relief to investors. Although it does so through disparate legislations[346], ensures foreign investors and their investments freedom of transfer and protection against expropriation[347]. This study suggests that this distribution of foreign investment norms is done purposely to leave jurisdictional space for the ACIA; which ensures the applicability and effectiveness of the community treaty as it strengthens legal harmony and complementarity between Brunei's laws and the ACIA.

2.2.Cambodia

Foreign investment is regulated primarily by the 1994 Cambodia Investment Law as amended in 2003[348]. It provides some protection standards available to qualified investment projects (QIPs). It assures non-discrimination treatment by only way of the investor being a foreigner investor[349]. It replicates the right to compensation for expropriation[350] and the repatriation of capital[351]. It clearly appears that this distribution of foreign investment norms leaves substantive provisions within the purview of the ACIA. It thus can be submitted that this is done deliberately to avoid competition and conflict with the ACIA in order for it to be applicable.

2.3.Indonesia

The Indonesia Investment Law of 2007 regulates domestic and foreign investment in the country[352]. It ensures equitable treatment to be accorded to all investors that carry out investment

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[346] CHAISSE and JUSOH (n 21) 54; JONATHAN BONNITCHA, 'Investment Laws of ASEAN Countries: a Comparative Review' (2017) IISD 5; OECD, 'Legal Framework for Investment in Lao PDR' (2017) OECD Investment Policy Reviews 73

[347] BONNITCHA (346) 73

[348] Law on Investment, 1994 as amended (henceforth Cambodia Investment Law)
The Phnom Penh Post announced that Cambodia's newly-drafted Investment Law will be in effect as soon as in April 2021 according to the Ministry of Economy and Finance <https://www.phnompenhpost.com/business/investment-law-may-be-effect-soon-april> accessed 2 March 2021
As of September 13, this law was still not in effect. This same media reported that the new Law on Investment is expected to come into force next year (2022). <https://www.phnompenhpost.com/special-reports/devil-details-tax-versus-incentives-new-investment-law> accessed 13 September 2021
As said, the government is planning to revise the investment law to draw more FDI as the country adjusts to the fastest-changing regional and global landscapes. The projected changes are not however expected to include investment protection standards. <https://opendevelopmentcambodia.net/tag/investment-laws/> accessed 10 November 2020.

[349] Cambodia Investment Law, article 8

[350] Cambodia Investment Law, article 9

[351] Cambodia Investment Law, article 11

[352] Law of the Republic of Indonesia No.25concerning Investment (henceforth Indonesia Investment Law), 2007

activities in Indonesia[353]. Article 7 prohibits the government to take any measure of nationalisation or expropriation against the proprietory rights of investors, including foreign investors. The right to compensation in case of expropriation is reaffirmed. It also provides the right to repatriate foreign investors' profits, proceeds and other funds is guaranteed[354]. Arbitration is guaranteed upon agreement between the disputing parties. The observations formulated for Brunei and Cambodia are hereto applicable.

2.4.Laos

The Investment Promotion Law of 2009[355] (amended in 2016) deals with foreign investment matters in Laos. It provides for the right to compensation or restitution in case of expropriation, nationalisation, confiscation or seizure[356]. Investors' intellectual property rights (IPR) are also protected pursuant to the IPR law[357]. The observations formulated towards Brunei and Cambodia are hereto applicable.

2.5.Malaysia

Disparate legislations regulate foreign investment in Malaysia. There is for instance the investment promotion law of 1986 or Malaysia Industrial Development Authority Act of 1967, but there is no precision about foreign investors' substantive rights. Therefore, the observations formulated for Brunei and Cambodia can hereto be rehearsed.

2.6.Myanmar

The Myanmar Investment Law of 2016[358] regulates foreign investment. It exceptionally provides for an uncommonly defined fair and equitable treatment[359]. This standard is highly qualified. It

[353] Indonesia Investment Law, article 6
[354] Indonesia Investment Law, article 8
[355] Law on Investment Promotion, 2009 (amended 17 November 2016 by the Law No. 14/NA. The amendment came into force 19 April 2017 <http://www.investlaos.gov.la/images/IP_Law_2016_PDF/Final_IPL_No.14.NA_17Nov2016_Eng_30_Oct_2018.pdf> accessed 13 September 2021)
[356] Lao Investment Law (amended), article 23
[357] Lao Investment Law (amended), article 24
[358] Myanmar Investment Law, 2016
[359] Article 48 reads as follows:
"The Government guarantees to the investors fair and equitable treatment in respect of the followings:

is said to address issues of process, leaving apart State's liability for regulatory changes that may detrimentally affect investors and their investments[360]. The Law contains as well an expropriation provision that provides for a fair and adequate compensation standard[361]. The transfer of funds is guaranteed under article 56, although subject to Myanmar's regulatory right to delay or prevent under circumstances provided for under article 61; or approval of the Central Bank for transferring a loan or taking a loan under article 57. Unusually, this law contains general and security exceptions modelled on the General Agreement on Tariffs and Trade (GATT) of 1994[362] and ACIA[363]. The Law guarantees as well post-establishment national treatment and MFN[364].

In spite of that, this law cannot resist the quality test in a confrontational intertwinement with ACIA's substantive provisions. The ACIA, as shown in section 1, covers the whole range of foreign investment provisions. It provides for – to cite all – FET, full protection and security (FPS), MFN, national treatment, compensation for expropriation and strife, repatriation of funds and international arbitration.

2.7.Philippines

The primary legislation governing foreign investment in the Philippines[365] is the Foreign Investments Act of 1991[366] (as amended in 2019). It requires consistent government action[367] and guarantees against the impairment or nullification of the benefit accruing to foreign investors by it. It is however the Omnibus Investments Code of 1987 that confers the right to compensation

a. the right to obtain the relevant information on any measures or decision which has a significant impact for an investor and their direct investment;
b. the right to due process of law and the right to appeal on similar measures, including any change to the terms and conditions under any license or permit and endorsement granted by the Government to the investor and their direct investment.

[360] BONNITCHA (n 346) 16

[361] Myanmar Investment Law, article 52

[362] See GATT, articles XX and XXI

[363] See ACIA, articles 17 and 18

[364] Myanmar Investment Law, article 47.a and b

[365] The Philippines has two other Investment-related laws. The Omnibus Investments Code of 1987 establishes the Philippines Board of Investment as the main body responsible for investment promotion and incentives. The Special Economic Zone Act of 1995 covers investments made within one of the Philippine special economic zones. See OECD (n 346) 73

[366] Foreign Investments Act, 1991 as amended in 2019 (henceforth Philippines Investment Law)

[367] Philippines Foreign Investments Act of 1991 (as amended 2019) s12

for expropriation and the repatriation of capital[368]. The observations formulated towards Brunei and Cambodia are hereto applicable.

2.8.Singapore

Singapore does not have a law that comprehensively regulates foreign investment[369]. It is submitted that special rules to attract foreign investments were branded to developing capital-importing countries as best practices. These best practices were then domesticated as a result of assistance provided in the drafting of domestic investment laws by specialists units at the World Bank[370]. The lack of such a statute in Singapore implies that foreign investment is governed by disparate legislations. Therefore, the observations formulated towards Brunei and Cambodia are hereto applicable.

2.9.Thailand

Foreign Business Act of 1999 as amended[371]is the primary law governing foreign investment in Thailand. There are two other relevant laws on the subject matter[372]: the Investment Promotion Act of 1977[373] and the Industrial Estate Authority of Thailand Act of 1979[374]. There is however no precision of even basic substantive provisions. Therefore, the observations formulated for Brunei and Cambodia are hereto applicable.

2.10. Vietnam

Foreign investment is governed by the Law on Investment of 2020[375] (as amended in 2020). It guarantees the right to compensation and reimbursement in case of expropriation or

[368] Philippine Omnibus Investments Code (Executive Order No. 226), article 38. See BONNITCHA (n 346) 18; OECD (n 346) 73

[369] CHAISSE and JUSOH (n 21) 56

[370] TARALD BERGE and TAYLOR ST JOHN, 'Asymmetric Diffusion: World Bank 'Best Practice' and the Spread of Arbitration in National Investment Laws' (2019) Review of International Political Economy 3

[371] Foreign Business Act of 1999 as amended

[372] See HIDESHI OBARA, Doing Business in Thailand (2012) Nishimura & Asahi 19-20; OECD (n 346) 73

[373] See Investment Promotion Act B.E. 2520, 1977.

[374] See Industrial Estate Authority of Thailand Act B.E. 2522, 1979

[375] Law on Investment (Law No. 61/2020/QH14) was adopted on 17 June 2020 and entered into force on 1 January 2021 <https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/vietnam> accessed 13 September 2021. It henceforth referred to as "Vietnam Investment Law" and replaces the 2014 Law on Investment Law No. 07/2014/QH13)

confiscation[376]. Repatriation of capital and profits is mentioned[377]. The observations formulated for Brunei and Cambodia are hereto applicable.

From the above exercise, it clearly appears that the ACIA remains the only instrument that guarantees substantive provisions to foreign investors and their investments within the ASEAN. In spite of the incorporation of generic protections standards in individual ASEAN laws; these standards do not stand the quality test when they are confronted with protection norms contained in the ACIA. Their existence seems then to make almost no difference. They essentially cover expropriation and compensation, and freedom of transfer, among other basic provisions. Although the Myanmar Investment Law sets a case apart, it does not stand the quality test when it is confronted with ACIA's protection provisions.

This is important because, in a context of coexistence, quality supremacy takes precedence over hierarchy supremacy. As such, irrespective of its legal nature as a 'community treaty', to be applicable and effective, a RIA must provide for better and higher quality standards of protection to stand the coexistence with MS domestic investment laws. An investment agreement that provides for poorer standards of protection will definitely lose its applicability, thereby dropping any chance to regulate foreign investment and complete regional integration in the REC.

The evidence that the ACIA remains the unique instrument that establishes standards of protection that are of better and higher quality within ASEAN should not mean to deny any importance *per se* to basic provisions contained in MS FILs. It is rather a way to relativise their pertinence in the presence of the ACIA. This means that, unless covered by a BIT, any foreign investor alleging unfair or inequitable treatment will have no options but to rely on and use the ACIA because no ASEAN MS FIL does provide for better substantive protection rules.

It is worth mentioning that such a distribution of investment norms is undertaken consciously by each ASEAN country. This is praiseworthy. It helps allow the ACIA to function and pursue its objectives of regional economic integration. This is also important because an economic

[376] Vietnam Investment Law, article 10
[377] Vietnam Investment Law, article 12

community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness[378].

CHAPTER 3: ASEAN MEMBER STATES' LAWS ON FOREIGN INVESTMENT AND CALIBRATION ON FOREIGN INVESTMENT PROMOTION AND FACILITATION

Like chapter 2 that sought to bring evidence of the exclusivity of the ACIA on foreign investment protection; this chapter undertakes to seal the argument by highlighting the calibration of ASEAN MS FILs on foreign investment promotion and facilitation. This will conclude this research's assertion that the ASEAN coexistence framework features a distribution of foreign investment norms in which protection rules are exclusively provided for by the ACIA when the ASEAN laws are calibrated to provisions on foreign investment promotion and facilitation.

Investment promotion rules show profitable investment opportunities. They target both domestic and foreign investors. They mostly seek to bring investment opportunities to the attention of potential investors that can provide capital, jobs, skills or technology in order to increase productivity, innovation and wages in a region or a country. The revised Lao investment promotion law of 2016 defines investment promotion as 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[379]. With this in mind, investment promotion mostly consists in promoting the dissemination of investment information through promotion actions such as the organisation of seminars or exhibitions on investment opportunities, investment laws, regulations, procedures and policies. Some promotion rules require quotas for disadvantaged or minority groups in certain sectors or industries. Others encourage the growth and development of infant industries as well as specific crucial established enterprises.

Investment facilitation on the other hand seeks to encourage new investments and reinvestments. It mostly consists in enhancing transparency, consistency and predictability with respect to investment rules, regulations, policies and procedures. It puts forward harmonising investment

[378] OPPONG (n 134) chapter 2

[379] Law on Investment Promotion, 2009 (2016 amended article 2)

policies to promote coordination among government ministries and agencies. The simplification of procedures and establishment of one-shop centres is a key feature of the facilitation of investments. That is also the case of consultation schemes with private sector stakeholders and promotion agencies or other ministries.

This chapter is divided into two sections. The first section shows the focus of ASEAN MS FILs on foreign investment promotion and facilitation. It supports that they mostly consist of these norms. The second section also recalls provisions on investment promotion and facilitation contained in the ACIA.

Section 1 ASEAN MS FILS' PROVISIONS ON FOREIGN INVESTMENT PROMOTION AND FACILITATION

Although ASEAN MS FILs contain some basic protection norms; they essentially consist of norms on foreign investment promotion and facilitation. This section presents promotion and facilitation rules contained in the laws of Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Thailand, and Vietnam.

1. Brunei Darussalam

As set forth above, the Investment Incentives Order 2001 as amended by the Order in 2010 and 2011 is the primary legislation on foreign investment[380]. It offers incentives such as tax relief to investors. Brunei does not have a specific investment law dealing with both domestic and foreign investments[381]. In spite of that, Brunei ensures foreign investors and their investments with protection against expropriation and free transfer of capital under other laws, policies and regulations[382].

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<http://www.agc.gov.bn/SitePages/INVESTMENT%20INCENTIVES%20ORDER,%202001%20-%20AMENDMENT.aspx> accessed 2 March 2021

381 CHAISSE and JUSOH (n 21) 54

382 BONNITCHA (n 346) 5; OECD (n 346) 7

2. Cambodia

Foreign investment is regulated primarily by the 1994 Cambodia Investment Law as amended in 2003[383]. It mainly governs qualified investment projects (QIP) and defines procedures and benefits thereto[384]. It designates the Council for the Development of Cambodia (CDC) as the sole and one-stop service organisation responsible for rehabilitation, development and the oversight of investment activities[385]. Procedures for any person willing to establish a QIP are provided under article 6. If the requirements are all met, for the investment proposals that are related to the national interest or are environmentally sensitive, the CDC will issue a conditional registration certificate which lists all the specific approvals, authorisations, licenses, permits or registrations relating to that QIP and that are required for the sector or sub-sector in which that QIP will be undertaken[386]. If the requirements are not all met, the CDC issues a letter of non-compliance within three days of receiving an application. Approved QIPs shall benefit from privileges and incentives, which may include the total exemption of customs duties and taxes[387]. This Law establishes a negative list[388] and addresses also restrictions on land ownership and use as well as on foreign personnel employment[389]. Other rules are addressed under the special economic zone scheme[390]. Nevertheless, this law also contains few generic protections standards, such as non-discrimination treatment towards foreign investors[391]; compensation in case of expropriation[392]; and the repatriation of capital[393].

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[383] Law on Investment, 1994 as amended (henceforth Cambodia Investment Law)
The newly-drafted Investment Law is still not yet in effect. Its entering into force is projected for 2022 <https://www.phnompenhpost.com/special-reports/devil-details-tax-versus-incentives-new-investment-law> accessed 13 September 2021

[384] Cambodia Investment Law, article 1

[385] Cambodia Investment Law, article 3

[386] LORETTA MALINTOPPI and CHARIS TAN (eds), *Investment Protection in Southeast Asia: a Country-by-Country Guide on Arbitration Laws and Bilateral Investment Treaties* (Brill Nijhoff 2017) 87

[387] Cambodia Investment Law, articles 12 and 13

[388] BONNITCHA (n 346) 6

[389] Cambodia Investment Law, articles 16, 17, 18

[390] <http://www.cambodiainvestment.gov.kh/investment-scheme/policies-toward-fdi.html#:~:text=Laws%20and%20regulations%20governing%20FDI,invest%20freely%20in%20many%20areas.> accessed 10 November 2020.

[391] Cambodia Investment Law, article 8

[392] Cambodia Investment Law, article 9

[393] Cambodia Investment Law, article 11

3. Indonesia

The Indonesia Investment Law of 2007 (Law No. 25 on Capital Investment) regulates domestic and foreign investment in the country[394]. It focuses on creating competitiveness of the national economy in order to encourage the Indonesian economy into the global economy. It undertakes to update norms that no longer keep pace with the challenges and needs in the field of foreign investment. It undertakes to maintain Indonesia as a favoured investment destination. It expands the investment opportunities for foreign investors, including specific schemes for the development of Indonesian natural resources and the provision of public infrastructure[395]. It mainly poses conditions to set up a foreign investment[396], defines facilities and conditions upon which they can be granted to foreign investors and their investments[397] as well as sanctions in case of violation of substantive provisions of the law[398]. For example, unless otherwise provided, a foreign capital investment must take the form of a limited liability company under Indonesian corporate law and be domiciled in Indonesia. These critical provisions aim at accommodating the business environment and make the investment the primary source of Indonesia's participation in the world economy[399].

The Law affirms the principle that all business sectors or business types shall be open to investment activities, except those that are declared to be closed or open with requirements to foreign investors. The negative list is defined by regulations enacted by the President of the Republic[400]. It shall include, without being limited to, the production of weapons, ammunition, explosive devices and armaments in the interests of defence and security.

The Law defines the obligations, responsibilities and rights of investors, including foreign investors. These obligations include the duty to implement corporate social responsibility and the principle of good corporate governance and report on investment activities to the Investment

[394] Law of the Republic of Indonesia No.25concerning Investment (henceforth Indonesia Investment Law), 2007
[395] IMELDA & REKAN, '2019-2020 Investment Window into Indonesia (IWI)' (2019) Deloitte Indonesia 28
[396] Indonesia Investment Law, article 5(2)
[397] Indonesia Investment Law, articles 18-24
[398] Indonesia Investment Law, articles 33-34
[399] PETRA BUNAWAN, 'Foreign Investment in Indonesia: The Legal Aspects under the New Indonesian Investment Law' (2017) Dialogia Iuridica 3
[400] *id.* 9-11; see also, IMELDA & REKAN (n 395) 30

Coordinating Board of Indonesia[401]. In this way, it promotes green investments. In terms of rights, (foreign) investments shall be granted facilities if they absorb many workers, fall under high priority scale, engage in infrastructure constructions or pioneer industry, transfer technology, they are located in the less-developed area, keep environment sustainable, conduct research, development and innovation activities, they are in partnership with micro, small and medium enterprises or cooperatives, or are engaged in an industry that uses domestically-produced capital goods, machines or equipment. The facilities to be granted include income tax reduction or exemptions or relief on import duty of production capital, goods, machines and equipments not yet produced in Indonesia; raw materials or components for a definite period. They also include accelerated depreciation or amortisation, and relief on land and buildings tax[402]. Facilities also include more specific regulations on the forms of fiscal facility, land title facility, immigration and import permission facility[403]. The law establishes special economic zones to maintain a balance of advancement of regions[404]; and reserves some business sectors and activities to or in partnership with micro, small and medium enterprises and cooperatives[405].

The Indonesian law also contains a few generic provisions, for example, the prohibition of expropriation without compensation[406].

4. Lao PDR

The Investment Promotion Law of 2009[407] (amended in 2016) deals with foreign investment matters in Laos. It has been heralded as levelling the playing field between domestic and foreign investments through *inter alia* introducing uniform business registration requirements and tax

[401] Indonesia Investment Law, article 16

[402] Indonesia Investment Law, article 18
The facilities provided for in article 18 shall not apply to foreign investments of nn-limited liability company form (article 20)

[403] See BUNAWAN (n 399) 12-13

[404] Indonesia Investment Law, article 31

[405] Indonesia Investment Law, article 13

[406] Indonesia Investment Law, article 7(2)

[407] Law on Investment Promotion, 2009 (amended 17 November 2016 by the Law No. 14/NA. The amendment came into force 19 April 2017
<http://www.investlaos.gov.la/images/IP_Law_2016_PDF/Final_IPL_No.14.NA_17Nov2016_Eng_30_Oct_2018.pdf> accessed 13 September 2021)

incentives that apply to both categories of investments[408]. Nevertheless, there still are some controls and restrictions on foreign investments that foreign investments need to comply with. It distinguishes between three different types of investments[409]: general business, concession business and investment in special economic zones[410]. Each of the three types of investments has a different approval process administered by a different agency. The Ministry of Industry and Commerce grant some licenses, the National Committee for Special Economic Zones is responsible for approving investment projects in these zones; the Committee for Investment Promotion is the governing body responsible for providing strategic orientations and coordinating investment promotion measures[411]. Nevertheless, the Investment Promotion Department of the Ministry of Planning and Investment is the dedicated promotion agency[412]. Its mandate includes both promotional and regulatory functions. The amendment of 2016 brought some innovations, for instance, it abolished the minimum registered capital requirement for foreign investors in general business companies. In addition, investment incentives – exemptions on profit tax (3 – 15 years) and rent/concession fee exemptions (5 – 15 years) to be offered to investors in promoted business sectors. Also, general investment activities are divided into two categories: activities in the negative list managed under the Ministry of Planning and Investment; and activities outside the negative list under the Ministry of Industry and Commerce[413].

The Lao promotion law also contains a few basic provisions, such as the right to compensation or restitution in case of expropriation, nationalisation, confiscation or seizure[414].

5. Malaysia

Disparate legislations regulate foreign investment in Malaysia[415]. There is for instance the investment promotion law of 1986. This law deals exclusively with investment. There is also the

[408] MALINTOPPI and TAN (n 386) 169, 173
[409] Lao Investment Law, article 13
[410] OECD, Investment Promotion and Facilitation in Lao PDR (2017) OECD Investment Policy Reviews 157
[411] *id.* 147-148
[412] *id.* 150
[413] < https://arionlegal.la/investment-lao-pdr-amended-law-investment-promotion-2016/>; <https://investmentpolicy.unctad.org/investment-laws/laws/177/lao-people-s-democratic-republic-investment-law> accessed 13 September 2021
[414] Lao Investment Law (amended), article 23
[415] OECD (n 346) 73

Malaysia Industrial Development Authority Act of 1967. It establishes, since 1967, the Malaysia Investment Development Authority as the government's principal agency [416] in charge of allowing the entry and establishment of foreign businesses for the promotion of the manufacturing and services sectors.

The Malay Investment Promotion Act grants the Minister of International Trade and Industry broad discretionary powers[417] to determine conditions of eligibility and magnitude of investment incentives[418]. These incentives include the grant of a pioneer status which entitles foreign businesses to an income tax allowance holiday for five years, susceptible to be extended for a further five years[419]. There is also the 'investment tax allowance' which allows investors to offset certain classes of capital expenditure relating to the investment against future income in any year during the five years following the year in which the expenditure was made[420]. These two incentives are mutually exclusive; an investor must choose which one to apply for[421]. The direct and indirect tax incentives are *inter alia* provided for in the Malay Investment Promotion Law. Investors investing in certain sectors such as manufacturing, biotechnology, research and development, tourism, agriculture, environmental management and protection, agriculture, and Islamic financial services can benefit from direct and indirect tax incentives. Direct tax incentives grant particle or total relief from income tax for a specified period, while indirect tax incentives provide exemptions from or refunds of import duty, sales tax and excise duty[422].

6. Myanmar

The Myanmar Investment Law of 2016[423] regulates foreign investment. It establishes the Myanmar Investment Committee as the investment promotion agency with promotional and regulatory functions, which include approval of investments and granting of incentives. This Law

[416] Malaysia Investment Development Authority <https://www.mida.gov.my/home/about-mida/posts/> accessed 10 November 2020.
[417] BONNITCHA (n 346) 13
[418] Malay Investment Promotion Law, s4
[419] Malay Investment Promotion Law, s14C
[420] Malay Investment Promotion Law, s29
[421] BONNITCHA (n 346) 12
[422] MALINTOPPI and TAN (n 386) 205
[423] Myanmar Investment Law, 2016

has the merit of having addressed the complexity resulting from a multiplicity of different laws and processes of investments approval thereto[424]. It merged two previous investment laws together, the Myanmar Foreign Investment Law of 2012 and the Myanmar Citizens Investment Law of 2013 in single legislation that covers activities of both domestic and foreign investors. Most importantly, the Law introduced the new concept of dividing the investment areas into three zones and granting different investment incentives to the promoted areas in each of the three zones based on their development level[425].

Within the purview of article 42, some types of investment businesses are stipulated as a restricted investment. They include (i) investment businesses allowed to carry out only by the Union; (ii) investment businesses that are not allowed to carry out by foreign investors; (iii) investment businesses allowed only in the form of a joint venture with any citizen owned entity or any Myanmar citizen; and (iv) investment businesses to be carried out with the approval of the relevant ministries.

For the purpose of supporting the development of the country, it is allowed FDIs in sectors that need to be developed, and for the proportionate development of Regions and States. To that end, investors can be granted one or more tax exemptions or reliefs if they apply for[426]. Income tax exemptions for instance are accorded to investment businesses in Zone (1) for a period of 7 consecutive years including the year of commencement of commercial operation; investment businesses in Zone (2) for a period of 5 consecutive years including the year of commencement of commercial operation, and investment businesses in Zone (3) for a period of 3 consecutive years including the year of commencement of commercial operation.

The Myanmar law tried to be special in providing for some guarantees beyond the generic ones found in most ASEAN MS FILs. It provides for example for fair and adequate compensation in case of expropriation[427] and transfer of funds[428]. It exceptionally provides for an uncommonly

[424] MALINTOPPI and TAN (n 386) 228

[425] NIMNUAL PIEWTHONGNGAM, 'The AEC and Regulatory Reforms in CLMV Countries with a Special Focus on Myanmar' in PASHA HSIEH and BRYAN MERCURO, *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms* (Cambridge University Press 2019) 304-305

[426] Myanmar Investment Law, article 74

[427] Myanmar Investment Law, article 52

[428] Myanmar Investment Law, articles 56; 57 and 61

defined FET, although highly qualified[429]; MFN[430] and contains general and security exceptions modelled on the General Agreement on Tariffs and Trade (GATT) of 1994[431] and ACIA[432]. In spite of that, most of its provisions emphasise foreign investment promotion and facilitation.

7. Philippines

The primary legislation governing foreign investment in the Philippines[433] is the Foreign Investments Act of 1991[434] (as amended in 2019). It comprehensively prescribes the procedures for registering enterprises doing business in the Philippines and lists investment areas reserved to Philippine nationals or opened with requirements to foreign investors. It covers the registration of investments of non-Philippine nationals[435]. It allows 100% ownership for foreign investment in both export enterprises whose products and services do not fall within the negative list[436] and domestic market enterprises unless otherwise prohibited or limited by law[437]. In other words, there are no restrictions on the extent of foreign ownership of export enterprises. In domestic market enterprises, on the other hand, full foreign ownership is an exception. The law promotes environment-friendly investment. All industrial enterprises, domestic and foreign, shall comply with existing rules and regulations to protect and conserve the environment and meet applicable environmental standards[438].

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[429] Article 48 reads as follows:
"The Government guarantees to the investors fair and equitable treatment in respect of the followings:
a. the right to obtain the relevant information on any measures or decision which has a significant impact for an investor and their direct investment;
b. the right to due process of law and the right to appeal on similar measures, including any change to the terms and conditions under any license or permit and endorsement granted by the Government to the investor and their direct investment.

[430] Myanmar Investment Law, article 47.a and b

[431] See GATT, articles XX and XXI

[432] See ACIA, articles 17 and 18

[433] The Philippines has two other Investment-related laws. The Omnibus Investments Code of 1987 establishes the Philippines Board of Investment as the main body responsible for investment promotion and incentives. The Special Economic Zone Act of 1995 covers investments made within one of the Philippine special economic zones. See OECD (n 346) 73

[434] Foreign Investments Act, 1991 as amended in 2019 (henceforth Philippines Investment Law)

[435] Philippines Investment Law, s5

[436] Philippines Investment Law, s6 and s8; Executive Order No.65 promulgating the eleventh regular foreign investment negative list, 2018

[437] Philippines Investment Law, s7

[438] Philippines Investment Law, s11

The Philippines welcomes foreign investments as a supplement to Filipino capital and technology in the enterprises serving mainly the domestic market. This logic can partially explain why, in contrast to other ASEAN countries such as Vietnam, the Philippines' recent reforms have been more cautious[439] to encourage FDI and capture the spillover from the shift of supply chains in the context of the US-China trade war. The recent reforms to the Philippines Investment Law[440] pertain to the removal of the 'practice of professions' from the foreign investment negative list, and a reduction in the number of mandatory direct local hires by foreign investors from 50 to 15[441].

This law also contains some basic provisions, such as the requirement of consistent government action[442]. Under the Omnibus Investments Code of 1987; expropriation and the repatriation of capital are also covered[443].

8. Thailand

The Foreign Business Act of 1999 as amended[444] is the primary law governing foreign investment in Thailand. There are two other relevant laws on the subject matter[445]: the Investment Promotion Act of 1977[446] and the Industrial Estate Authority of Thailand Act of 1979[447].

The Thai Investment Law defines a foreign business, sets limitations applicable to foreign investors as well as a list of sectors reserved to Thai nationals or opened under requirements to foreign businesses. The definition of foreign business includes both natural and juristic persons.

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[439] In spite of the increasing competition from its ASEAN peers, namely Malaysia, Vietnam, Thailand and Indonesia in attracting FDI, the amendments sought only to ease strict rules on foreign ownership and employment restrictions. See STA LAW FIRM, 'Philippines: The Amendments to Philippines Foreign Investment Law 2019' <https://www.mondaq.com/inward-foreign-investment/878838/the-amendments-to-philippines-foreign-investment-law-2019> accessed 8 November 2020.

[440] Foreign Investments Act, 1991 as amended in 2019 (henceforth Philippines Investment Law)

[441] ASEAN Briefing, 'The Philippines' Foreign Investment Act: Amendments May Attract FDI from SMEs' <https://www.aseanbriefing.com/news/philippines-foreign-investment-act-amendments-may-attract-fdi-smes/#:~:text=On%20September%209%2C%202019%2C%20lawmakers,foreign%20investment%20into%20the%20country.&text=According%20to%20the%20central%20bank,US%245%20billion%20in%202018.> accessed 8 November 2020. These amendments are contained in a House bill adopted on 9 September 2019.

[442] Philippines Foreign Investments Act of 1991 (as amended 2019) s12

[443] Philippine Omnibus Investments Code (Executive Order No. 226), article 38. See BONNITCHA (n 346) 18; OECD (n 346) 73

[444] Foreign Business Act of 1999 as amended (henceforth Thai Investment Law)

[445] See OBARA (n 372) 19-20; OECD (n 346) 73

[446] See Investment Promotion Act B.E. 2520, 1977.

[447] See Industrial Estate Authority of Thailand Act B.E. 2522, 1979

It is considered a foreign business, any business that is not incorporated in Thailand, any business whose half or more of its capital is owned by foreign individuals or legal entities even if the company is incorporated in Thailand, any business whose half or more of the value of the total capital is being invested by foreigners[448].

Market entry and establishment are subject to prohibitions and restrictions. The Law indicates three lists. List 1 covers expressly prohibited activities. List 2 and 3 cover businesses opened with requirements. List 2 covers sectors and activities restricted for reasons of national security, environment, or culture. List 3 covers infant industries.

Restrictions are substantiated by the non-readiness of Thai nationals to compete. A foreign investor is required to obtain a license to operate in any of the restricted sectors in list 2 and 3[449], unless it is covered by an investment treaty, obtains an investment promotion certificate from the Thai Board of Investment or the Estate Authority of Thailand[450]. There are sanctions in case a foreign investor engages in business in prohibited sectors or restricted activities without permission[451].

[448] Thai Investment Law, s4

[449] See SANTHAPAT PERIERA, DAVID BECKSTEAD and LUXSIRI SUPAKIJJANUSON, 'Thailand' in DENNIS UNKOVIC, MEYER, UNKOVIC & SCOTT LLP (eds), *Foreign Direct Investment: a View from the Inside* (Global Legal Post, 2016) 237-240

[450] THE WORLD BANK GROUP, 2019 Investment Policy and Regulatory Review – Thailand (2020) 18

[451] Thai Investment Law, s33-42

9. Vietnam

Foreign investment is governed by the Investment Law of 2020[452]. It deals with investments made in Vietnam and, unusually, outward investment[453]. For investments made in Vietnam, the Law covers admission and approval of new investments as well incentives thereto[454]. It draws conditional business lines in which foreign investors must satisfy certain conditions for reasons of national security, social order and ethics or public health[455]. Article 6 covers banned businesses in narcotic substances, chemicals and minerals, prostitution, specimens of rare and endangered wild flora and fauna, human trafficking and cloning. Investment incentives include reduction or exemption on corporate income tax, import tax and land rents and levy on government-owned land[456]. In addition to incentives, investors are accorded investment support in forms of development of technical infrastructure and social infrastructure beyond the perimeter of the project, training and development of human resources, credit support, relocation and research, information and market development[457].

Uncommonly, the Law governs outward investment and procedures thereto as it encourages Vietnam nationals to expand the market, improve the export, access to new technologies and so

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[452] Law on Investment (Law No. 61/2020/QH14) was adopted on 17 June 2020 and entered into force on 1 January 2021 <https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/vietnam> accessed 13 September 2021. It replaces the Law on Investment No. 67/2014/QH13 which has been in effect since 2014.
On 26 March 2021, Decree No. 31/2021/ND-CD (Decree 31) was issued to provide guidance for the implementation of the aforementioned investment law. There is also Law No. 64/2020/QH14 on Investment in the Form of Public-Private Partnership adopted on 18 June 2020.
The investment law (2020) introduces two more business lines to be banned from business investment, including trade in firecrackers and debt collection services. Besides, the new law also specifies that investors must make deposits or have bank guarantees for their deposit obligations to secure the implementation of projects of request the State for land allocation, land lease, permission for change of land use purposes, except for 04 cases as follows: firstly, investors win the land use right auction to implement investment projects that are allocated land with land use levy or leased land by the State with one-off rental payment for the entire lease term. Secondly, investors win the bidding to implement investment projects subject to land use. Thirdly, investors are entitled to land allocation or land lease by the State on the basis of receiving a transfer of investment projects that have made deposits or have completed capital contribution or capital raising in accordance with the schedule specified in written investment policy approvals or investment registration certificates. Fourthly, investors are entitled to land allocation or land lease by the State to implement investment projects on the basis of receiving a transfer of land use rights and properties attached to the land of other land users. <https://english.luatvietnam.vn/law-on-investment-no-61-2020-qh14-dated-june-17-2020-of-the-national-assembly-186270-Doc1.html> accessed 23 November 2021

[453] Vietnam Investment Law, article 1

[454] Vietnam Investment Law, article 2

[455] Vietnam Investment Law, articles 7 and 8

[456] BONNITCHA (n 346) 23

[457] Vietnam Investment Law, article 18 and 19

forth[458]. For state-owned outward investments, the Law defines conditions for profit transfer to Vietnam or its use to increase capital.[459] The Law also adopts a negative list approach which prohibits operations by foreign businesses in six sectors and requires investment license in 267 sectors.

In addition, the Vietnam law also provides for some generic provisions, such as the prohibition of expropriation or confiscation without compensation or reimbursement[460]; or the repatriation of capital and profits[461].

From the above, the evidence surfaces that there is a systematic calibration of ASEAN MS FILs on rules on foreign investment promotion and facilitation. Regardless of the few generic standards found in ASEAN domestic laws; they remain substantially dominated by norms on foreign investment promotion and facilitation. Even Myanmar in its attempt to escape from this trend through providing protection standards beyond the average; most of the provisions are focused on rules on foreign investment promotion and facilitation. This sends us to the next section.

[458] Vietnam Investment Law, articles 1 and 51

[459] Vietnam Investment Law, s2
It is important to note some changes between the 2014 and the current 2020 law. The investment law (2020) abolishes several conditional business lines included in the 2014 law. The abolished business lines are as follows: (a) Service activities of commercial arbitration organisations (b) Franchise services (c) Logistic services (d) Service of ship agents (e) Services of training and retraining knowledge on real estate brokerage, operating real estate trading floors (f) Cosmetic surgery services. However, it also supplements some business lines which will be considered 'conditional', such as services of voluntary drug rehabilitation, smoking cessation, HIV / AIDS treatment, caring for the elderly, people with disabilities and children; or supplying clean water (daily-life water). In addition, under the current LOI 2014, prior to establishing an economic organisation (e.g., enterprise), a foreign investor must have an investment project and obtain an Investment Registration Certificate. In the 2020 Law, this requirement remains does not apply to small and medium-sized start-ups or start-up investment funds in accordance with the Law on Supporting Small and Medium-Sized Enterprises.
<https://www.rajahtannlct.com/media/4017/vietnam-client-update_the-law-on-investment-2020_july.pdf> accessed 23 November 2021

[460] Vietnam Investment Law, article 10

[461] Vietnam Investment Law, article 12

Section 2 ACIA's PROVISIONS ON FOREIGN INVESTMENT PROMOTION AND FACILITATION

ACIA also contains provisions on foreign investment promotion and facilitation. This section shows that these provisions do not contradict but rather accompany those contained in ASEAN MS FILs. This reinforces the assertion that ASEAN MS FILs are systematically calibrated to rules on foreign investment promotion and facilitation.

On investment promotion, the ASEAN MS must cooperate in increasing awareness of ASEAN as an integrated investment area in order to increase foreign investment into ASEAN and intra-ASEAN investments[462]. This is done through, *inter alia,* encouraging the growth and development of ASEAN small and medium enterprises and multinational enterprises, enhancing industrial complementation and production networks among multinational enterprises in ASEAN, organising investment missions that focus on developing regional clusters and production networks, organising seminars on investment opportunities and on investment laws, regulations and policies, and conducting exchanges on other issues of mutual concern relating to investment promotion[463].

On investment facilitation, ASEAN MS have to endeavour to cooperate in the facilitation of investments into and within ASEAN through, *inter alia,* creating the necessary environment for all forms of investments, streamlining and simplifying procedures for investment applications and approvals, promoting the dissemination of investment information, establishing one-shop investment centres, strengthening databases on all forms of investments for policy formulation to improve ASEAN's investment environment, undertaking consultation with the business community on investment matters, and providing advisory services to the business community of the other MS[464].

[462] ACIA, article 24
[463] MALINTOPPI and TAN (n 386) 23
[464] *ibid.*

Few conclusions can be drawn in the light of the development above. In confronting the foreign investment norms of the ACIA with the norms of each ASEAN MS law; it is possible to understand the functioning of the ASEAN coexistence framework. Exactly as the norm-based conceptual framework suggests; by primarily looking at the relationship between legal norms rather than the RIA as a whole, it has become possible to find the evidence that the ASEAN coexistence framework features a distribution of foreign investment norms in which protection rules are exclusively provided for by the ACIA when the ASEAN laws are systematically calibrated to provisions on foreign investment promotion and facilitation. This displays further legal harmony and complementarity between the two. Furthermore, it is found that this is done with intent[465] to avoid contradiction and allow the community treaty to be applicable, which is exactly lacking in the SADC to advance the applicability of the SADC IA.

CHAPTER 4 PARTIAL CONCLUSION

The EU[466] is the benchmark par excellence in integration studies. Nevertheless, in foreign investment matters, the ASEAN has positioned itself as the reference for other RECs around the world. ASEAN, like never before, shows positive prospects for its integration process. It succeeded to engineer a coexistence framework that both accommodates the sovereignty of MS and advances regional integration.

This is true; however, it should be nuanced concerning the liberalisation of foreign investment that this study has set away to focus on foreign investment promotion, facilitation and protection. Taking the case of Indonesia for instance, Indonesia filed a reservation which limits the application of the ACIA's principle of national treatment to all steps related to land, property (including

[465] J. Chaisse asserts that 'ASEAN economies act as a component of the worldwide chain of product and services, while the ASEAN agreements and the AEC serve to integrate the value chain between the ASEAN MS and the global community. This new analytical approach can help explain the way ACIA integrates ASEAN countries between themselves and the global economy'. See CHAISSE (n 26) 246

[466] Article 2017 of the Treaty on the Functioning of the EU (TFEU, 2008) confers a new exclusive FDI competence to the EU. FDI is thus included in the common commercial policy (CCP) of the EU, along with trade, tariff or commercial aspects of intellectual property. see RUMIANA YOTOVA, 'The New EU Competence in Foreign Direct Investment and intra-EU investment Treaties: Does the Emperor Have New Clothes?' in FREYA BAETENS, (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 389

acquisition, ownership, and leasing of land and property), and natural resources. Reference sources for these restrictions are Article 33 of the 1945 Constitution, Law Number 5 of 1960 concerning Basic Agrarian Provisions, and Law Number 25 of 2007 concerning Investment. Some of the provisions contained in ACIA are very much contrary to what is regulated in domestic law in Indonesia. For example, article 3 of the ACIA, which has opened up opportunities for the liberalisation in many sectors, will be contrary to article 12 of Indonesian Investment Law. In this legislation, Indonesia still applies the type of business that is closed to foreign investment in order to protect its national interest. In fact, Indonesia as a developing country has people who still live from agriculture and plantations. As such, liberalisation in this area is restricted to foreign investments. In the mining sector, Indonesia still requires that foreign companies wishing to carry out exploration activities must enter into joint venture agreements with state-owned companies. Despite being legal[467], these domestic requirements and restrictions, however, violate the spirit of openness that is supposed to guide the ACIA. Nevertheless, as mentioned above, it remains pertinent to say that the ASEAN has succeeded to engineer a coexistence framework that both accommodates the sovereignty of MS and advances regional integration.

The relationship between the ACIA and the laws of ASEAN MS is not contentious and helps ensure the applicability of the ACIA in all ASEAN MS. 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.

[467] ACIA, articles 8 and 9 allow MS to make reservations regarding some provisions, especially senior management and board of directors and national treatment provisions.

Fig. 1 below presents the ASEAN investment coexistence framework.

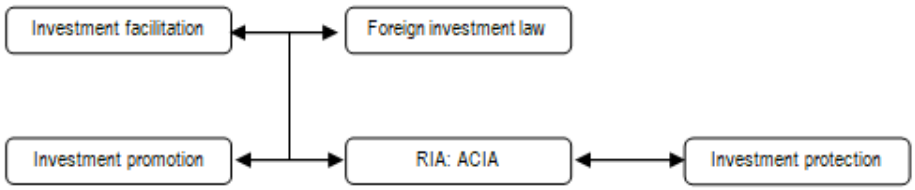

Fig. 1: ASEAN coexistence investment framework: the relationship between the ACIA and ASEAN Member States' laws on foreign investment

This figure shows that the ACIA and each ASEAN MS FIL all provide for foreign investment promotion and facilitation provisions. It is, however, the domestic laws that show systematic calibration on provisions on promotion and facilitation of investment. The fact for the ACIA to include these norms does not contradict but rather reinforce them. And, in any way, there is almost no consequence as that would be for investment protection rules.

The figure also shows that investment protection relates only to the ACIA and does not touch the case of MS FILs. This characteristic is at the core of the success of the ASEAN coexistence framework. This coexistence is functioning because it ensures exclusivity in protection standards by the ACIA, and calibrates MS FILs to promotion and facilitation norms; making it clear that any foreign investor should rely upon and use only the community treaty to protect its investment. This helps the ACIA to be applicable and pursue the objective of integrating the laws of ASEAN MS in 'an investment area'.

It is important to mention that this distribution of foreign investment rules between the treaty and different ASEAN MS' legislations is deliberately undertaken. When comparing the FILs of individual ASEAN MS; none of them provides for substantive provisions. With only a few exceptions, the laws of Brunei, Cambodia, Indonesia, Laos, Myanmar, Philippines, or Vietnam only provide for generic protection rules, such as expropriation or free transfer of capital. As mentioned before, these standards are pointless in relation to the ACIA. They either form the *raison d'être* of 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. The ACIA on the other hand provides FET, MFN, ISDS, etc. As the relational framework suggests, an economic community must have well structured and managed relations

between itself and other legal systems as a necessary condition for its effectiveness. To achieve complete integration, it is indispensable for MS to show political will under a 'federal conscience'. The distribution of foreign investment norms between the ACIA and ASEAN MS FILs aims at allowing the regional treaty to be applicable and pursue its integration objectives. It illustrates, as the neo-functionalist approach suggests, an increased political will for integration in ASEAN and the willingness of governments, driven by gains in trade, to negotiate under the stimulus of a 'federal conscience' rather than as completely free agents.

This concludes Part I of this study and sends us to Part II.

PART II: SADC COEXISTENCE FRAMEWORK: ANALYSING THE RELATIONSHIP BETWEEN THE SADC IA AND SADC MEMBER STATES' LAWS ON FOREIGN INVESTMENT

Much attention has been paid to the economic, social and political dimensions of regional integration in Africa, and in particular the SADC. Few scholars even successfully attempted to exclusively frame it from the legal perspective. These have been well explored. This Part does not attempt to rehearse them. It rather builds upon current issues arising from the coexistence between the SADC Investment Agreement (SADC IA) and SADC Member States' laws on foreign investment (SADC MS FILs).

SADC MS FILs explored in this study refer to the laws on foreign investment of the Democratic Republic of Congo (Congo), Zimbabwe and South Africa. The justification for the three cases lies in the fact that they show perfect illustrations of an asymmetrical coexistence of investment laws in relation to the SADC IA. It is hence pointless to elaborate on other SADC countries. Each domestic law provides for standards different from those contained in the other. This situation exacerbates the asymmetrical coexistence of investment laws in the region. Through the intertwinement of their respective foreign investment norms, the standards contained in the SADC IA are confronted with individual norms in each domestic law. This reveals that the distribution of norms is not well carried out. Instead of harmony and complementarity, there is rather a conflict and competition between the SADC MS FILs and the SADC IA. This undermines the applicability and effectiveness of the community treaty inasmuch as it provides for poorer quality of norms. In this way, it cannot stand the quality test when it is confronted with the norms contained in the SADC MS FILs, for instance, those of Zimbabwe and Congo. Exactly as the relational framework suggests, to be effective, a community legal order must have well-structured and managed relations between itself and other legal systems. This situation reveals how regional economic integration cannot be completed.

This Part is organised as follows. Chapter 1 briefly presents an overview of the SADC and the SADC IA. This is important to have an all-encompassing view of the SADC and its investment framework. Chapter 2 introduces the SADC IA with its substantive standards. This prepares the terrain for the next chapter (3) as it allows putting the norms in the laws of Congo, Zimbabwe and

South Africa, in a confrontational setting with the treaty standards. Finally, chapter 3 highlights the asymmetrical coexistence of the investment laws of Congo, Zimbabwe and South Africa. It then generates the evidence that the RIA is not applicable and cannot, therefore, achieve its integration objectives. Chapter 4 terminates the discussion with a conclusion.

CHAPTER 1: OVERVIEW OF THE SADC AND SADC INVESTMENT AGREEMENT

This chapter is divided into two sections. The first section briefly introduces the SADC. The second section broadly presents the SADC IA with the general investment framework of the SADC.

Section 1 SADC OVERVIEW

SADC is the most prominent organisation for regional integration in central and southern Africa[468]. It includes countries from both central and southern Africa. Its MS are Angola, Botswana, Comoros, the Democratic Republic of the Congo (Congo), Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.

The main objectives of the SADC are to achieve development, peace and security, and economic growth, to alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through regional integration, built on democratic principles and equitable and sustainable development[469]. The SADC Common Agenda summarises the aforementioned objectives in three main principles: (i) promotion of sustainable and equitable economic growth and socio-economic development that ensures poverty alleviation with the ultimate objective of its eradication; (ii) promotion of common political values, systems, and other shared values, which are transmitted through institutions that are democratic, legitimate and effective; and (iii) promotion, consolidation and maintenance of democracy, peace and

[468] See GEDA and SEID (n 170) 3. See also, CHELSEA MARKOWITZ, 'FDI Trends in SADC: Implications for Value Chains, Industrialisation and Inclusive Growth' (2020) South African Institute of International Affairs
[469] SADC Treaty, article 5

security[470]. To reach these objectives, SADC MS have adopted a number of protocols. These include the Protocol against Corruption (2001), Protocol on Combating Illicit Drug Trafficking (1996), Protocol on the Control of Firearms Ammunition and other Related Materials (2001), Protocol on Culture, Information and Sport (2001), Protocol on Education and Training (1997), Protocol on Energy (1996), Protocol on Extradition (2002), Protocol on the Facilitation and Movement of Persons (2005), Protocol on Fisheries (2001), Protocol on Forestry (2002), Protocol on Gender and Development (2008), Protocol on Health (1999), Protocol to the Treaty Establishing SADC on Immunities and Privileges (1992), Protocol on Legal Affairs (2000), Protocol on Mutual Legal Assistance in Criminal Matters (2002), Protocol on Mining (1997), Protocol on Politics, Defence and Security Cooperation (2001), Protocol on Science, Technology and Innovation (2008), Protocol on Shared Watercourses (2000), Protocol on the Development of Tourism (1998), Protocol on Trade (1996 as amended in 2016), Protocol on Trade in Services (2012), Protocol on Transport, Communications and Meteorology (1996), Protocol on Tribunal and Rules Thereof (2014), Protocol on Wildfire Conservation and Law Enforcement (1999), Revised Protocol on Shared Watercourses (2000) and Protocol on Finance and Investment (2006)[471].

The Southern African Development Coordinating Conference (SADCC), established on 1 April 1980 was the SADC precursor. It was a loose association until 17 August 1992 when the SADC Treaty was adopted in Windhoek, Namibia.

Section 2 SADC INVESTMENT FRAMEWORK

Community rules take the form of treaties, protocols, regulations, decisions, principles, etc[472]. Under articles 21[473] and 22[474] of the SADC Treaty, the parties agreed to adopt measures to cooperate *inter alia* in investment. In that order, SADC MS adopted the SADC Finance and

[470] <https://www.sadc.int/about-sadc/overview/sadc-common-agenda/> accessed 28 August 2020
[471] < https://www.sadc.int/documents-publications/protocols/> accessed 14 September 2021
[472] OPPONG (n 59) 1
[473] SADC Treaty, article 21.3.c
[474] This provision requires the SADC Member States to conclude such Protocols as may be necessary for each area of cooperation.

Investment Protocol (SADC FIP) to further cooperation among countries in finance and investment.

The SADC FIP is a common framework that enables the SADC region to pursue coordination of macroeconomic, monetary and fiscal policies as a precondition to sustainable economic growth and the creation of a monetary union. Through the SADC FIP, SADC countries acknowledge their collective duty to achieve economic growth and balanced intra-regional development, compatibility among national and regional strategies and to develop policies aimed at the progressive elimination of obstacles to the free movement of capital, labour, goods and services.

With regard to investment, the SADC FIP seeks to harmonise policies, laws and regulations of the region in finance and investment. It enables States to 'coordinate their investment regimes and cooperate to create a favourable investment climate within the SADC region[475]. The SADC FIP contains 11 Annexes. Investment is covered by Annex 1 – Cooperation on Investment (referred to as SADC Investment Agreement, SADC IA). Apart from the SADC IA, SADC governments also adopted the SADC Model BIT, a non-binding regional agreement.

1. SADC Investment Agreement

The first SADC IA was adopted in 2006 along with the SADC FIP which it forms Annex 1. It entered into force in 2010. The 2006 SADC IA had, however, a short tenure. At its 36th session, the SADC Summit approved the draft agreement amending Annex 1 to the SADC FIP. That was six years after it entered into force. The 2006 SADC IA was then replaced by the new and current Annex 1 in 2016 (SADC IA).

The SADC IA is referred to as 'Agreement Amending Annex 1 – Cooperation on Investment on the SADC Protocol on Finance and Investment'. Such a reference is misleading because the 2006 Annex was not amended but repealed. Article 2 (Amendment of Annex 1 to the Protocol on Finance and Investment) reads as follows: "Annex 1 of the Protocol on Finance and Investment is repealed and replaced by the text which is in the Appendix to this Agreement".

[475] SADC FIP, article 3

The new Annex and current SADC IA entered into force on 24 august 2017. As of September 2021, 13 of 16 SADC MS have signed the SADC IA, namely: Angola, Botswana, the Democratic Republic of the Congo, Eswatini, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Tanzania, Zambia and Zimbabwe.

The SADC IA can be considered as the first attempt by a REC to try achieving economic integration through establishing a community investment treaty. It regulates foreign investment within SADC. It is a unique instrument that creates 'legally binding rights and obligations to investors and MS[476]' at the SADC regional level and aims to unify disparate investment rules of MS under a single regime. It especially undertakes to integrate MS' laws on foreign investment into a 'SADC Investment Zone[477]'. The SADC IA is a tool for the realisation of integration objectives, to enhance the attractiveness of the SADC region as an investment destination through promoting the free flow of capital. It was adopted as an attempt to ensure an overall balance of rights and obligations between investors, host States and home States. The SADC IA seeks to reduce the exposure to ISDS by narrowing the scope of covered investments and limiting investor rights in the region. MS agree not to waive or otherwise derogate from health, safety and environmental regulations as an encouragement for the establishment, acquisition, expansion or retention of investments in their respective jurisdictions. Moreover, the State right to regulate is clearly recognised in the pursuit of sustainable development or other legitimate socio-economic policy objectives.

2. SADC Model BIT

The dual approach towards foreign investment consists of a binding approach with the SADC IA; and a non-binding approach with the SADC Model Bilateral Investment Treaty Template (SADC Model BIT)[478]. It is clearly mentioned that the SADC Model BIT is not intended to be and is not a legally binding document. [479] It exists as a reference from which the MS can choose to use all or some of the model provisions as a basis for either developing their own model treaty or engaging

[476] KONDO (n 25) 3
[477] SADC IA, article 17
[478] SADC Model Bilateral Investment Treaty template with commentary (2012), Gaborone, Southern African Development Community (henceforth SADC Model BIT)
[479] SADC Model BIT, Introduction 3

in investment treaty negotiation.[480] Pushed by South Africa, the committee of ministers of trade approved in 2011 the development of a model SADC BIT template in order to safeguard interests of SADC countries when concluding treaties; review current content of SADC MS' treaties in light of regional development goals, and improve consistency of investment negotiations and the treaties concluded.[481]

CHAPTER 2: SADC INVESTMENT AGREEMENT AND FOREIGN INVESTMENT PROTECTION

This chapter discusses the SADC IA's substantive protection standards. It shows that the SADC provides for poorer quality of norms compared to protection norms contained in MS FILs, especially in the laws of Zimbabwe and Congo. This chapter is divided into six sections. It discusses the scope of application in section 1. Section 2 discusses the absence of FET and ISDS clauses. Section 3 features the unique transparency standard. Expropriation and compensation, national treatment and transfer of capital are presented respectively in sections 4, 5 and 6.

Section 1 SCOPE OF APPLICATION

The scope of an investment treaty depends on the significance of definitions employed therein. Three options are generally put forward in IIAs for the conceptualisation of investment. An investment can consist of an enterprise. It can also consist of either some assets exhaustively enumerated or only an indicative list of assets. An enterprise-based definition is the most narrowly drafted definition of investment. It requires the establishment, acquisition or expansion of an enterprise for the purpose of making a foreign investment[482]. An open-list asset-based definition is on the other hand the most broadly drafted definition of investment. Its formulation always covers 'every kind of asset' or 'every kind of investment' followed by a non-exhaustive list of the covered investments[483]. Unlike the enterprise-based definition which requires holding a business,

[480] SADC Model BIT, Introduction 3
[481] DEPARTMENT OF TRADE AND INDUSTRY, 'South Africa's Investment Policy: Presentation to the Parliamentary Portfolio Committee on Trade and Industry' (2015) 5
[482] KONDO (n 25) 6, 7
[483] *id.* 7

this one requires a foreign investor to hold an asset. Beyond the two approaches, there is a closed-list asset-based definition. This approach combines the characteristics of an enterprise-based definition and those of an open-list asset-based definition[484]. Based on the SADC Model BIT, the SADC IA opted for an enterprise-based definition of an investment.

1. Definition of 'Investment' and 'Investor'

An investment is defined as an enterprise.[485] Article 1 provides that investment is an enterprise within the territory of one State Party established, acquired or expanded by an investor of the other State Party, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the legal requirements of the host State.[486] Similarly, an investor is defined as a natural or a judicial person of a State Party making an investment in another State Party, in accordance with the laws and regulations of the State Party in which the investment is made.[487] The agreement only recognises juridical persons. Its coverage does not extend to individuals.

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[484] *Ibid.*

[485] An enterprise is defined as any entity constituted or organised under the applicable laws of any State, whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other such organisation (SADC IA, article 1).

[486] SADC IA, Article 1

This article further elaborates that the enterprise may possess assets such as:

(a) Shares, stocks, debentures and other equity instruments of the enterprise or another enterprise;
(b) A debt security of another enterprise;
(c) Loans to an enterprise;
(d) Movable or immovable property and other property rights such as mortgages, liens or pledges;
(e) Claims to money or to any performance under contract having a financial value;
(f) Copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names; to the extent they are recognized under the law of the host State; and
(g) Rights conferred by law or under contract, including licences to cultivate, extract or exploit natural resources.

However, Investment shall not include:

(a) Debt securities issued by a government or loans to a government;
(b) Portfolio investments;
(c) Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a State Party to an enterprise in the territory of another State Party, or the extension of credit in connection with a connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (g) above.

[487] SADC IA, article 1.

2. Implications from the Definitions of 'investment' and 'investor'

It is important to draw a few implications from the set above definitions. First, the assets and persons which find protection under the SADC IA are limited to SADC investors and their investments. An investment is constituted by an enterprise within the territory of another SADC country, and an investor is a person making an investment in another SADC country. Therefore, investors and investments outside the SADC are entitled to no protection under the SADC IA's regime.

Second, the effectiveness of the SADC IA as a regional framework is impaired. In the absence of an MFN clause[488], and given the narrowing definitions of 'investment/investor', only SADC investors and their investments are eligible for the benefits of the SADC IA. Paradoxically, the majority of FDI inflows originate from non-SADC investors. To effectively promote and protect foreign investments, a regional investment framework must cover non-SADC investments. The exclusion of non-SADC investors leaves a vacuum in the regulation of foreign direct investments (FDI) in the region and diminishes the functional dimension of the treaty itself. Although intra-regional FDI statistics are not readily available, there is evidence that intra-SADC investment is limited. For example, Nkuna notes that in 2010, intra-regional FDI accounted for only 5% of total projects on the basis of total FDI projects.[489] In 2013, South Africa retained the lion's share of investment in the SADC region, even though intra-SADC investment represented a small share of SADC FDI inflows.[490] These statistics have not changed significantly. The 2019 EY Africa Attractiveness report shows that the most significant investors by several projects and capital are extra-African. The largest investors are the United States, France and the United Kingdom; with China being the largest source of inward capital.[491] Only South Africa appears in the top ten largest investors being the largest source of intra-African investments. Legal instruments, legislations or treaties, are adopted to apply to as many situations as possible. Because non-SADC investments

[488] Tribunals interpreted the MFN clause to import favourable provisions from a third-party treaty into the basic treaty of the protected investment. Without MFN provision in the SADC IA, there is no way SADC investors can invoke the benefit of favourable provisions that are contained in intra-SADC BITs.
See NIKIÈMA (n 299) 13, 15.
[489] ONELIE NKUNA, 'Intra-Regional Foreign Direct Investment in SADC: South Africa and Mauritius Outward Foreign Direct Investment' (2017) 341 AERC Research Paper 1.
[490] NEPAD, 'Regional Integration and Trade Department' (2013)
[491] EY, 'Africa Attractiveness Report' (2019) 23-5.

are left apart; the SADC IA only covers a few situations. It cannot, therefore, be effective for its 'regional' purpose.

Third, the SADC IA creates an unfair competition towards SADC investors. It provides for poorer protection norms while allowing MS to conclude BITs with third States.[492] Non-SADC investors covered by BITs can enjoy better protection into the SADC region in stark contrast with SADC investors covered by the SADC IA.

Section 2 ABSENCE OF FAIR AND EQUITABLE TREATMENT AND INVESTOR-STATE ARBITRATION CLAUSES

The SADC IA lacks both the FET and ISDS. It is important to mention that these are the most favoured standards by foreign investors. They also have the most far-reaching potential to upgrade a treaty's protection features. This is evident because even foreign investors operating within the EU continue to invoke their rights under existing intra-EU BITs rather than relying on well-established national judicial systems[493].

Critical changes that led to the adoption of the SADC IA in 2016 have curtailed broad access to international arbitration under the 2006 regime[494]. This was followed by the adoption in 2014 of a new Protocol on the SADC Tribunal that does no longer grant the tribunal the power to hear applications by individuals[495]. This 'reform' wave took with it both the FET and the ISDS

[492] SADC IA, article 24

[493] YOTOVA (n 32) 413.

[494] In August 2016, SADC Member States implemented crucial changes in the SADC to curtail this broad offer of treaty protection. First, the SADC member states deleted the provisions on fair and equitable treatment and replaced them with national treatment standards, thereby curtailing the scope of substantive, international law protections for foreign investors. Second, the SADC member states amended the treaty to offer protection only to investors of an SADC member state investing in another member state. See, JONES DAY, 'Investors in Southern African Development Community Stripped of International Treaty Protections' (2017) <https://www.lexology.com/library/detail.aspx?g=91d7f45e-96a5-40ef-bcfe-34d3dd24ea48> accessed 15 June 2020

[495] See Protocol on the Tribunal in the Southern African Development Community, 18 August 2014.
The adoption of this new Protocol followed the *Campbell* case and the refusal by Zimbabwe to abide by the decisions of the SADC Tribunal. The participation of South Africa and Tanzania for example in the suspension of the previous SADC Tribunal had been challenged domestically. In South Africa, the Constitutional Court declared that the President has violated the Constitution of the country and international obligations.
See Law Society of South Africa and others v President of the Republic of South Africa and others [2018] ZACC 51
The High Court of Tanzania ruled on the same matter and considered that the suspension of the previous SADC Tribunal eroded existing rights of parties who had access to the tribunal. *See* Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and the Attorney General of the United Republic of Tanzania (issued on 4 June 2019).

clause[496]. Access to domestic courts and tribunals for investors has thus become the principal means for settling disputes[497]. This is however untenable inasmuch as, apart from South Africa, other SADC MS have a deficient rule of law and governance rankings[498]. As such, recourse to the domestic settlement of investment disputes can favour only countries like South Africa to the detriment of countries like Zimbabwe or Congo.

Following the removal of the MFN clause and the narrowing of the definition of 'investment', only SADC investments are eligible for the benefits of the SADC IA. And in the absence of an arbitration clause, SADC investors are trapped between either referring their claims to domestic tribunals with poor rule of law tradition or seeking redress through their home states. To create a balance between the exercise of state sovereignty and investment promotion, SADC countries should consider that 'investors demand a more reliable dispute resolution process than what host States can normally provide'.[499] Differences in the rule of law traditions amongst SADC members impede the regional project to the detriment of two types of countries: (i) countries that are unable to engage based on inherent confidence in their regulatory regimes predicted upon decades of proven commitment to the rule of law[500]; (ii) and countries with unfriendly-investor regulatory

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To avoid compliance of the resolution suspending the SADC Tribunal, the SADC Summit found it clever to amend through a new protocol that does not recognize the right for individuals to file complaints to the SADC Tribunal. For more details, *See* GERHARD ERASMUS, 'Another Ruling against the Dismantling of the SADC Tribunal' <https://www.tralac.org/blog/article/14149-another-ruling-against-the-dismantling-of-the-sadc-tribunal.html#_ftn3> accessed 6 September 2020

[496] Although the SADC IA provides for arbitration, it only recognises state-to-state arbitration by the SADC tribunal. Critics of the SADC tribunal argue that reference to this tribunal in the SADC IA is not pertinent. The main reasons put forward are as follows: the tribunal is viewed by many observers as 'toothless' as Member States can refuse – and actually had refused – to abide by its decisions without any consequence. For example, the SADC Tribunal found the Republic of Zimbabwe in breach of its obligation under the SADC Treaty for unlawfully expropriating private property without compensation. Zimbabwe refused to abide by the tribunal decision. The option to prefer inter-State arbitration over ISDS was put forward following the *Campbell* case. See *Mike Campbell (Pvt) Ltd* v Republic of Zimbabwe, 2008 SADCT 2, 28 November 2008.

[497] Access to domestic courts and tribunals becomes the primary means for settling investment disputes. Within the terms of article 25, State Parties shall ensure that investors have the right of access to the courts, judicial and administrative tribunals, and other authorities competent under the laws of the host State for redress of their grievances in relation to any matter concerning their investment including but not limited to the right for judicial review of measures relating to expropriation or nationalisation and determination of compensation in the event of expropriation or nationalisation. cf SADC IA, article 25

[498] For details about rankings in rule of law and democracy, See, WORLD JUSTICE PROJECT, Rule of Law Index 2017-2018 <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2017%E2%80%932018>; THE ECONOMIST, Democracy Index 2018 <https://www.eiu.com/topic/democracy-index> accessed 15 June 2020

[499] STEPHAN (n 44) 355

[500] ZACHARY DOUGLAS, *The International Law of Investment Claims* (Cambridge University Press 2009) 1

frameworks. As Stephen notes, what investors do not trust is not so much the governing law, but rather the institutions that will apply the law.[501]

Critics of ISDS argued that the exclusion of the ISDS clause would push the SADC to shift focus to mediation and other alternative dispute resolution mechanisms which help aggrieved parties to resolve disputes while continuing the investment projects[502]. They further argued that the SADC region could replicate its experience in political disputes settlement in investment dispute settlement. In saying that Africa should capitalise upon its own *savoir-faire*, which entails a cultural and a sociological dimension; these critics seem to further submit that international arbitration is not 'African enough', but only alternative dispute mechanisms should be put forward. This is not pertinent. As M. Mbengue elaborates, Africa has contributed as a catalyser of the ICSID system, crystalliser of investment 'jurisprudence' and customizer of ISDS[503]. Also, such a misconception does not benefit the SADC given the high need for FDI combined with the low level of development and the low domestic rule of law tradition in most of its MS. Despite the shortcomings of arbitration resulting in large financial losses for developing countries; exposure to liability through international arbitration can help a country improve its governance. Fear of arbitration proceedings can raise awareness amongst internal authorities that are in charge of enforcing the law and therefore promote governance standards.

Section 3 A UNIQUE TRANSPARENCY STANDARD?

The transparency provision of the SADC is reinforced. It is submitted that this is an attempt to fill the vacuum caused by the suppression of the FET standard. The SADC IA transparency provision set the bar beyond the traditional scope of transparency provisions in IIAs.

[501] STEPHAN (n 44) 355

[502] For more details on alternative dispute settlement mechanisms, see ZHAO (n 328) 113

[503] MAKANE MOÏSE MBENGUE, 'Somethin' ELSE': African Discourses on ICSID and on ISDS – an Introduction' (2019) 34 ICSID Review 259.

Article 7 reads:

> "1. State Parties shall promote and establish predictability, confidence, trust and integrity by adhering to and enforcing open and transparent policies, practices, regulations and procedures as they relate to investment.
>
> 2. State Parties that introduce new regulations that affect the provisions of this Annex shall notify the Secretariat for information purposes within a period of three (3) months of introducing such regulations".[504]

The terms of this article distance the SADC IA from transparency provisions in other treaties. Traditionally, transparency obligation is limited to the obligation by host States to either inform any policy change to the relevant treaty body or provide information and, where appropriate, participation for norm creation to investors[505].

1. Transparency Provisions in IIAs

The ACIA transparency provision for example does not provide beyond the duty to inform any policy change to the relevant treaty body. It reads as follows:

> "1. In order to achieve the objectives of this Agreement, each Member State shall:
>
> (a) Promptly and at least annually inform the AIA Council of any investment-related agreements or arrangements which it has entered into and where preferential treatment was granted;
>
> (b) Promptly and at least annually inform the AIA Council of the introduction of any new law or of any changes to existing laws, regulations or administrative guidelines, which significantly affect investments or commitments of a Member State under this Agreement;

[504] SADC IA, article 7.

[505] See ESMÉ SHIRLOW, 'Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures' (2017) GoJIL 45-47

(c) Make publicly available, all relevant laws, regulations and administrative guidelines of general application that pertain to, or affect investments in the territory of the Member State; and

(d) Establish or designate an enquiry point where, upon request of any natural person, juridical person or any other Member State, all information relating to the measures required to be published or made available under subparagraphs (b) and (c) may be promptly obtained.

2. Nothing in this Agreement shall require a Member State to furnish or allow access to any confidential information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular juridical persons, public or private[506]".

The USMCA transparency provisions are related to the duty to make publicly available relevant measures[507]. There is also a reference to confidentiality and the State right to request any information solely for informational or statistical purposes[508].

The transparency provision of the Energy Treaty Charter (ECT) remains in the same perspective. It reads as follows:

"(1) Laws, regulations, judicial decisions and administrative rulings of general application which affect trade in Energy Materials and Products or Energy Related Equipment are, in accordance with Article 29(2)(a), among the measures subject to the transparency disciplines of the WTO Agreement.

(2) Laws, regulations, judicial decisions and administrative rulings of general application made effective by any Contracting Party, and agreements in force between Contracting Parties, which affect other matters covered by this Treaty shall also be published promptly in such a manner as to enable Contracting Parties and Investors to become acquainted with

[506] ACIA, article 21
[507] See USMCA, article 14.D.14 "Service of Documents" of Annex 14-D
[508] USMCA, article 14.13.2 (Special Formalities and Information Requirements)

them. The provisions of this paragraph shall not require any Contracting Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any Investor.

(3) Each Contracting Party shall designate one or more enquiry points to which requests for information about the above-mentioned laws, regulations, judicial decisions and administrative rulings may be addressed and shall communicate promptly such designation to the Secretariat which shall make it available on request"[509].

The above examples reveal that the SADC IA transparency provision is unique as compared to the provisions in other IIAs. The transparency provisions of the ACIA, USMCA and ECT are limited to what is described as the 'procedural aspect of the transparency provision', which includes the mere and basic duty to inform a treaty body of any policy change or the duty by host States to make available basic and relevant information. It can be submitted that, because those treaties all provide for FET; it would have been pointless to elaborate more on a transparency provision. But because the SADC IA does not contain the FET, the transparency provision was extended beyond its traditional procedural aspects.

Undoubtedly, ECT, USMCA and ACIA provisions are similar to paragraph 2 of the SADC IA transparency provision. This paragraph reads: "State Parties that introduce new regulations that affect the provisions of this Annex shall notify the Secretariat for information purposes within a period of three (3) months of introducing such regulations"[510]. Aware of the importance of the FET standard, the drafters opted for an upgraded transparency provision as an attempt to balance the lack of FET in the SADC IA. They clearly sought to make a difference between paragraph 2 setting procedural aspects of transparency provision which is limited to the obligation by each Party to notify the Secretariat any change in investment regulations, and paragraph 1 setting the obligation to provide "predictable and transparent legal framework". The next development elaborates more on this.

[509] ECT, article 20 'Transparency'
[510] SADC IA, article 7.

2. Uniqueness of the Transparency Standard under the SADC IA

Predictability obligation entails a possibility of regulatory change when such a change is foreseeable by either party. Article 7 of the SADC IA thus implies an element of stability that distances it from the procedural meaning of transparency standards in other IIAs. Although, it is the scope of its paragraph 2; article 7 of SADC IA is not restricted to the sole obligation to render available information to the investor or any relevant treaty-body, or assure the investor participation in the decision-making process when applicable. Its paragraph 1 includes "predictability and transparency obligation" as it goes from the duty of "assuring the availability of information and openness in the decision-making process[511]" to the prohibition of detrimental unforeseeable regulatory change. It thus makes regulatory standards more visible by alerting the investors on eventual violations, and by creating incentives for compliance by the host State[512]. For all these reasons, article 7, especially paragraph 1, can be a source of legitimate expectations[513].

Transparency as a source of legitimate expectations has developed in investment treaty arbitration under the FET. However, even without the FET standard, the legal consequences of transparency obligation remain comparable. As such, article 7 of the SADC IA can provide a case of legitimate expectations outside FET.

By analogy, it is possible to rely on article 7 for a breach of investor's expectations under the obligation to provide a 'predictable and transparent legal framework'.

The tribunal in *Tecmed* considered the FET standard in light of the principle of good faith and interpreted it to require the host State to act consistently and transparently. The decision reads that the host State should provide "treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations

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[511] ROBERT VAUGHN, 'Transparency in the Administration of Laws: The Relationship between Differing Justifications for Transparency and Differing Views of Administrative Law' (2011) 26 no.4 American University International Law Review (2011) 972

[512] ANDREW NEWCOMBE and LLIUS PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment* cited by TREVOR ZEYL, 'Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law' (2011) Alberta Law Review 207

[513] There is a trend in investment treaty arbitration to consider the obligation to act transparently as a source of legitimate expectations. SHIRLOW (n 505) 84

with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations"[514].

The tribunal in *Binder* poses transparency as having the effect of boosting legal certainty and hence being strongly linked with stability and predictability of the legal order. The decision in favour of the State, after quoting the *Tecmed case,* reads: "The elements of stability and predictability of the State's legal order go hand in hand with the need that the State act with reasonable consistency and transparency, as part of an overall aim of enhancing legal certainty".[515]

This tribunal rendered an award in favour of the host State. It concludes that while the host State is entitled to determine its legal and economic order, the investor also has a legitimate expectation in the system's stability to facilitate rational planning and decision making. The decision in favour of the host State reads: "The protection of the investor's legitimate expectations is closely related to the concepts of transparency and stability. Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework. Stability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected"[516].

The tribunal in *Plama,* after relating transparency to FET observed: "Transparency appears to be a significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework"[517].

Applying the FET standard, the tribunal in *Saluka* observed: "A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (…), or discriminatory".[518] A little bit far, the tribunal noted: "The Czech Government's exchange of views with Saluka/Nomura and

[514] *Técnicas Medioambientales Tecmed* v. United Mexican States (ICSID Case No. ARB(AF)/00/2), para 154.
[515] *Binder* v. Czech Republic, Final Award, 15 July 2011, para. 446
[516] *Frontier Petroleum Services Ltd* v. The Czech Republic, Final Award, 12 November 2010 (UNCITRAL), para. 285
[517] *Plama Consortium Limited* v. Republic of Bulgaria (ICSID Case No. ARB/03/24) para 178
[518] *Saluka Investments BV*. v. The Czech Republic, Partial Award, 17 March 2006 (UNCITRAL), para 309

IPB on possible solutions for IPB also lacked sufficient transparency to allow Saluka/Nomura and IPB to understand exactly what the Government's preconditions for an acceptable solution were"[519].

The *LG&E* tribunal noted the relevance of the obligation, under FET standard, to provide a transparent and predictable legal framework as follows: "(…) violations of the fair and equitable treatment standard may arise from a State's failure to act with transparency –that is, all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made under an investment treaty should be capable of being readily known to all affected investors.[520] Thus, this Tribunal (…) understands that the fair and equitable standard consists of the host State's consistent and transparent behaviour, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfil the justified expectations of the foreign investor[521]".

Besides the aforementioned awards, other arbitral tribunals share the conclusion that legitimate expectations serve *inter alia* to support transparency, stability and predictability of the legitimate space of the host country[522]. Tribunals in *Enron* and *Occidental* had incorporated the "transparency and free from arbitrary" requirements of the *Tecmed* standard into what would become a key element of the FET – the duty of host States to maintain the stability of the legal and business framework[523]. In *Occidental,* the tribunal held that the tax law was changed without providing any clarity about its meaning and extent. It concluded that such requirements of the FET standard were not met by Ecuador. All the facts addressed in these cases can by analogy help to interpret[524] the scope of article 7.1 of the SADC IA.

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[519] *id.* para 420

[520] *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc* v. Argentine Republic, Decision on Liability, ICSID Case No. ARB/02/1, 3 October 2006, para 130.

[521] *id.* para 131.

[522] ZEYL (n 512) 208. See also, ZEINAB ASQUANI, 'Investor's Legitimate Expectations and the Interests of the Host State in Foreign Investment' (2014) Asian Economic and Financial Review 1906-18

[523] *Enron Corporation and Ponderosa Assets, L.P.* v. Argentine Republic, ICSID Case No. ARB/01/3, para 260; *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. The Republic of Ecuador, ICSID Case No. ARB/06/11, para 554

[524] These enumerated facts are related to the broad approach by relevant case law of the concept of legitimate expectations; as opposed to the narrow approach that requires a case-by-case analysis as well as additional commitments by the host State. ASQUANI (n 522) 1909

To close this section, let's say that the transparency provision under SADC IA – unlike its USMCA, ACIA and ECT counterparts – entails stability and predictability of the legitimate space of the host country whose breach can be a source of investor's legitimate expectations. Because the same obligation is the source of legitimate expectations under FET, similarly it remains a source of legitimate expectations even when it is set alone. The duty by host States to act fairly[525] cannot be restrained by the banner "fair and equitable treatment" in a treaty. Even with different wording, the normative content and legal effects can be comparable. It is therefore submitted that legitimate expectations remain, not as part of the FET standard that has been suppressed, but rather as a revelation of the 'upgraded' transparency provision under the SADC IA. The objective pursued by the SADC MS by removing the FET standard is left vulnerable. The principle remains, although outside the standard that occasioned its birth in investment treaty arbitration. By accepting the transparency provision after removing the FET, the SADC IA has unknowingly opted for the remaining of the legitimate expectations principle.

Section 4 EXPROPRIATION AND COMPENSATION

It is a general principle that host States have a right of taking foreign-owned property or assets. It is also a general principle that such taking be followed by compensation serves and not be discriminatory. The conditions relating to the *intérêt public* and non-discrimination can form part of customary international investment law[526]. In this view, a country cannot adopt laws or regulations that do not consider compensation. The standard of compensation varies from a country or a treaty to another. Some treaties replicate the Hull formula that compensation should be 'prompt, adequate and effective'. This standard is the most favoured by investors. In other treaties, the parties prefer to trim down the severity of the Hull formula through alternative standards such as 'fair and adequate compensation' like in the SADC IA[527].

The SADC IA and SADC Model BIT take the same stance with respect to expropriation. They start with a general prohibition of expropriation without compensation. In most treaties, the difference is not drawn between direct and indirect. Some treaties however tend to address them

[525] See DIRK BRYNARD, 'The Duty to Act Fairly. A Flexible Approach to Procedural Fairness in Public Administration' (2010) Vol. 18 No 4 Administratio Publica
[526] SORNARAJAH (n 317) 207
[527] SADC IA, article 5

altogether and clearly extend the general prohibition to both direct and indirect expropriation. The SADC IA provides that investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of fair and adequate compensation[528]. Likewise, the SADC Model BIT reads that a State Party shall not directly or indirectly nationalise investments in its territory[529].

The issue of compensation is divisive. Capital-exporting countries tend to steadfastly adhere to the Hull standard of prompt, adequate and effective compensation'[530]. FDI-importing countries on the other hand tend to favour appropriate compensation as the standard of compensation that must be satisfied in the event of expropriation[531]. It is thus not surprising that, in the determination

[528] SADC IA, article 5 provides:
"1. Investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of fair and adequate compensation.
2. Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. However, where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard to all relevant circumstances and taking account of:
(a) The current and past use of the property;
(b) The history of its acquisition;
(c) The fair market value of the investment;
(d) The purpose of the expropriation;
(e) The extent of previous profit made by the foreign investor through the investment; and
(f) The duration of the investment.
3. Any payment shall be made in freely convertible currency. On payment, compensation shall be freely transferable in accordance with applicable legislation in the host State.
4. payments that are significantly burdensome on a host State may be paid yearly over a three-year period or such other period as agreed between the host State and the investor, subject to payment of interest at the rate established by agreement of the host State and the investor.
5. This article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.
6. A measure of general application shall not be considered an expropriation of a debt security or loan solely on the ground that the measure imposes costs on the debtor that causes it to default on the debt.
7. A measure of general application by a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation.
8. The investor affected by the expropriation shall have a right under the law of the State Party making the expropriation to a review by a judicial or other independent authority of that State Party of the investor's case and the valuation of the investment in accordance with the principles set out in this article".
[529] SADC Model BIT, article 6
[530] CHESTER BROWN (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press Oxford 2013) 677
[531] SORNARAJAH (n 317) 209-213

of the value of a property or asset on expropriation[532], the SADC IA opted for a 'fair and adequate compensation'. It also draws a thin line between non-compensable regulatory takings and compensable expropriation. Article 5 further notes that the equitable balance to be found between the public interest and interest of the investor can be dismissed considering the purpose of the expropriation and other cases therein under article 5.2. In addition to that, some regulatory takings, irrespective of their impact on the investments, are not considered as expropriation, and thus cannot be compensated. This is exemplified by any measure aimed at protecting or enhancing legitimate public welfare objectives, such as public health, safety and the environment within the purview of article 5.7 in line with the SADC Model BIT.

Section 5 NATIONAL TREATMENT

National treatment is a basic principle that prohibits differential treatment on the basis of nationality. It forms part of non-discrimination principles that allow foreign investors to be equally treated *vis-à-vis* host State's regulations. This clause requires a host State to make no negative differentiation between foreign and national investors when enacting and applying its law and thus to promote the foreign investor to the level accorded to nationals.[533]

Some treaties provide for both pre-entry and post-entry national treatment[534]; but the SADC IA does not. Article 6 reads as follows

> "A State Party shall accord to investors and their investments treatment no less favourable than the treatment it accords, in like circumstances[535], to its own investors and their

[532] KONDO (n 25) 6

[533] DOLZER and SCHREUER (n 253) 178

[534] SORNARAJAH (n 317) 253

[535] Article 6.2 further elaborates that:
"For greater certainty, references to "like circumstances" in paragraph 1 requires an overall examination on a case-by-case basis of all the circumstances of an investment including, inter alia:
(a) Its effects on third persons and the local community;
(b) Its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
(c) The sector the investor is in;
(d) The aim of the measure concerned;
(e) The regulatory process generally applied in relation to the measure concerned; and
(f) Other factors directly relating to the investment or invest in relation to the measure concerned".

investments with respect to the management, operation and disposition of investments in its territory".[536]

It is said that this standard aims at filling the vacuum of an MFN treatment clause[537]. National treatment and MFN clauses are two comparator standards that allow foreign investors to be granted, in like circumstances, similar treatment as their domestic counterparts or other foreign investors in the host State. However, it is difficult to substantiate this assertion. Unlike the transparency provision set to nuance the absence of a FET standard, it can hardly be justified that the national treatment clause can assure the function of an MFN clause.

As set forth above (section 3), the FET standard comprises amongst substantive contents 'transparency, legitimate expectation, arbitrary conduct, discriminatory conduct, good faith, denial of justice and due process'[538]. The transparency standard provided for under article 7 of the SADC IA bears elements of transparency and legitimate expectations. Accordingly, it can be said that it aims at filling the vacuum caused by the removal of the FET standard in the SADC IA. This is however untenable with regard to the MFN and NT. The MFN standard allows investors protected by a treaty to avail of the benefits granted to other investors in other treaties; while the national treatment standard is concerned about non-discriminatory treatment between domestic and foreign investors with regard to the application of the host State's regulations. Therefore, the lack of an MFN clause in the SADC IA cannot be filled even partially by a national treatment standard.

The SADC IA national treatment clause is qualified because State Parties are allowed to take measures that violate its dispositions provided that these measures aspire to achieve national development objectives[539]. SADC scholars stress the particular importance of this exclusion. T. Kondo for example notes that this clause is crucial to ensure the development needs and guarantees constitutional imperatives of countries like South Africa and Zimbabwe. The Constitutions of these countries[540] require their respective governments to take specific measures to redress the

[536] SADC IA, article 6.1
[537] KONDO (n 25) 10
[538] PATRICK (n 284) 50
[539] See SADC IA, article 6.3
[540] See The Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act) following s 9(2) of the Constitution of the Republic of South Africa. See also The Indigenisation and Economic Empowerment Act [Chapter 14: 30] (IEEA) following s 14 of the Constitution of the Republic of Zimbabwe, 2014

injustices of the past by empowering previously disenfranchised groups through preferential treatment[541]. Nonetheless, these exceptions cannot be generalised to all the economic sectors. They must be partial or limited to specific fields or areas of the economy of the country. Otherwise, it can be considered as an unfair, discriminatory and inequitable treatment towards foreign investments in breach of the treaty as well as domestic law provisions. Given that there is no legal framework that covers these limitations; it is left upon each MS' discretion and in accordance with its laws to decide to grant preferential treatment to domestic investors and their investments to the detriment of foreign investments in any concerned field.

Section 6 TRANSFER OF CAPITAL

Investment projects are developed for the purpose of making profits. If the repatriation of the profits is prevented, this purpose will be frustrated. The grand bargain approach informs that free transfer of profits is necessary for an investor that may have to 'service loans, pay for services and buy equipment and machinery'[542]. Free transfer of profits is among the standards recognised in all investment treaties. Some investment treaties contain absolute provisions protecting the right of repatriation. As M. Sornarajah explains, an 'unhindered repatriation of profits[543]' is unrealistic. This author further notes that in contexts of extreme balance-of-payment difficulties, it could be argued that the general doctrine of necessity suspends the treaty obligation to permit repatriation, at least until the situation improves[544]. The SADC IA does not stand for an absolute right to repatriation. It leaves it at the discretion of SADC MS to decide whether repatriation of investments and returns should be absolute or otherwise. Article 13 reads as follows:

> "1. Each State Party shall ensure that investors are allowed facilities in relation to repatriation of investments, compensation and returns in accordance with the rules and regulations stipulated by the host State.

[541] KONDO (n 25) 12
[542] SORNARAJAH (n 317) 206
[543] *id.* 13
[544] *id.* 207

2. Notwithstanding the provisions of paragraph 1, State Parties may regulate repatriation of investments and returns subject to their domestic laws and regulations, when necessitated by economic constraints that include but are not limited to:

(a) Difficulties for balance of payment purposes;

(b) External financial difficulties; or

(c) Difficulties for macroeconomic management including monetary policy or exchange rate policy"[545].

Paragraph 1 leaves it at the discretion of each MS to decide the relevant measures it deems necessary to facilitate the repatriation of investments, compensation and returns[546]. Article 8 of the SADC Model BIT provides for a general right of an investor to repatriate its profits, subject to prudential measures. It provides that a State Party shall accord to investors the right to repatriate the capital invested and investment returns; any compensation to the investor; funds for repayment of loans; proceeds from compensation upon expropriation, the liquidation or sale of the whole or part of the investment including an appreciation or increase of the value of the investment capital; to transfer payments for maintaining or developing the investment project; to remit the unspent earnings of expatriate staff of the investment project; to make payments arising out of the settlement of a dispute[547]. As it appears, the SADC IA recognises the right of each MS to take necessary measures accordingly; when the SADC Model BIT recommends a general free transfer principle.

Paragraph 2 however coincides with the restrictions to the general right to repatriation provided for in the SADC Model BIT. It allows State Parties to regulate repatriation of investments and

[545] SADC IA, article 13.

[546] Within the terms of article 269 of the mining Code of the Democratic Republic of Congo, it is required of mining companies to repatriate 60% of foreign earnings from export sales in a bank located in the Congo and can keep up 40% of foreign earnings in a foreign bank account to reimburse foreign debt. See Congo Mining Code Law n°007/2002 as amended by Law n°18/001 of 9 March 2018. *See* also Regulation No. 001/19 of the Central Bank of the Democratic Republic of Congo issued in relation to the amended mining law <http://www.bcc.cd/downloads/actu/reglement_001_19.pdf> accessed 9 September 2020
See also DESKECO, 'RDC : les miniers non en règle ont 15 jours pour rapatrier la quotité de 60% des recettes d'exportation (Conseil des ministres) <https://deskeco.com/2020/08/29/rdc-les-miniers-non-en-regle-ont-15-jours-pour-rapatrier-la-quotite-de-60-des-recettes> accessed 9 September 2020

[547] SADC Model BIT, article 8

returns. The limitation of the right of State Parties to limit repatriation of investments and returns must however be substantiated by economic necessities that include but are not limited to difficulties pertaining to the balance of payment, external financial difficulties or difficulties for macroeconomic management. The SADC Model BIT furthers more situations that account for a State Party to regulate repatriation of profits[548] with provisions that are stronger than in other models or agreements[549].

This chapter brings to light SADC IA's substantive provisions. Their quality is, however, low from the perspective of investment protection. The agreement accords the right to fair and

[548] See SADC Model BIT, article 8
(…)
8.3. Notwithstanding paragraphs 8.1 and 8.2, a State Party may prevent or delay a transfer through the non-discriminatory application of its law and regulations relating to:
(a) bankruptcy, insolvency, or the protection of the rights of creditors;
(b) issuing, trading or dealing in securities, futures, options or derivatives;
(c) criminal or penal offences and the recovery of the proceeds of crime;
(d) financial reporting or record keeping of transactions when necessary to assist law enforcement or financial regulatory authorities;
(e) ensuring compliance with orders or judgments in judicial or administrative proceedings;
(f) taxation;
(g) social security, public retirement or compulsory savings schemes;
(h) severance entitlements of employees; and
(i) the formalities required to register and satisfy the Central Bank and other relevant authorities of a State Party.
8.4. Safeguard provision:
(a) Where, in the opinion of a State Party, payments and capital movements under this Agreement cause or threaten to cause serious
(i) difficulties for balance of payment purposes,
(ii) external financial difficulties, or
(iii) difficulties for macroeconomic management including monetary policy or exchange rate policy,
the State Party concerned may take safeguard measures with regard to capital movements on a temporary basis so as to be eliminated as soon as conditions permit, and in any event as it relates to measures taken under paragraphs (ii)-(iii), for a period of no longer than 12 months if it considers such measures to be necessary.
(b) Where such measures are taken under 4.1(a)(ii) or (iii), a State Party shall enter into consultations with the other State Party at its request, with a view to review such measures and seek the minimum impact of such measures on an investor.
(c) Where, in the opinion of a State Party that has taken such measures, it is necessary to extend them for a further period due to the extended period of conditions described in paragraph 4.1(a), the State Party shall offer to enter into consultations with the other State Party with a view to seeking the minimum impact of such measures on an investor.
Such measures shall again be taken on a temporary basis so as to be eliminated as soon as conditions permit, and in any event for a period of no longer than 12 months from their renewal.

[549] MUTHUCUMARASWAMY SORNARAJAH, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 359

adequate compensation in case of expropriation[550]. It provides for a qualified national treatment[551] although it has a unique featured transparency provision 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[552]. It allows free capital movements concerning the repatriation of investments, compensation and returns[553]; and poses access to domestic administrative and judicial review as the principal means of settling investment disputes[554].

Notwithstanding the above, the SADC IA contains poorer quality of investment protections norms. It lacks both the ISDS and FET which are the most cherished standards by foreign investors. Their absence in the SADC IA considerably diminishes the treaty's protection features. In addition, it only recognises an enterprise as an investment; and its scope is limited to exclusively SADC MS' enterprises as investors and investments.

CHAPTER 3: ASYMMETRICAL COEXISTENCE: CONTENTIOUS RELATIONSHIP BETWEEN THE SADC INVESTMENT AGREEMENT AND THE FOREIGN INVESTMENT LAWS OF CONGO, ZIMBABWE AND SOUTH AFRICA

Three situations appear in the asymmetric complex treaty network described above. Some countries maintain standards that the SADC IA sought to replace. Their domestic investment regimes adapt foreign investor-friendly, similar to provisions in the first generation BITs. The 2002 Congo Investments Code exemplifies this state of affairs.[555] It provides for FET and ISDS along with a general consent to arbitration.

Unlike Congo, some other SADC MS adopt standards that replicate the SADC IA in a sort of functional coordination.[556] Their domestic investment regimes mirror both the SADC IA and the

[550] SADC IA, article 5.
[551] SADC IA, article 6.
[552] SADC IA, article 7.
[553] SADC IA, article 13.
[554] SADC IA, article 25.
[555] Law on Code of Investments 2002, Democratic Republic of Congo.
[556] See, ALSCHNER (n 3).

SADC Model BIT.[557] This is exemplified by the 2015 South African Protection of Investment Act.[558] It refers to investors and foreign investors interchangeably, without defining either term. External and internal factors substantiate this. External factors are substantiated by *inter alia* extensive interpretation of FET and nuanced consideration for the host State's regulatory space in investor-State arbitration. As a result, the South African Protection of Investment Act ensures equal promotion and protection to all investments, including foreign investments which reflect rights enshrined in the South African Constitution. It adopts the fair administrative treatment[559] (FAT) standard, which can be traced to the 2012 SADC Model BIT. On the other hand, internal factors include the pursuit of the Black Economic Empowerment programme, which aims to redress Apartheid policies and promote more equal ownership of enterprises. As a result, the Act emphasises the right for the government to take regulatory measures to redress historical and socio-economic inequalities and injustices; uphold rights, values and principles contained in the Constitution; and preserve cultural heritage, foster economic development, protect the environment; and achieve the progressive realisation of socio-economic rights. With respect to foreign investors, the Act provides for national treatment, physical security of property and free transfer of funds clauses. But still, this Act does not provide for the FET standard or ISDS clause.[560]

The Congo Investment Code and the Protection of Investment Act of South Africa represent two different relationships with the SADC IA. Unlike Congo and South Africa, the 2019 Zimbabwe Investment and Development Agency Act (ZIDA) can be put somewhere in the middle.[561] This Act recognises an uncommonly defined FET standard. While imposing general and specific responsibility to investors, including the obligation to preserve the environment; it guarantees national treatment, MFN[562] and ISDS upon agreement with the government.

This chapter develops this asymmetry of coexistence of investment laws in SADC. It thus helps comprehend the manner in which the applicability of the SADC IA is undermined when its norms

[557] SADC Model Bilateral Investment Treaty Template with Commentary Southern African Development Community (July 2012). It is hereinafter referred to as 'SADC Model BIT'.
[558] Protection of Investment Act 2015, Republic of South Africa.
[559] Protection of Investment Act 2015, s 6.
[560] Section 13 of the Act promotes State-to-State arbitration subject to exhaustion of domestic remedies.
[561] Zimbabwe Investment and Development Agency Act 2019, Republic of Zimbabwe (entered into force 7 February 2020).
[562] Zimbabwe Investment and Development Agency Act 2019, s 14.

are intertwined with and confronted to those contained in especially the laws of Congo and Zimbabwe. It shows the alignment of the South African law to the SADC IA and then indicates normative differences that set apart both SADC and ASEAN coexistence frameworks regardless of their structural commonalities.

This chapter is divided into three sections. The first section brings together the norms of the SADC IA with those of the SADC IA. The second section does the same with the norms contained in the investment law of Zimbabwe. The third section highlights South Africa as a model because it aligns its domestic law to the regional framework. It further shows that such an alignment is made through domestic law rather than the harmonisation effect from the SADC community law directly.

Section 1 CONGO INVESTMENTS CODE AND SADC INVESTMENT AGREEMENT

This section highlights divergences between the SADC IA and the Congolese investment law. This comparison aims to show how coexisting domestic law impacts the functional dimension of the SADC IA on the same subject. The functional comparison of both instruments is based on the following elements: scope of application, fair and equitable treatment, and investor-state arbitration clause.

1. Scope of application

As a national law, the Congo Investment Code obviously applies to subjects under its jurisdiction. The same is true and evident for the SADC IA. As a SADC investment treaty, it applies to investors originating from a SADC country. The nature of these two instruments predisposes them to have different scopes of application. However, the scope of application is a useful basis for comparison. This is important because most favoured nation (MFN) clauses may allow parties to an investment dispute to import more favourable provisions, including the arbitration clause, from treaties signed with third party states[563]. The 2006 SADC IA contained a provision that allowed foreign investors to be afforded no less favourable treatment than that which is accorded to investors of any other third State[564]. Moreover, its definition of 'investment' and 'investor' in article 1 included both

[563] NIKIÈMA (n 299) 13, 15

[564] Annex 1 – Cooperation on Investment – on the SADC Protocol on Finance and Investment, 2006.

SADC and non-SADC investors. In so providing, the regime of 2006 expanded its reach to non-SADC investors[565].

Consistent with the 2012 SADC Model BIT, the revised SADC IA of 2016 does not contain an MFN treatment clause.[566] Also, it only applies to investments by nationals of a SADC MS. One may consider the reason behind limiting the scope of application to only local (SADC) investors and less favourable standards. As it will be argued in subsequent sections, because the SADC IA omits the FET clause and does not provide for direct access to international arbitration, domestic laws of SADC MS may provide better protection. In addition, SADC investors are disadvantaged *vis-à-vis* non-SADC investors whose country has a BIT with the SADC country in which the investment is made. This is paradoxical because a regional investment protocol aims to harmonise domestic policies, laws, and practices following the best practices towards regional integration.[567]

It is also important to mention that the current SADC IA adopts an enterprise-based definition. As such, an investor is viewed not as an individual, but rather as an enterprise[568] incorporated following the laws and regulations of a MS.[569] In international investment law, treaty definitions significantly impact the scope and coverage of treaty protection. Treaty definitions of investor and investment determine the persons and assets which are protected under the treaty. Generally, investment treaties adopt three options: an enterprise-based definition, a closed-list asset-based definition, or an open-list asset-based definition.[570] An enterprise-based definition is the narrowest option for defining an investment.

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[565] Article 6 of the 2006 SADC provided that:
1. Investments and investors shall enjoy fair and equitable treatment in the territory of any State Party.
2. Treatment referred to in paragraph 1 shall be no less favourable than that granted to investors of the third State

[566] SADC Model BIT, article 4. The commentary however reveals a tightened approach recommended in case a Member chooses to include an MFN clause. It reads that should a Member State choose to include an MFN provision, the Drafting
Committee recommends that the Member State should follow the following structure:
'Each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to investors of any other State and their investments with respect to the management, operation and disposition of Investments in its territory'.

[567] SADC IA, article 17.

[568] SADC IA, article 2.

[569] SADC Model BIT, article 2.

[570] KONDO (n 25) 6, 7

It can be argued that the enterprise-based definition has the advantage of bringing businesses into a country and providing more jobs. However, without comparable standards of protection, this enterprise-based definition represents an additional restriction to intra-SADC investments. When we compare the SADC IA with investment laws of SADC MS, 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 Investment Code is an excellent example for examining divergences in the scope of application between the SADC IA and SADC domestic laws. Under this code, a foreign direct investor can be an individual[571] or an enterprise carrying out direct investment in Congo even if its headquarters is located outside of Congo as long as it carries out direct investment in Congo. In other words, to avail of protection under the Congo Investment Code, a foreign investor must be an individual or a company undertaking an inward direct investment in Congo.[572] There are no additional requirements for an investor to enjoy the guarantees provided for in the investment code. This has been confirmed by the ICSID tribunal in the *Lahoud* award.

In *Lahoud v Democratic Republic of Congo*, the tribunal concluded that the claimants were not subject to additional requirements, such as submitting a request for the admission of their investment. According to the tribunal, the guarantees in the Congo Investment Code apply as a matter of law to all foreign investors.[573] These guarantees include treatment of protection standards and the ISDS clause. The tribunal added that the terms' all domestic and foreign investors … whether approved or not' unambiguously establish that the general guarantees provided by the code of investments apply to all investors, irrespective of whether they have obtained the admission of

[571] Congo Code of Investments, article 2(b) provides that: provides that non-resident Congolese may benefit from the regime of foreign investors. Nevertheless, the extension to non-residents does not obviously cover other clauses, such as the ISDS clause.
In respect to companies, this definition includes private companies and foreign public institutions in the definition of an 'investor' or 'foreign direct investor'.

[572] The Congo investment code determines the conditions, advantages and general rules applicable to both national and foreign direct investments. In respect to foreign investment, this is the law that comprehensively regulates foreign direct investment in Congo. This regime does not include portfolio investments. It covers both national and foreign direct investors. However, specific provisions, such as the investor-State dispute settlement (ISDS) clause, are meant exclusively for foreign direct investors. The code determines general rules applicable to all sectors, except those listed under its negative list (Congo Code of Investments, Article 3).

[573] *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud* v Democratic Republic of Congo, ICSID Case No ARB/10/4, Decision on Annulment 29 March 2016 para 164.

their investments from the competent authorities.[574] By offering better protection than the SADC IA, the Congo Investment Code places itself over the treaty.

Like many other investment codes, Article 2(c) of the Congo Investment Code defines covered investment as 'an investment whose foreign participation is of at least 10% of shares'. When read in conjunction with article 2(b), a covered investment under the code of investments is a new enterprise or an existing enterprise that aims at putting in place a new capacity or to increase the production capacity; to expand the range of products or to improve the quality of products and services; provided that foreign ownership at least 10% of the investment.

Beyond the definition of investment under the SADC IA and domestic laws, it is essential to highlight that most FDI inflows in the SADC region originate from non-SADC investors. To effectively promote and protect foreign investments, a regional investment framework must cover non-SADC investments. The exclusion of non-SADC investors leaves a vacuum in the regulation of FDI in the region and diminishes the functional dimension of the treaty itself.

As demonstrated before, there is evidence that intra-SADC investment is significantly low. For example, Nkuna notes that in 2010, intra-regional FDI accounted for only 5% of total FDI flows in the SADC.[575] In 2013, South Africa retained the lion's share of investment in the SADC region, even though intra-SADC investment represented a small share of SADC FDI inflows.[576] These statistics have not changed significantly. The 2019 EY Africa Attractiveness report shows that the most significant investors in terms of project and capital are extra-African. The largest investors are from the United States, France and the United Kingdom with China being the largest inward capital source.[577] Only South Africa, which is the largest source of intra-African investments, appears in the top ten largest investors.

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[574] ibid 165.
The French version reads as follows:
"le Tribunal a conclu : « L'emploi des termes « [t]ous les investisseurs nationaux et étrangers, […] agréés ou non » établit sans ambiguïté que les garanties générales prévues par le code s'appliquent à tous les investisseurs, qu'ils aient ou non obtenu l'agrément des autorités congolaises compétentes. […] La NCI ne prévoit ainsi qu'une exception à ce principe d'application des garanties générales, celles des avantages douaniers, fiscaux et parafiscaux prévus aux Titres III et IV155».
[575] NKUNA (n 489) 1
[576] NEPAD (n 490)
[577] EY (n 491) 23-5.

The statistics described above show that the SADC IA covers only a small percentage of FDI in the region. Thus, in practice, the SADC IA has not promoted SADC cross-border investments. On the contrary, it creates more obstacles for SADC investors and imposes restrictions that undermine the objective to promote investments through a favourable, transparent and predictable framework. For this reason, BITs and domestic laws may provide better protection; thereby thwarting the integration objectives of the treaty. For example, South Africa, which is the largest intra-SADC FDI source, has not terminated its BIT with Congo even though it has chosen not to renew many of its BITs with other states. The South Africa – Congo BIT (2004) adopts an asset-based definition of investment, FET standard and investor-State arbitration clause.

2. Fair and equitable treatment

Arbitral interpretation of the FET clause will depend on its formulation in a treaty. It can be qualified or unqualified.[578] For example, under the USMCA[579], a mere breach of contract will not suffice to establish a breach of article 14.6[580]; while ECT[581] adopts a formulation with considerable room for arbitral tribunals' discretion.[582] The ACIA, on the other hand, requires strict regulatory

[578] A qualified FET clause refers to a formulation in a treaty that links FET to the minimum standard of treatment or customary international law and/or a formulation that lists explicitly the type of treatment that constitutes a breach of FET. An unqualified FET clause on the other hand is characterized by vagueness in its formulation that has given rise to expansive and widely diverging arbitral interpretations of what can be a breach of the FET clause. *See* examples in
<https://investmentpolicy.unctad.org/uploaded-files/document/Examples%20of%20qualified%20FET%20clauses%20updated.pdf> accessed on 21 August 2020.

[579] This provision reads: "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security". It is the same formulation as under the previous article 1105 of NAFTA.

[580] See, *Glamis Gold, Ltd* v United States of America, NAFTA/UNCITRAL, Award, 8 June 2009 para 620.

[581] ECT, article 10(1)
The Energy Charter Treaty (adopted 17 December 1994, entered into force 24 April 1998) 2080 UNTS 95.

[582] LUCY REED and LUCY MARTINEZ, 'The Energy Charter Treaty: An Overview' (2008) 14 ILSA Journal of International and Comparative Law 410.
Because of a wide room for interpretation in the ECT, the tribunal in *CEF Energia* concluded that there was a breach of article 10 (1) on the basis of CEF's legitimate expectations; despite findings by the tribunal that there was a legitimate public interest. In addition to this, a due diligence report showed that Italy had the right to unilateral amendment, and that the measures adopted were reasonable. The fact that the law (*spalma incentivi* or Law Decree N°91/2014) was adopted in a transparent way did not cause the tribunal to reconsider its conclusion.
See CEF *Energia. V Spalma Incentivi* v. The Italian Republic, SCC Case No. 158/2015 Award 16 January 2019 para 246.

stability. Thus, a mere existence of a change in the regulatory framework applicable to an investment may be sufficient to trigger a violation of the FET provision.[583]

The FET standard is the most frequently invoked investment clause in investment treaty disputes. Foreign investors have used it to substantiate their claims even when they failed to comply with some host State's requirements.[584] Although the FET clause's broad interpretation has led to controversies, it remains a fundamental pillar for ensuring the security of foreign investments.

The FET standard is absent from the SADC IA. In fact, SADC MS considered that the previous (2006) SADC IA[585] created unintended consequences[586], and failed to adequately balance investor protection and development policy space of host states.[587] Following the amendments introduced in 2016, the SADC IA no longer provides for FET. The exclusion of this standard is in line with the recommendations contained in the SADC Model BIT. In *lieu* of FET, the SADC Model BIT suggests an alternative formulation under the terms of 'fair administrative treatment standard'.[588] South Africa is a rare SADC MS that has aligned its domestic investment legal frameworks with this new formulation of FET found in the SADC IA and the SADC Model BIT. In Congo, the 2002 Code of Investments which adopts a FET standard linked with international law principles continues to operate.

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[583] For more details, see FEDERICO ORTINO, 'The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?' (2018) 21 Journal of International Economic Law 845.

[584] The tribunal's findings in *Goetz* II established that non-compliance with special economic zones requirements is not sufficient basis for unlawful expropriation or unfair treatment against an investor. *See* KEHINDE OLAOYE, 'Goetz v. the Republic of Burundi I & II: How Foreign Investors Challenge 'Free-Zone Regimes" in JULIEN CHAISSE and JIAXIANG HU (eds), *International Economic Law and the Challenges of the Free Zones* (Kluwer Law International 2019).

[585] The first SADC IA was adopted in 2006 with both a FET clause and an arbitration clause. As highlighted before, this agreement has been replaced by the current SADC IA, signed in 2016 and entered into force on 24 august 2017.

[586] SADC IA, Preamble.

[587] SADC IA, Preamble.

[588] SADC Model BIT 24.

This reads as follows:

"It is because of the large degree of unpredictability of the FET standard (…) This alternative approach seeks to avoid the most controversial elements of FET, while still addressing levels and types of actions by States toward an investor that should create a liability. (...) Given the above, the Drafting Committee (…) was believed that this would still provide useful protection for investors, while limiting the risks of the expansive rulings associated with the FET standard in a number of arbitral awards".

Article 25 of the Code provides:

> "The Democratic Republic of Congo undertakes to assure a fair and equitable treatment under principles of international law".

This provision also states that Congo assures that, as such, the FET standard is neither *de jure* nor *de facto* hindered. In *Lahoud,* the ICSID tribunal interpreted the meaning of this formulation. The dispute arose over subsequent acts of eviction of rights, looting and destruction of the claimants' company and goods that led to the cessation of the claimants' activities. Different State organs undertook these acts. In reviewing the FET standard under the Congo Investment Code, the tribunal noted that 'as a whole, because closely related to each other', these acts and omissions, which led to the disorganisation of the company and the sharp decline in its activities until their cessation, constituted a violation of article 25 of the code attributable to the respondent State.[589] The annulment proceeding committee upheld the tribunal's decision that these acts were in breach of Congo's obligations under the expropriation and FET clause[590] under the Congolese Code of investments.[591] Without the FET standard, SADC investors are not protected against arbitrariness or other unfair and inequitable acts aimed at illegal attempts to take possession of their foreign investments. A domestic legal framework that provides for this standard in addition to ISDS has the potential to undermine the treaty applicability.

Shifts of treaty language from 'investor rights-based' focus to 'investment governance-based' approach have been put forward in the SADC Model BIT to justify the FET standard's exclusion. However, the replacement of the FET standard with a reinforced national treatment clause does not bridge this gap. A national treatment clause cannot replace the FET standard, talk less of an NT qualified.[592] Indeed, as set forth above, despite its controversies, the FET standard remains a

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[589] *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud* v Democratic Republic of Congo, ICSID Case No ARB/10/4, Award, 7 February 2014 para 488.

[590] *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud* v Democratic Republic of Congo, ICSID Case No ARB/10/4, Decision on Annulment, 29 March 2016 para 172.

[591] Congo Investments Code, articles 25 and 26

[592] Article 6(3) of the SADC IA provides that notwithstanding the obligation to provide national treatment, a State party may, in accordance with its domestic legislation, grant preferential treatment to domestic investors and investments in order to achieve developmental objectives. Kondo notes the importance of this exception in countries such as South Africa and Zimbabwe for redressing the injustices of the past and empowering previously disenfranchised groups. KONDO (n 25) 12

crucial standard of protection sought by foreign investors, especially in developing countries where the rule of law is weak. Better standards of protection can ensure that investors and their investments will be treated fairly. This may be why before making their investments; foreign investors often make sure that institutions in charge of enforcing investment law internally or internationally are independent, transparent and relevant.[593] Exclusion of FET and ISDS clauses from the SADC IA leaves investors with significant concerns on both the governing law – the SADC IA – and the institutions – domestic tribunals – that will apply the SADC IA. A SADC investor in Congo will make a rational choice between an investment treaty and the guarantees provided under domestic law.

3. Investor-State arbitration clause

ISDS clauses are essential to protecting the interests of investors. R. Yotova stresses that even foreign investors operating within the EU continue to invoke their rights under existing intra-EU BITs rather than relying on well-established national judicial systems.[594] This is illustrative of the way foreign investors are attached to the FET and ISDS clauses, especially before making an investment in a country with a low rule of law profile.

Access to domestic courts and tribunals is the principal means for settling investment disputes under the SADC IA. Apart from South Africa, other SADC MS have a deficient rule of law and governance profiles[595]. Thus, the suppression of the ISDS cannot benefit them[596]. It is believed that this is the reason why, notwithstanding governments' long-lasting criticism and resistance to ISDS; many academic circles still support the reintroduction of access to international arbitration under, among other institutions, the UNCITRAL rules, ICSID rules or African regional forums[597].

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[593] STEPHAN (n 44) 354, 355

[594] YOTOVA (n 32) 413

[595] For details about rankings in rule of law and democracy, *See*, World Justice Project, Rule of Law Index 2017-2018 <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2017%E2%80%932018>; The Economist, Democracy Index 2018 <https://www.eiu.com/topic/democracy-index> accessed 15 June 2020

[596] The differentiated level of development and rule of law can also justify Asia's fragmented responses to ISDS reform. For more details, see LOCKNIE HSU, 'An Asian View on the CETA Investment Chapter' in MAKANE MOISE MBENGUE and STEFANIE SCHACHERER (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 297-99

[597] It is important to support N. Angelet's view that investment lawyers and experts bear a special burden in accompanying the debating process over controversial issues of investment law. This author recommends against dismissing any question of the public or fear of the political elites. See NICOLAS ANGELET, 'CETA and the Debate

Following the removal of the MFN clause and the narrowing of the definition of 'investment', only SADC investments are eligible for the benefits of the SADC IA. And in the absence of an arbitration clause, SADC investors are trapped between either referring their claims to domestic judicial systems with the poor rule of law's traditions or seeking redress through diplomatic protection.

Congo has sought to nuance its weak rule of law index. It, therefore, guarantees that disputes between investors and the Congo are to be settled amicably. However, if the parties do not reach any settlement within three months, the dispute shall be settled consistent with the ICSID Convention and its additional facility.[598] Moreover, article 38 consents to the competence of the ICSID and its additional facility. Hence, it provides for ISDS, and also includes a general consent clause. Consent to arbitration by an investor is upon admission under the Investment Code, or subsequently by a separate act. To that end, a foreign investor who carries out investment through a Congolese company which it controls will be considered a national of another contracting party for the purpose of ICSID jurisdiction.

Section 2 ZIMBABWE INVESTMENT LAW IN LIGHT OF THE SADC INVESTMENT AGREEMENT

Investments, domestic and foreign, are regulated in terms of the Zimbabwe Investment and Development Agency Act[599] (referred to as ZIDA). It is the latest legislation on investment into the SADC and presents a special illustration of the way SADC MS maintain contradictory regimes that distort the regional framework, thereby wiping out any positive prospects for the SADC IA to meet its integration objectives. It was adopted in 2019 and published in the Government Gazette of 7 February 2020. Its date of commencement was, therefore, 7 February 2020.

The ZIDA provides a necessary overhaul of the investment policy regime and a renewal impetus for investment in Zimbabwe. It highlights the Zimbabwean government's efforts to ensure

on the Reform of the Investment Regime' in MAKANE MOISE MBENGUE and STEFANIE SCHACHERER (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 16

[598] Congo Investments Code, article 38.

[599] Zimbabwe Investment and Development Agency Act 2019, Republic of Zimbabwe
This Act repeals previous disparate legislations on investment and become the cornerstone for investment protection in Zimbabwe. It repeals the Zimbabwe Investment Authority Act, Special Economic Zones Act and Joint Ventures Act.

restitution or compensation of Zimbabwean farmers whose properties had been expropriated without compensation in the framework of The Indigenisation and Economic Empowerment Act. It shows a 'new Zimbabwe' that is eager to 'streamline investment laws and create a business-friendly environment attractive to both local and foreign investors'[600]. It establishes a one-stop investment services centre that is controlled and supervised by the Zimbabwe Investment and Development Agency (ZIDA).

This Centre consists of desks to represent agencies from ZIDA agency, public-private partnerships (PPP) unit, special economic zones unit, immigration department, revenue authority, environment authority, the bank of Zimbabwe, registration of companies office, social security authority, energy authority, ministry of mines and minerals, ministry for local authorities, tourism authority, ministry of labour and any other additional authority, department or ministry as it is considered to be relevant for the success of the Centre.[601]

The ZIDA applies to both domestic and foreign investors and their investments. This section presents substantive provisions of the ZIDA and confronts them to those contained in the SADC IA in order to determine whether the applicability of the SADC IA is guaranteed or undermined.

1. Scope of application

The ZIDA defines a foreign investor as a natural or juristic person domiciled outside Zimbabwe, who seeks to make, is making or has made an investment in Zimbabwe pursuant to this Act.[602] This definition entitles both individuals and companies to investment protection as well as duties thereto. The investor is thus not only an enterprise as provided in the SADC IA and the South Africa investment Act but also individuals.

[600] TALKMORE CHIDEDE, 'The ZIDA Act: An Overhaul of the Investment Policy Regime and Impetus for Investment in Zimbabwe?' (2020) Tralac <https://www.tralac.org/blog/article/14431-the-zida-act-an-overhaul-of-the-investment-policy-regime-and-impetus-for-investment-in-zimbabwe.html> accessed 25 September 2020
[601] ZIDA Act, s5
[602] ZIDA Act, s2

Foreign investments cover all types of investments except portfolio investments.[603] They may consist of direct or indirect investments.[604] To be covered and protected by this Act, all investments must be established in accordance with and shall be subject to the laws of Zimbabwe.[605] This addendum on conformity to the law of investments is crucial in a country with low rule of law ranking to guarantee that investors do not involve in corruption-related behaviour in order to set their businesses. Indeed, such an attempt would be counterproductive as arbitral tribunals almost altogether accepted a 'corruption defence' by host States.[606] An enterprise-based definition of 'investor' and 'investment' is said to increase precision by covering assets only when they are part of the assets of an enterprise created for the 'purpose of making a foreign investment'. It is also submitted that such an approach ensures the contribution of investments to the development of the host country as required by the ICSID Convention[607] followed by provisions on sustainable development of both the SADC IA and SADC Model BIT. Contrary to the SADC IA and South Africa Investment Act which cross paths in the SADC investment strategy, the ZIDA dissociates from them through extending the scope of its coverage. It can be seen from definitions developed in the ZIDA that the Zimbabwean approach accounts for both natural and juristic persons. Likewise, covered investments include both enterprise and assets.

While the SADC IA and South Africa investment Act opt for an enterprise-based conception on investment protection; Zimbabwe prefers to consider the fact that investors tend to prefer an asset-

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[603] Foreign portfolio investment means within the terms of section 2 of ZIDA Act, the purchase of Zimbabwean stocks and bonds by any natural or juristic person domiciled outside Zimbabwe, and includes the deposit by such person of money in any banking account in Zimbabwe.

[604] ZIDA Act, s2

[605] ZIDA Act, s11

[606] See *World Duty Free company Limited* v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, October 4, 2006; *Metal-Tech Ltd.* v the Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, p143 <http://italaw.com/sites/default/files/case-documents/italaw3012.pdf > accessed 25 September 2020
Following the pioneering corruption WDF case in 2006, numeral arbitral tribunals have echoed similar reasoning and strictly applied the corruption defence in favour of the host State. The 2010 award in *GmbH & Co KG* v. Republic of Ghana noted that "an investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud or deceitful conduct; [or] if made in violation of the host State's law. Moreover, in Phoenix Action, Ltd. v. Czech Republic, the Tribunal similarly concluded that States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith or in violation of their laws. See Phoenix Action, Ltd. v Czech Republic (ICSID Case No.ARB/06/5) Award, 15 April 2009, para 101, 106

[607] cf *Salini* test. See Patrick Mitchell v. The Democratic Republic of Congo, Decision on the Application for Annulment of the Award, 1er November 2006 (ICSID Case No.ARB/99/7), para 33. The investment must contribute in one way or another to the economic development of the host State. See also Phoenix Action, Ltd. v Czech Republic (ICSID Case No.ARB/06/5) Award, 15 April 2009, para 93-97

based definition and affords them wider protection. This is important for the domestic investment strategy of Zimbabwe which attempts to revive FDI after decades of turmoil characterised by mass expropriation without compensation[608].

2. Investor-State arbitration

Part VIII of the ZIDA is all about dispute settlement. It acknowledges and leaves room for both contractual and treaty investor-State arbitration. It provides that every dispute concerning an investment covered by the ZIDA shall be governed by and construed in accordance with domestic and international arbitration.[609] The arbitration referred to under paragraph (1) (a) is the one provided by the Zimbabwe Arbitration Act [Chapter 7:15] (No. 6 of 1996). Paragraph (1) (b) refers on the hand to contractual clauses of arbitration between an investor and Zimbabwe through mutual agreements of the parties. Paragraph 2 refers to BIT's arbitration clauses through which an investor can initiate ISDS proceedings.[610] Domestic arbitration applies as a general dispute resolution mechanism. In addition to it, investors can rely on either a contractual clause if applicable; or a treaty clause from an investment agreement between Zimbabwe and its home country.

This approach is different from both the SADC IA and the South Africa investment Act provisions on investment dispute settlement. In the terms of the SADC IA, investment dispute resolution is left within the ambit of inter-State relations. The SADC IA does not contain an ISDS clause. It leaves the issue to be addressed by the Protocol on the SADC Tribunal which no longer grants the tribunal the power to hear applications by individuals. Access to domestic courts and tribunals has

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[608] See *Mike Campbell (Pvt) Ltd* v Republic of Zimbabwe, 2008 SADCT 2, 28 November 2008. The SADC Tribunal found Zimbabwe in breach of its treaty obligations, including through targeting the expropriated properties on a racial basis. Zimbabwe however refused to abide by this decision.
See also <http://www.zim.gov.zw/index.php/en/my-government/government-ministries/finance-and-economic-development/9-uncategorised/381-zimbabwe-is-open-for-business> accessed 25 September 2020
The 'Zimbabwe is OPEN FOR BUSINESS' is described as a call by the President to Investors and Traders or Business Entities, both Local and International, to take up abundant opportunities in the country. It is a call to re-engage and mobilise and seeks to mend broken relationships, to pursue a reform agenda that energizes the people of Zimbabwe and restores hope for a better future for all sections of the population and growth of the economy.
For critics of the 'Zimbabwe is OPEN FOR BUSINESS', See NYASHA CHINGONO, 'Zim is open for business' mantra now rights hollow' (2020) <https://www.theindependent.co.zw/2020/02/28/zim-is-open-for-business-mantra-now-rings-hollow/> accessed 25 September 2020

[609] ZIDA Act, s38(1)(a)(b)

[610] ZIDA Act, s38(2)

become the principal means for settling investment disputes. South Africa adopts a similar approach. Domestic and foreign investors are granted identical treatment rights to seek redress through venues available under South African law. In addition to that, an investor may request that the Department of Trade and Industry (DTI) facilitates mediation within six months of the investor becoming aware of the dispute.

Notwithstanding its subscriptions to both the SADC IA and the Model BIT; Zimbabwe opted to maintain standards that these regional instruments sought to shear off. This is a realistic approach and can partially be explained by the Zimbabwean government's efforts to rebuild trust to attract FDI following decades of expropriations without compensation. South Africa pushed for the removal of all protection features in the treaty because, among other things, it disposes of a well-established judicial system with a high profile in rule of law tradition. Zimbabwe cannot brag that much about its judicial system. Therefore, without real guarantees; foreign investments cannot be expected to flow as investors can hardly trust the ability of the courts and tribunals to rule impartially and independently. In spite of that, Zimbabwe adopts a nuanced approach that places it somewhere in the middle between two extreme conceptions in the South Africa investment Act where ISDS is rejected, and the Congo Investment Code where ISDS is a key component with a general consent clause. ZIDA gives priority to domestic courts and tribunals[611], while acknowledging investor-State arbitration upon mutual agreement between the investor and Zimbabwe.

3. Most-favoured Nation

The MFN clause is not common in domestic investment legislations. This renders the ZIDA exceptional. Section 14 guarantees non-discrimination among foreign investors. It reads that ZIDA shall accord to foreign investors and their investments, treatment no less favourable than that it accords, in like circumstances, to investors of any other country with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of their investments.[612] It includes both pre-establishment phases (establishment,

[611] See ZIDA Act, s38(5)(6)
[612] ZIDA Act, s14(1)

acquisition and expansion) and post-establishment phases (management, operation and disposition).

Exceptions and qualifications soften the significance, scope, coverage and application provisions. This provision circumscribes the limit of the MFN clause. The word 'treatment' is stated to not include procedures for the resolution of investment disputes between a foreign investor and Zimbabwe provided for in international investment treaties and trade agreements.[613] This is important because, in the past, MFN clauses allowed tribunals to import more favourable provisions, including the arbitration clause, from a third-party treaty into the basic treaty of the protected investor[614]. Furthermore, to interpret the likeness test, paragraph 2 requires tribunals to account for the totality of the circumstances, including the relevance of any legitimate public welfare objective.[615] The reason for this can be found in the SADC Model BIT. It is therein stated that the totality approach towards examining whether investors are found in like circumstances is a proper basis for comparison. It ensures that a 'broad view is taken, rather than simply a narrow question of whether the investors are in the same or a related or competitive sector, an approach seen in a number of earlier arbitrations.[616] In addition, ZIDA precludes the application of MFN to advantages accorded by Zimbabwe within the framework of regional integration or any free trade arrangement. Exceptions to MFN include beneficial treatment that may be granted to Zimbabweans as a result of measures adopted to promote or preserve cultural heritage and indigenous knowledge, specific measures to redress the injustices of the past by empowering previously disenfranchised groups[617], or measures adopted to promote new industries, small and medium businesses.

Despite exceptions and qualifications, the existence of an MFN clause along with the FET standard and a nuanced ISDS clause into the ZIDA improves its investment protection features. It makes it a relatively attractive framework, thereby diminishing the ability of the SADC IA to cover

[613] ZIDA Act, s14(3)

[614] NIKIÈMA (n 299) 13, 15

[615] ZIDA Act, s14(2)

[616] SADC Model BIT, article 4 commentary
The commentary refers to the COMESA Investment Agreement (CCIA) and adds that this approach ensures the reasons for any measures to be fully considered and not just their financial impacts.

[617] See Indigenisation and Economic Empowerment Act [Chapter 14: 30] (IEEA) following s14 of the Constitution of the Republic of Zimbabwe, 2014 See also Broad-based Black Economic Empowerment Act 53 of 2003 (BEE Act) following s 9(2) of the Constitution of the Republic of South Africa.

foreign investment in Zimbabwe. The SADC IA does not contain an MFN clause. The drafting committee of the SADC Model BIT recommends against its inclusion to avoid broad interpretations taken by earlier arbitrations.

4. Fair and Equitable Treatment

The ZIDA provides for a qualified FET standard. This provision sets out an exhausted list of elements to be taken into account when assessing the host State's unfair and inequitable conduct.[618] It includes denial of justice, manifest arbitrariness, due process, discrimination, coercion and harassment. In addition, investors are entitled to equal access to the law, and the protection of investments.[619] It is important to note that a breach of due process has to be fundamental. For this reason, paragraph 1(b) necessitates substantial procedural delays; fundamental breaches of procedural transparency in judicial and administrative proceedings; or any substantive change to the terms and conditions under any licence, permit or endorsement.

The discrimination element of the ZIDA takes into account the specific context in Zimbabwe where some groups of the population have been targeted on the basis of race by expropriation measures. Paragraph 1(d) prohibits targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief. This is a major breakthrough in Zimbabwe relationships with investors. It helps set a base for dialogue and sustainable and pacific cohabitation between previously racially targeted populations and investors.

As mentioned before, the SADC IA does not include the FET. The formulation of the FET under ZIDA shows a prudential move by Zimbabwe. It subscribes to the criticism towards FET contained in the preamble of the SADC. SADC MS acknowledge that, as currently drafted, some provisions of 2006 SADC IA may have unintended consequences for them; inasmuch as they also failed to adequately balance investor protection and development policy space for the host State. At the same time, the ZIDA distances itself from it and guarantees, although with qualifications, a FET to foreign investors and their investments in Zimbabwe. Notwithstanding the qualification of ZIDA's FET standard; its inclusion in the law improves its protection features and broadens the

[618] ZIDA Act, s16(1)
[619] ZIDA Act, s16(2)

differences with the norms contained in the regional treaty. The drafting committee of the SADC IA adopted outright suppression to avoid the exposure to more liability.[620] For almost the same reason, the South Africa investment Act follows the SADC Model BIT recommendation to prefer the FAT standard over the FET clause.

5. National treatment

National treatment standard is found in almost all investment agreements. The ZIDA guarantees foreign investors that they will, together with their investments, in like circumstances, be accorded treatment no less favourable than that accorded to domestic investors.[621] In contrast to the SADC IA and South Africa Investment Act, ZIDA Act displays both pre and post-establishment national treatment. Foreign investors are granted no less favourable treatment with respect to the establishment, acquisition and expansion on the one hand; and management, conduct, operation, sale and other disposition of their investments on the other hand. The South Africa investment Act provides that foreign investors and their investments must not be treated less favourably than South African investors in like circumstances[622]; when the SADC IA only applies to the post-establishment phase[623].

This provision provides for some exceptions to ensure policy space to the country. Accordingly, shall not constitute a breach of national treatment existing non-conforming measures as set out in section 3 and 3A of the Indigenisation and Economic Empowerment Act [Chapter 14:33] as well as non-substantial amendments, the Land Commission Act [Chapter 20:29], and the Legal Practitioners Act [Chapter 27:07][624].

6. Expropriation

The expropriation provision represents a crucial change in Zimbabwean law. Zimbabwe espoused capital-importing assertions that 'compensation was not required for a separate category of taking

[620] SADC IA Preamble
[621] ZIDA Act, s13(1)
[622] South Africa Investment Act, s8(1)
[623] SADC IA, article 6.1
[624] ZIDA Act, s13(2)

carried out as part of a general programme of land reform[625]' seeking to redress historical inequalities. Under this conception, the government was responsible for 'racially motivated' taking of properties without compensation. The continuing infusion of compensation in investment agreements as applied in arbitral awards and the need to rally altogether conceptions of inviolability of private property, protection of investment and promotion of favourable business environment fuelled pressure on Zimbabwe to improve its investment standards. It can also be argued that objectives of economic development and political stability made it increasingly difficult to justify the maintenance of expropriation rules that take no account of compensation in the 21st century.

Section 17 on guarantee against expropriation provides that no investment shall be nationalised or expropriated.[626] It adds that no investor shall be compelled to cede an investment to another person, either directly or indirectly through measures having an effect equivalent to nationalisation or expropriation.[627] As a general rule, ZIDA accepts expropriation except for an *intérêt general,* in accordance with due process of law, in a non-discriminatory manner and on payment of prompt, adequate and effective compensation.

The standard of compensation crystallises additional differences with the SADC IA and the South Africa investment Act. The SADC IA trims down the severity of the Hull formula and opts for 'fair and adequate compensation'. Almost similarly, the South Africa investment Act adopts a 'just and equitable compensation' formula.

7. Transfer of funds

Investors may transfer funds in and out of Zimbabwe. This includes contributions to capital, such as principal and additional funds to maintain, develop or increase the investment; proceeds, profits from the asset, dividends, royalties, patent fees, licence fees, technical assistance and management fees, shares and other current income resulting from any investment under the ZIDA.[628]

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[625] KATE MILES, *The Origins of International Investment Law: Empire, Environment and the Safeguard of Capital* (Cambridge University Press 2013) 120

[626] ZIDA Act, s17(1)(a)

[627] ZIDA Act, s17(1)(b)

[628] ZIDA Act, s19(a)(b)(c)(d)(e)(f).

Nevertheless, the government is given a right to prevent or delay a transfer of funds, including in the vent of serious balance-of-payments[629] or financial crises[630].

This provision is not different from free transfer standards around the world. The repatriation of funds is always guaranteed but contained into monetary sovereignty.[631] M. Sornarajah finds it 'unrealistic[632]' to provide for an absolute right to the repatriation of profits. The SADC IA charts the same course. It accounts for situations of extreme balance-of-payment difficulties and leaves it at the discretion of each SADC MS to decide over restrictions applicable to the right to the repatriation of capital.[633] Without applicable restrictions, it is argued that the general doctrine of necessity could apply and suspend the treaty obligation to permit repatriation, at least until the situation improves.[634]

To encourage foreign investment, and to maintain control over it[635], States adopt rules relevant for inward foreign investment, some of them having better protection norms than in investment treaties[636]. The SADC IA cannot apply only because it's a treaty. Domestic laws that offer better protection are likely to supersede its uses and functions as they constitute a best the refuge for investors in a world tormented by 'paths towards a reconceptualised international investment law'[637] through restrictions to investors' rights and past privileges. The main argument lies in the statement that, in a context of coexistence, in order for the SADC IA to integrate MS FILs into an investment zone, it must stand the confrontation through intertwinement of its foreign investment norms and those contained in the laws of Congo, Zimbabwe and South Africa. Like in the case of Congo, it clearly appears that ZIDA also provides for the better quality of standards. As the

[629] ZIDA Act, s19(3)
[630] ZIDA Act, s19(4)
[631] ZIDA Act, s19(3)
[632] SORNARAJAH (n 549) 13
[633] See SADC IA, article 13
[634] SORNARAJAH (n 317) 207
[635] WAIBEL and BURGSTALLER (n 44) 2
The authors note that investment codes are relevant for inward foreign investment with a two-fold purpose (i) to encourage foreign investment, and (ii) to maintain control over it.
[636] RUDOLF DOLZER, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2006) NYUJ Int'l. L. & Pol. 954.
[637] MILES (n 625) 16

unifying document within the community, the SADC IA aims to achieve consistency and harmonisation of MS' laws, policies and practices concerning investments to develop the region into a SADC investment zone. And yet, to protect foreign investment in Zimbabwe, it can only be rationally relied upon the ZIDA rather than the SADC IA. This situation affects the applicability of the treaty and renders the attainment of integration objectives no more conceivable. Although new and specific to investment, it recalls the relational issues invoked by F. Oppong and which, by their own existence hinder any progress[638].

Section 3 ALIGNMENT OF THE SOUTH AFRICA INVESTMENT PROTECTION ACT TO THE SADC INVESTMENT AGREEMENT

The Protection of Investment Act was adopted on 15 December 2015 and came into operation on 13 July 2018.[639] Its adoption is a response to risks associated with exposure of South Africa in the BITs and the government decision not to enter into new BITs or to renew any BIT that comes up for renewal.[640] Following especially the case in *Piero Foresti, Laura de Carli and others*[641], South Africa opened itself for either review or termination of most of its BITs in an effort to substitute treaty protections with domestic legislation in order to certify that the benefits of FDI be balanced against its costs to the economy.

In terminating most of its BITs, South Africa found no connection between economic growth and exposure to more ISDS liability. This is exemplified by the 2013 Minister of Trade and Industry statement that South Africa has a significant amount of FDI from the US, Japan, Malaysia, India and other countries, and does not have BITs with them, compared to other countries that it holds BITs with.[642] The investment Act is set to provide holistic protection to foreign investors and their

[638] OPPONG (n 134) 12

[639] <https://www.gov.za/> accessed 15 August 2021

[640] DEON GOVENDER, 'South Africa' in CALVIN GOLDMAN and MICHAEL KOCH (eds), *The Foreign Investment Regulation Review Seventh Edition* (Law Business Research Ltd 2019) 184

[641] See Piero Foresti, Laura de Carli and others v The Republic of South Africa, ICSID case No.ARB(AF)/07/01 This case was discontinued at the request of the claimants. In this case, the claimants challenged some provisions of the mineral and petroleum resources development Act of 2002 under both an Italy – South Africa BIT (1999) and a Luxembourg – South Africa BIT (1998).

[642] SAGNA, 'Bill to Help Modernise SA's Investment Regime: Davies' SA Government News Agency, April 2014 <http://www.sanews.gov.za/south-africa/bill-help-modernise-sas-investment-regime-davies> accessed 15 September 2020

investments, and thus obviate South Africa from entering into BITs individually with its trading partners.[643]

With this Act, South Africa sought to ensure that constitutional obligations are upheld while allowing the government to retain the policy space to regulate in the public interest. Moreover, it remains open to foreign investments; ensures adequate security and protection to all investors; preserving the sovereign right to regulate in the public interest and pursue development policy objectives. In view of that, the government of South Africa established an intra-governmental process to explore the establishment of a national investment Act.

The 2015 investment Act is framed to be applied based on the principle of equal treatment within the terms of the South African Constitution. It is drawn based on the following pillars:

- Protect the investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors;
- Affirm the Republic's sovereign right to regulate investments in the public interest; and
- Confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.[644]

In this line, the Act undertakes to clarify the fact that South Africa bears no greater obligation to foreign investors than to its domestic investors with regard to their investments in like circumstances. The expression 'like circumstances' is defined as meaning the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including factors specific to South Africa and not the investor.[645] These factors include the effect of the investment on the country and the cumulative effects of all investments; the sector where the investment is established, acquired or extended; effect on local communities, employment and environment.

[643] GOVENDER (n 640) 179
[644] South Africa Investment Act, s4
[645] GOVENDER (n 640) 184

The Investment Act is influenced to a large extent by the SADC Model BIT. It also bears more in common with the SADC IA. For example, problematic standards such as FET, MFN or Full protection and security (FPS) are not incorporated into the Act.[646] Differences in wording followed by extensive interpretations that may or actually infringed on the State's right to regulate in the public interest by arbitral tribunals form the leading cause to exclude the FET standard. This standard brings in an element of fairness and equity drawn from customary international law[647] and whose meaning and scope are unclear and depend on the host State's conduct and circumstances of each case. For the MFN, equal treatment obligation among foreign and domestic investors is the reason for its exclusion. It is not relevant *vis-à-vis* the Constitution and other legislations of South Africa to accord all investors to be treated equally. Differential treatment is crucial and required by constitutional imperatives to ensure that South African authorities take specific measures to redress the injustices of the past by empowering previously disenfranchised groups.[648] The FPS standard has been interpreted widely and beyond physical security. The 2015 Act sought to clarify this standard by reducing it to its customary meaning not beyond the physical security of property[649]. To exclude ISDS[650], South Africa draws upon its past experience in investor-State arbitration, and importantly on its high ranking in rule of law and democracy index. South Africa adopts a dispute prevention approach and reserves to foreign investors legal rights to seek redress through venues available under South African law.[651] Mediation is provided. An investor may request the Department of Trade and Industry (DTI) to facilitate mediation within six months of the investor becoming aware of the dispute. DTI holds unilateral powers to issue the rules on mediation. As D. Govender explains, the DTI has already issued those rules, meaning that the room to negotiate amendments is limited.[652] State-to-State arbitration is possible subject

[646] DEPARTMENT OF TRADE AND INDUSTRY (n 481) 4

[647] SURYA SUBEDI, *International Investment Law: Reconciling Policy and Principles* (2nd edition Hart Publishing 2012) 59

[648] See Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act) following s 9(2) of the Constitution of the Republic of South Africa. See also The Indigenisation and Economic Empowerment Act [Chapter 14: 30] (IEEA) following s 14 of the Constitution of the Republic of Zimbabwe, 2014

[649] South Africa Investment Act, s9

[650] In 2019, South Africa ranks 6th in overall governance, Zimbabwe 33th and Congo 49th. See, Ibrahim Index of African Governance, 2020 Index report 21.

[651] LINDELWA MHLONGO, 'A Critical Analysis of the Protection of Investment Act 22 of 2015' (2019) South Africa Public Law Journal, Forthcoming 16

[652] GOVENDER (n 640) 184

to exhaustion of internal remedies being either local arbitration or courts.[653] This approach is borrowed from human rights law mechanisms and the diplomatic protection rules. Such a dispute settlement process is not favoured by investors as it is time and resource-consuming. It brings economic claims of individuals back into the inter-State political realm as it requires both the consent of the host State and home State of the investor.[654] The 2015 Act shows a remarkable turnaround in international investment law that South Africa will only enter into BITs in future on the basis of compelling economic or political reasons.[655]

The next development discusses the alignment of the South Africa investment Act to the SADC IA with respect to the scope of application, fair administrative treatment (FAT), physical security clause, transfer of funds, national treatment, and expropriation.

1. Scope of application

The investment Act applies to all investments in South Africa which are made in accordance with the laws of South Africa.[656] The definitions of 'investor' and 'investment' are based on the SADC IA and SADC Model BIT.

An investor is an enterprise making an investment into the territory of South Africa.[657] An enterprise is referred to as any natural or juristic person.[658] A restricted approach is ideal from a developing country perspective as investors comprise enterprises that help *inter alia* to reduce unemployment. To be covered by the investment Act, the investment made must be in the form of an enterprise as provided for under the Companies Act or any other relevant legislation. Therefore, investors seeking to establish a physical presence in South Africa for the purpose of

[653] Having regard to the dispute resolution process provided for in the investment Act, South Africa is unlikely to accede to the ICSID in the near future. In 2017, South Africa adopted the International Arbitration Act which incorporates the UNCITRAL Model Law on International Commercial Arbitrations of 2006. However, this is between private parties. See GOVENDER (n 640) 184-5
[654] MHLONGO (n 651) 16
[655] DEPARTMENT OF TRADE AND INDUSTRY (n 646) 4
[656] South Africa Investment Act, s2(5)
[657] South Africa Investment Act, s1
[658] South Africa Investment Act, s1

setting up new facilities or engaging in merger and acquisition activity must establish a company to serve as a subsidiary.[659]

Similarly, an investment is defined as an enterprise and in relation to an enterprise. Section 2 of the investment Act reads as follows:

"An investment is

(a) Any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit;

(b) The holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or

(c) The holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that such holding, acquisition or merger with another enterprise outside the Republic, has an effect on an investment contemplated by paragraphs *(a)* and *(b)* in the Republic".[660]

Assets that are not linked to an enterprise are not covered and thus cannot be protected under the investment Act. This conception of investment is said to reduce far-reaching definitions. It so does by covering assets exclusively when they form part of the assets of an enterprise. In line with the SADC Model BIT and the SADC IA, the investment Act provides an indicative list of assets of an enterprise, such as shares, stocks, debentures, securities, debt security of another enterprise,

[659] GOVENDER (n 640) 181

[660] South Africa Investment Act, s2(1)

loans.[661] To promote sustainable development[662] at a crucial moment where development goals must be balanced with the needs of future generations, an enterprise-based conception appears the best option. It manages investors while providing host States with a framework in which they can advance domestic policy in the public interest. For these reasons, the SADC Model BIT recommends definitions that have a high threshold of precision to eschew unexpected liabilities.

Notwithstanding the similarities between the definition of 'investment' in the SADC IA and the South African investment Act, crucial differences still remain. Do not constitute investment within the terms of the SADC IA portfolio investments[663]; debt securities issued by a government or loans to a government; and claims to money that arise solely from commercial contracts, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the investment.[664] In so providing, the SADC IA looks more restrictive in its enterprise-based definition of investment than the South African investment Act. Within the terms of the investment Act, as long as they form a part of the assets of an enterprise, other assets are covered and protected as an investment.

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[661] See South Africa Investment Act, s2(2)
For the purposes of the definition of ''investment'', an enterprise may possess assets such as, amongst others—
(a) shares as defined by the Companies Act, 2008 (Act No. 71 of 2008), stocks, debentures, securities as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012), or other equity instruments of the enterprise or another enterprise;
(b) a debt security of another enterprise;
(c) loans to an enterprise;
(d) movable or immovable property or other property rights such as mortgages, liens or pledges;
(e) claims to money or to any performance under contract having a financial value;
(f) copyrights, know how, goodwill, or intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent that they are recognised under the law of South Africa;
(g) returns such as profits, dividends, royalties or income yielded by an investment; or
(h) rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources.

[662] The promotion of sustainable development is problematic as a justification against foreign investor's rights. To a certain extent, M. Sornarajah supports that sustainable development is an uncertain concept. SORNARAJAH (n 549) 361

[663] Portfolio investment is defined as an investment that constitutes less than 10 percent of the shares of the company or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment (SADC Model BIT 11)

[664] SADC IA, article 1

2. Fair Administrative Treatment

The FAT is a new standard developed in the wake of attempts to get rid of the FET[665]. It first appeared in the SADC Model BIT as an alternative standard to the FET before South Africa replicates it into its investment Act. According to the investment Act, South African authorities bear the obligation to provide fair administrative treatment to investors. It is so provided as follows:

> (1) The government must ensure administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors in respect of their investments as provided for in the Constitution and applicable legislation.
>
> (2) Administrative decision-making processes must include the right to be given written reasons and administrative review of the decision consistent with section 33 of the Constitution and applicable legislation.
>
> (3) Investors must, in respect of their investments, have access to government-held information in a timely fashion and consistent with section 32 of the Constitution and applicable legislation.
>
> (4) Subject to section 13(4), investors must, in respect of their investments, have the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum consistent with section 34 of the Constitution and applicable legislation.[666]

[665] The commentary of the SADC Model BIT explains that it is because of the large degree of unpredictability of the FET standard that South Africa has developed and proposed the FAT as an alternative standard. The drafting committee found potential viability of this option as it was believed that this would still provide useful protection for investors while limiting the risks of the expansive rulings associated with the FET standard in a number of arbitral awards. As such, the formulation of the FAT seeks to avoid the most controversial elements of FET, while still addressing levels and types of actions by States towards an investor that should create a liability. Furthermore, some key elements in the approach include changing the focus of the language from investor rights to a focus on governance standards. SADC Model BIT commentary 24

[666] South Africa Investment Act, s6

Within the terms of paragraph 1, investors are assured to not be treated in any arbitrary manner. Paragraph 2 recalls obligations incumbent upon administrative authorities to give reasons in writing for their decisions. It also reassures administrative review to investors. Paragraph 3 guarantees transparency by granting investors the right to information. This right is recognised in respect of the investment. Paragraph 5 is related to dispute resolution and guarantees the investors due process and access to the South African judiciary being either local arbitration or tribunals and courts.

The uniqueness of the FAT confirms what is referred to as 'African exception' or 'Africanisation' of investment law.[667] Regardless of this reverence, the FAT does not constitute a real innovation. It can be submitted that the FAT standard implies standards that are recognised in all SADC countries' legal systems. That is the case of the prohibition of arbitrariness in legislative, judicial or administrative which is a living principle of administrative law. Likewise, is the obligation upon administrative bodies to provide reasons in writing. Access to information, due process and access to tribunals and courts form as well as basic standards in administrative law. For these reasons, the FAT recalls standards of internal administrative law that are covered by either national treatment clause or customary international law minimum standard treatment of aliens.[668] It becomes too narrow in scope and coverage, and thus does not add much to the protection that is already given in domestic law as part of substantive and procedural fairness.[669]

The substantive content of the FAT as provided for in the investment Act is said to be what some countries meant with the FET standard when they entered into BITs with other countries.[670] As such, the FAT standard is set to bring SADC countries back to square one. Because the SADC

[667] <http://arbitrationblog.kluwerarbitration.com/2018/08/17/africanisation-rule-making-international-investment-arbitration/?print=pdf> accessed 16 September 2020

[668] See *L.F.H. Neer and Pauline Neer (U.S.A)* v United Mexican States, 4 R.I.A.A. 60 (2006) (15 October 1926). See also*, Glamis Gold, Ltd.* v The United Mexican States, UNCITRAL, Award (8 June 2009) para 22; *Waste Management, Inc.* v United Mexican States, ICSID Case No. ARB(AF)00/3, Award (30 April 2004) para 98; *Apotex Holdings, Inc.* v United States of America, ICSID Case No. ARB(AF)12/1, Award (25 August 2014) 9.43-46

[669] KONDO (n 25) 18-19

[670] "Some States may find this too high a standard to be meaningful to investors today. However, it is clear that this was the intended standard when the original treaties were drafted and that the expansive interpretations since provided by some tribunals had not been anticipated", SADC Model Bilateral Investment Treaty, p24.

Model BIT recommends against the inclusion of the FET, observers expected the SADC IA to rather opt for the FAT standard. And yet the SADC IA includes neither of them.

Although South Africa replicates the FAT standard as it is in the SADC Model BIT, some differences still remain.

Article 5 option 2 of the SADC Model BIT reads as follows:

> 5.1. The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice] [due process] to investors of the other State Party or their investments [taking into consideration the level of development of the State Party].
>
> 5.2. Investors or their Investments, as required by the circumstances, shall be notified in a timely manner of administrative or judicial proceedings directly affecting the Investment(s), unless, due to exceptional circumstances, such notice is contrary to domestic law.
>
> 5.3. Administrative decision-making processes shall include the right of [administrative review] [appeal] of decisions, commensurate with the level of development and available resources at the disposal of State Parties.
>
> 5.4. The Investor or Investment shall have access to government-held information in a timely fashion and in accordance with domestic law, and subject to the limitations on access to information under the applicable domestic law.
>
> 5.5. State Parties will progressively strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes in accordance with their respective domestic laws and regulations.[671]

This provision includes different thresholds to be met to assess a violation of the FAT standard.

[671] SADC Model BIT, article 5: Option 2

Starting paragraph 5.1 includes two tests: (i) arbitrariness of administrative, legislative and judicial processes and (ii) due process or denial of administrative, legislative and judicial processes. Each of these two tests must be conducted by taking into consideration the level of development of the host State. It is however not clear whether a mere disregard by the host State's authorities of processes should amount to a breach of this standard. It is believed that that the *Neer* or *ELSA*[672] tests can be supportive and inform the level of gravity to account for. In addition to that, it is important to underline that the determination of arbitrariness or denial of due process will never be uniform. The requirement to account for the level of development or availability of resources is thus a demurrer that can affect any decision on merit.

Paragraph 5.2 of article 5 option 2 introduces the obligation of prior notice to investors in a timely manner for any detrimental action on their investments to be taken by the host State. There is however an exception when such a notice is contrary to the host State's law.

Paragraph 5.3 ensures investors the right to administrative review and participation in the administrative decision-making processes. The exercise of these rights is nuanced with the level of development and availability of resources at the disposal of the host State. This means that host States are guaranteed to invoke scarcity of their resources as a defence against unfair treatment towards investors. The recognition of such exceptions reinforces the rationale behind and justification for optional investor-State arbitration. When the host State is incapable of ensuring fair trial during investment disputes, investors should be given the option to seek redress beyond the host State's adjudicatory processes. It is crucial to comprehend that investors demand a more reliable dispute resolution process than what host States can normally provide[673]. The differences in terms of the rule of law tradition amongst the MS will likely favour countries like South Africa with a 'proven commitment to the rule of law[674]' to the detriment of countries such as Zimbabwe

[672] A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, para 124. See also, *Glamis Gold, Ltd* v United States of America, NAFTA/UNCITRAL, Award, 8 June 2009.
[673] STEPHAN (n 44) 355
[674] DOUGLAS (n 500) 1

or Congo as investors do not trust so much not the governing law, but rather the institutions that will apply it[675].

Paragraph 5.4 relates to access to government-held information. This right is recognised based upon not international standards pertaining to the right to access to information; but rather in accordance to host State's law and regulations. As such, most restrictions to access to information that exist under the host State's law are likely to apply to the investor, whereas the quality of information is of practical importance as investors are likely to carry out their assessment of risks[676].

Paragraph 5.5 recommends SADC countries to include an obligation to progressively improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes. For this reason, it is obviously not replicated under the South Africa investment Act.

In light of the above, it is left no doubt that the FAT under both the SADC Model BIT and the South African investment Act provides for a narrower approach compared to the FET. The SADC IA removed the FET. In the meantime, it includes other flexible provisions that may lead to the same contested intrusion of tribunals in State regulatory space. The SADC IA accounts for the MS' difference in the level of development. This, however, clearly opens the paths for future tribunals to review the standard in order to determine whether, given the 'level of development' or 'availability of resources' a MS has the right to violate its obligations under the SADC IA. in other words, the search for flexibility given differences in the region has led to clearing the ground for future controversial decisions on the basis of 'level of development', 'progressive effort' or 'availability of resources' clauses. In seeking to establish whether the level of development of a country justifies its detrimental conduct towards an investment, tribunals applying these norms will definitely have to pass under scrutiny sovereign acts of independent States.[677] It is indeed understandable to share M. Sornarajah's astonishment. This is unfortunate given that it will permit tribunals to assess the conduct of a State on the basis of its own subjective standards of

[675] PAUL STEPHAN (n 44) 355
[676] cf SANNASSEE RAJA VINESH and OTHERS, 'Determinants of Foreign Direct Investment in SADC: an Empirical Analysis' (2014) The Business & Management Review, Volume 4 Number 4, 155.
[677] SORNARAJAH (n 549) 358

administrative governance, hence exposing the host country to the same expansive treatment that it sought to avoid in the case of FET.[678]

3. Physical security

The physical security clause is a special feature that distinguishes the South African investment Act from the SADC IA. The failure to include this provision highlights a low level of protection guaranteed to intra-SADC investors and their investments by the SADC IA. The investment Act recognises to foreign investors and their investments the right to be granted a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law.[679] *In lieu* of an unqualified 'full protection and security' (FPS) standard, the investment Act provides a clause with built-in exceptions related to the availability of resources and capacity of the authorities concerned. It is acknowledged that there has been a tendency to expand the scope of FPS well beyond its moorings in customary law.[680] For this reason, the investment Act provides for a physical security clause subject to available resources and capacity thereof. This is crucial to ensuring that this standard cannot be interpreted to, for instance, mandate the maintenance of conditions of stability for the investment.[681] The emphasis is put on the availability of resources and capacity as criteria to be included in assessing a breach of this standard in times of strife, civil unrest, armed conflicts or other national emergencies that can directly or indirectly detrimentally impact foreign investors and their investments.

4. Transfer of funds

The repatriation of funds and transfer of profits is anchored in the purpose of making a foreign investment. As underlined by R. Dolzer and C. Schreuer, the investor will need to import funds into the host State to start a production facility or expand its business, with the purpose of transferring the capital, including profits, into the home country or a third country.[682] This is a

[678] *ibid.*
[679] South Africa Investment Act, s9
[680] SORNARAJAH (n 317) 205
[681] *ibid.*
[682] DOLZER and SCHREUER (n 253) 191

basic provision as it is found in most, if not all, investment agreements. What is of key concern is rather the conditions upon which the transfer of funds is acknowledged.

The investment Act provides that a foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation.[683] This provision is stated in general terms but is however qualified by the fact that the right to repatriate funds is subject to the application of domestic legislative exceptions. This is obvious as treaty schemes on this standard are negotiated against the background of host States' monetary sovereignty.[684] Furthermore, this qualification is crucial as it would be unrealistic, again, to provide for an absolute standard when situations like the Asian or Argentinian financial crisis do occur, including situations when the host State may have exchange shortfalls which necessitate currency controls.[685]

The SADC IA does not provide otherwise on the transfer of funds. It includes a non-exhaustive list of what could qualify as economic constraints to partially limit the possibility of abuse.[686] This is important to the investment Act as it can inform interpretations of eventual abuse of this right in South Africa.

5. National treatment

South African investment Act provides for non-discrimination between domestic and foreign investors on the basis of a national treatment standard. It points out that foreign investors and their investments must not be treated less favourably than South African investors in like circumstances.[687] The 'like circumstances' test is stringent and requires an overall examination of the merits of the case. This examination must not be limited or be biased towards any one factor.[688] It must simultaneously include two or more factors among the (i) effect of the foreign investment on the country, and the cumulative effects of all investments; (ii) sector that the foreign investments are in; (iii) aim of any measure relating to foreign investments; (iv) factors relating to the foreign investor or the foreign investment in relation to the measure concerned; (v) effect on third persons

[683] South Africa Investment Act, s11
[684] DOLZER and SCHREUER (n 253) 192
[685] SORNARAJAH (n 317) 207
[686] KONDO (n 25) 20
[687] South Africa Investment Act, s8(1)
[688] South Africa Investment Act, s8(3)

and the local community; (vi) effect on employment; and (vii) direct and indirect effect on the environment.[689] Eventual expansive interpretation is whittled away with additional substantial restrictions preventing such interpretation to not be done in a manner that will require South Africa to extend to foreign investors and their investments the benefit of any treatment, preference or privilege resulting from legal or treaty taxation provisions, government procurement processes, etc.[690]

Although the South Africa investment law borrows from the SADC IA, some slight differences remain. Unlike the investment Act, the requirements to assess the 'like circumstances' test under the SADC IA do not contain an obligation to include direct and indirect effect on the environment.[691] Furthermore, treaty shopping is clearly banished as the investment Act cannot be interpreted in a manner that will require South Africa to extend benefits resulting from other agreements.[692]

Nevertheless, both the SADC IA and the South Africa Investment Act provide for qualified national treatment. Article 6 of the SADC IA reads that each SADC country shall accord to investors and their investments treatment no less favourable than the treatment it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of investments in its jurisdiction.[693] Without MFN, aspects of non-discrimination are solely covered by the national treatment clause. Initially in general terms, the provision is suddenly whittled away with qualifications. Some supporters of a qualified national treatment clause advance that it is particularly important for the national treatment clause to be qualified for it to ensure the development needs of developing countries[694]. This makes sense. Nevertheless, the threshold of exceptions and qualifications needs to be clarified. Otherwise, the content of the clause will be swallowed up and peeled off by exceptions. For this reason, critics argue that the mention of 'national treatment' standard into the South African investment Act is useless as the laws of South Africa contain immense otherwise stated restrictions to it. This is the

[689] South Africa Investment Act, s8(2)
[690] See South Africa Investment Act, s8(4)
[691] South Africa Investment Act, s8(2)g
[692] South Africa Investment Act, s8(4)
[693] SADC IA, article 6.1
[694] KONDO (n 25) 12

case of the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBEE Act) following s 9(2) of the Constitution of the Republic of South Africa. In addition, the SADC Model BIT allows countries to shape their investment laws in a manner that make significant inroads into national treatment standards[695]. Beyond exceptions and qualifications on the provision of national treatment, other provisions on sustainable development, labour, health and environment protection[696] have the effect of limiting the virtue of a national treatment standard.

The theoretical purpose of national treatment is to ensure that foreign investors and their investments will be treated no less favourably than domestic investors and their investments. The application of the national treatment standard can significantly vary depending on its wording in a text. Generally, the clause of national treatment does not apply to all types of investments. Sensitive industries are mostly excluded from the scope of this clause in BITs.[697] Exaggeratedly, the SADC IA, SADC Model BIT and South Africa investment Act seem to allow exceptions to national treatment to apply to all types of investments. The BBEE Act for instance broadly allows the participation of disadvantaged South Africans in the economy without specifying sectors or thresholds it applies.

The objectives of the BBEE Act consist of (i) promoting economic transformation in order to enable meaningful participation of disadvantaged people in the economy; (ii) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises: increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training; etc.[698] It is always a challenge for host States to address their domestic political and economic situation while fulfilling their obligations to foreign investors.[699] These broadly defined terms allow a limitless extension of the State's regulatory space. Consequently, exceptions to the national treatment clause appear more as the principle rather than the exception. By allowing immense restrictions, the core content and significance of this standard can easily be wiped away.

[695] SORNARAJAH (n 549) 361
[696] See SADC Model BIT, article 21
[697] See for instance US – Georgia BIT, article II and Annex 1
[698] BBEE Act (2003), s2
[699] SURYA SUBEDI (n 647) 59

Investors are therefore put at high risks. S. Subedi, for instance, notes that domestic investment law is not a sufficient deterrent to a rogue government intent on expropriating foreign investors' properties[700] as it gives the government the right to take measures on the basis of vague grounds such as redress historical inequalities[701].

Considering the above, in order to assess a violation of a national treatment standard, it will be required additional criteria beyond 'direct competition[702]', 'same sector[703]' or 'legal and factual context[704]' criteria. Put altogether, the BBEE Act's exceptions added to labour, health and environmental exceptions to national treatment; one of the best ways to assess a violation of this standard could be to borrow the 'minimum requirement of plausibility' test from the Russia – Traffic in Transit case[705]. This can help determine whether an exception to national treatment is not implausible or proportionate to the detrimental impact on the investment.

6. Expropriation

The investment Act does not contain provisions on expropriation. It interchangeably refers to domestic and foreign investors' right to legal protection of investment and defers the right to

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[700] *ibid.*

[701] See South Africa Investment Act, s12

[702] The tribunal in *ADF Group* concluded that the issue of likeness is relatively simple as it requires the domestic and foreign investor to be in direct competition with one another. See for instance *ADF Group, Inc.* v United States, ICSID Case No. ARB(AF)/00/1 (Final Award of Jan. 9, 2003) para 155-7. This is in line with South Africa Investment Act, s8(2)(a)(e)(f)(g).

[703] The tribunal in *S.D. Myers, Inc.* referred to 'likeness' to 'same sector', implying that the word 'sector' has to be taken widely into account to include concepts of 'economic sector' and 'business sector'. This is in line with South Africa Investment Act, s8(2)(b). See *S.D. Myers* v Canada, UNCITRAL Arbitration, First Partial Award of Nov. 13, 2000 para 250

[704] This criterion is related to measures that *de jure* or *de facto* discriminate. *De jure* discriminatory measures are promulgated measures that explicitly grant benefits or subsidies exclusively to domestic investors and their investments. *De facto* discriminatory measures on the other hand consist of measures that appear to be non-discriminatory but nevertheless discriminate in fact on the basis of nationality. This is in line with South Africa Investment Act, s8(2)(a)(c)(d)(e)(d)
See the tribunal in *Pope & Talbot* referring 'no less favorable' as to mean 'equivalent to, not better or worse than, the best treatment accorded to the comparator. *Pope & Talbot* v *Canada,* UNCITRAL/NAFTA Arbitration, Final Merits Award, Apr. 10, 2001. This conclusion matches the one *ADF* case where no prima facie case of discrimination or less favourable treatment was found since under the bridge construction program contract in question all companies were treated identically. See *ADF Group, Inc.* v U.S., ICSID Case No. ARB(AF)/00/1 (Final Award of Jan. 9, 2003*).* Addressing the evidence issue on national treatment clause, the tribunal in *Feldman* concluded that once a foreign investor provides sufficient evidence of less favourable treatment, the burden shifts to the host State of investment either to rebut that presumption or to provide a reasonable basis for the difference in treatment. *See Marvin Roy Feldman Karpa* v. United Mexican States*,* ICSID Case No. ARB(AF)/99/1.

[705] Panel Report, *Russia – Measures concerning Traffic in Transit*, WT/DS512/7 adopted 29 April 2019

property under section 25 of the Constitution of South Africa[706]. This constitutional provision strikes a delicate balance between the protected private interests of property owners and the interests of society as a whole. It recalls the inviolability of private property and guarantees that private property may be taken for public use upon just compensation therefore[707]. Such general formulations are not unique to the South African Constitution. They can be found in other Constitutions around the world. The Constitution of Japan for example provides for the taking of property upon compensation[708]. It is the same for the Congolese Constitution which recalls the

[706] South Africa Investment Act, s10

[707] See Constitution of South Africa (1996) s25. See also South Africa Expropriation Act (1975)
The Constitution reads as follows:
(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2) Property may be expropriated only in terms of law of general application—
(a) for a public purpose or in the public interest; and
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.
(4) For the purposes of this section—
(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
(b) property is not limited to land.
(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
(9) Parliament must enact the legislation referred to in subsection (6)

[708] See, Constitution of Japan (1947), article 29 paragraphs 1 and 2. See also Japan Expropriation of Land Act (1951), articles 1 and 2

inviolability of private property and provides that it can be expropriated for public use upon compensation.[709]

In stark contrast to international best practices; South Africa advances 'just and equitable' as the compensation standard in case of expropriation. This requires the following observations.

As the investment Act eschews to mention expropriation standards based on international best practices, any conduct tantamount to expropriation will be assessed exclusively based on domestic standards. This requires delicacy from authorities as national legislations offer them broad grounds and windows to directly or indirectly affect foreign investments. These windows stand from the provisions on expropriation, the BBEE Act, the right to regulate, or the labour, health and environmental exceptions. Tribunals and courts assessing expropriation measures taken on the aforementioned grounds will need to include additional tests in order to ensure the balance between investors' interests and the measures and interests at issue.

South Africa is the largest source of intra-African investment[710]. Its alignment to the SADC IA is a good signal for the SADC IA and a step forward towards assuring the applicability of this community treaty. The South Africa Investment Act was adopted in 2015 and features the SADC Model BIT of 2012. It also anticipated the major changes that were brought in the SADC IA in 2016.

Regardless of its economic size and influence in the region, South Africa alone cannot render possible the dream of integration. For integration objectives to be completed, each SADC country must contribute and abide by its commitments. There still is, however, a long way to go. Zimbabwe for instance recently adopted an investment law 'ZIDA' (2019) when the entire regional framework was already set. The SADC Model BIT existed already to guide the law making-process. Similarly, the SADC IA was there to constraint the nature and type of norms to be included. In spite of that, the ZIDA Act was adopted with rules that almost flouted the SADC IA, thus undermining the applicability of the SADC IA and thwarting the integration objectives. The

[709] See, Constitution of Congo Democratic Republic (2006), article 34 paragraph 3. It reads as follows: "Nul ne peut être privé de sa propriété que pour cause d'utilité publique et moyennant une juste et préalable indemnité octroyée dans les conditions fixées par la loi".
[710] EY (n 491) 23-5

same, for the Congo Investments Code to provide for better standards of protection, it annihilates the potential of the SADC IA to apply its jurisdiction. This sends us to the general conclusion.

CHAPTER 4 PARTIAL CONCLUSION

In the world, the SADC IA constitutes the first attempt by a REC to achieve regional integration through transforming MS FILs into an integrated investment zone. The previous (2006) SADC IA set the tone before it was followed by ASEAN in 2009 through the ACIA. In the same year, 2009, the treaty on the functioning of the EU (TFEU) came into effect. Through it, EU MS have reformed the common commercial policy to confer a new exclusive FDI competence to the EU along with trade, tariff or commercial aspects of intellectual property[711].

Notwithstanding the above, the SADC coexistence framework is contentious. The relationship between the SADC IA and SADC MS FILs seriously undermines the applicability of the regional treaty. Although it is in foreign investment matters, it remains heart-breaking to come to the same conclusion as F. Oppong, a decade ago, that Africa economic integration processes have neither been carefully thought through nor situated on a robust legal framework.

The SADC entertains a coexistence framework where both the SADC IA and SADC MS FILs apply. However, in a coexistential context; a treaty does not apply because of its legal nature 'treaty' but rather on the basis of the quality of its norms. A treaty that provides for poorer standards of protection will definitely lose its applicability, thereby dropping any chance to regulate foreign investment and complete its assigned objectives in the REC. A domestic norm containing better quality standards will therefore be preferred even though such preference setback the economic integration of the region. In this way, to be applicable and effective, the SADC IA needs to stand the quality test when its provisions are intertwined and confronted to those of the SADC MS FILs.

Given that the distribution of norms between the SADC IA and SADC MS FILs is not well carried out; the quality of norms plays a significant role in undermining the SADC IA functional dimension. Because it provides for poorer quality standards, the SADC IA is not applicable in countries like Congo and Zimbabwe where protection standards are among the most privileged by

[711] TFEU, article 2017
cf RUMIANA YOTOVA, 'The New EU Competence in Foreign Direct Investment and intra-EU investment Treaties: Does the Emperor Have New Clothes?' in FREYA BAETENS, (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 389

foreign investors. Thus, the conclusion is that the ASEAN coexistence framework is successful whereas the SADC framework has failed.

Fig. 2 below presents the SADC investment coexistence framework.

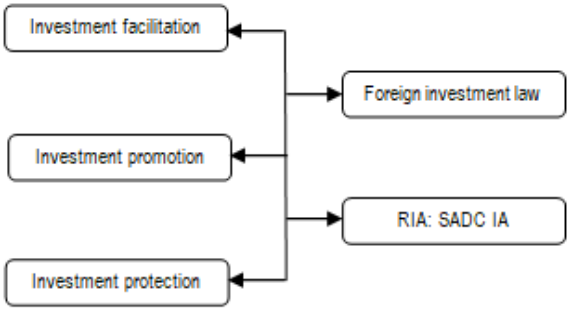

Fig. 2: SADC coexistence investment framework: the relationship between the SADC and SADC Member States' laws on foreign investment

This figure shows that the SADC IA and SADC MS FILs all provide norms on foreign investment promotion, facilitation and protection; and differently. The distribution of norms is not well carried out. If the norms on investment promotion and facilitation are less consequential in influencing the relationship with the SADC IA; investment protection standards can substantially impact the applicability of a regional treaty. Taking this into account, it appears that the SADC IA provides for poorer investment protection norms. It accords the right to fair and adequate compensation in case of expropriation[712]. It provides for national treatment[713] and allows the repatriation of capital[714]. 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.[715] It, however, does not include the FET and ISDS.

Through intertwinement of their norms, as the norm-based conceptual framework suggests, it is possible to see that the SADC IA provides for poorer quality of protection norms. It thus cannot

[712] SADC IA, article 5.
[713] SADC IA, article 6.
[714] SADC IA, article 13.
[715] SADC IA, article 7.

be applicable, especially in the Congo and Zimbabwe, and consequently pursue its integration objectives in the region. The Code Investments Code provides for FET and ISDS along with a general consent to arbitration. Although qualified, the Zimbabwe Investment and Development Act (ZIDA) guarantees FET, MFN and ISDS upon agreement with the government.

CONCLUSION

This should be a time of celebration for international lawyers, wrote 25 years ago, Y. Iwasawa and M. Young. That was in 1996 following the collapse of the Soviet Union, and the end of the polarisation between East and West that supposedly paralysed the international community. The time was henceforth ripe for concerted action on myriad long overdue international problems[716]. Like then, today should as well be an occasion of celebration. In International Investment Law, despite the failure to craft a world agreement on foreign investment[717] – capable of providing a centralised dispute resolution mechanism such as the dispute settlement body (DSB) of the World Trade Organisation (WTO) – regional frameworks are emerging[718], in a context of a 'post-American multipolar world'[719], as the viable alternatives[720]. This study looks at the emergence of regional frameworks in the field of foreign investment, with particular attention to the ACIA and the SADC IA and their relationship with foreign investment laws of ASEAN and SADC Member States (MS FILs).

This study identifies the emergence of a new trend in international investment agreements (IIAs) consisting in the adoption of RIAs within regional economic communities (RECs). It then seeks to analyse these RIAs and understand their interactions with MS domestic laws. Since the regionalisation of investment law is taking place intra-regionally as part of an agenda for deep integration; RECs have taken a prominent lead in adopting RIAs aiming at the achievement of a

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[716] MICHAEL YOUNG and YUJI IWASAWA (eds), *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy* (Transnational Publishers 1996) xv

[717] The negotiations on a proposed multilateral agreement on investment began in 1995 and lasted for three years, but countries could not agree to core principles of investment protection. See The Multilateral Agreement On Investment, Draft Consolidated Text, OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), DAFFE/MAI (98)7/REV1 (22 April 1998). Similarly, the Singapore Ministerial Conference of the WTO was discontinued due to conflicting States interests. It was held in 1996 and started working on a program on the relationship between trade and investment.

[718] Not without reason, F. Söderbaum notes that we are witnessing an explosion of various forms of regionalisms through the (re)emergence, revitalization or expansion of regional projects and organisations, such as the Southern Common Market/*Comisión Sectorial para el Mercado Común del Sur* (Mercosur), the Association of Southeast Asian Nations (ASEAN), the Southern African Development Community (SADC), and so forth. See FREDRIK SÖDERBAUM, 'Introduction: Theories of New Regionalism' in FREDRIK SÖDERBAUM and TIMOTHY SHAW (eds), *Theories of New Regionalism* (Palgrave Macmillan 2003) 1. See also, UNCTAD, World Investment Report 2015: Reforming International Investment Governance, UNCTAD/WIR/2015, (UNCTAD 2015), 123

[719] This expression is borrowed from KAREN ALTER and KAL RAUSTIALA, 'The Rise of International Regime Complexity' (2018) Annual Review of Law and Social Sciences 19-20.

[720] SÖDERBAUM and SHAW (n 718) 1

common market and the transformation into 'integrated investment areas' of the regions in which they are adopted. Their adoption, however, did not prevent MS from maintaining or adopting individual MS FILs. This has resulted into a coexistence framework where RIAs exist and apply simultaneously with MS FILs. In ASEAN, the ACIA coexists with, for example, the Indonesia or Vietnam investment laws. In SADC, the SADC IA coexists with, for example, the Congo or Zimbabwe investment laws.

RECs adopt different approaches concerning the relationship between RIAs and MS FILs. The following development explains the divergences between the EU, ASEAN, and SADC in a sort of trilateral perspectives on community law on foreign investment.

The EU opts for a unifying approach rejecting the possibility for no body of rules but the TFEU to regulate foreign investment. Recent rulings by the Court of Justice of the European Union (CJEU) in *Achmea*[721] (2018), *Komstroy*[722] (2021) and *PL Holdings*[723] (2021) consolidate this approach. No competing instrument – be it a multilateral investment agreement such as the Energy Charter Treaty (ECT) or a BIT – is given force of law within the EU. This position of the CJEU does not make sense for non-EU countries. Nevertheless, it consolidates the unifying approach according to which the TFEU is the unique instrument regulating foreign investment. The mention of the EU approach is necessary to grasping the necessity to compare the ASEAN with the SADC.

Contrary to the EU, the ASEAN and SADC promote a coexisting approach, thereby creating a framework where the community investment treaty applies simultaneously with MS FILs. In this context, the level of protection (qualitative or exclusive) contained in an instrument determines its applicability and effectiveness. When a treaty provides for poorer standards, it loses its applicability. And when an MS FIL provides for better standards, it undermines the uses and functions of the treaty to achieve regional integration. The applicability and effectiveness of the RIA become substantially tributary to its relationship with MS FILs in a coexistential framework.

This study uses the ASEAN and SADC as case studies. It undertakes to analyse the manner in which, in a context of coexistence, MS FILs impact the applicability and effectiveness of the ACIA

[721] Slovak Republic v. Achmea B.V. (Case C-284/16) EU:C:2018:158
[722] Republic of Moldova v. Komstroy LLC (Case C-741/19) EU:C:2021:655
[723] Republic of Poland v. PL Holdings Sarl (C-109/20) EU:C:2021:875

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 similar 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 sought 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? In other words, what makes the ACIA and SADC IA applicable given that they coexist with their MS FILs?

- 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. The concept of "distribution of norms" assesses the way norms of foreign investment promotion, facilitation and protection are distributed between an RIA and a domestic MS FIL. To be applicable and effective, an 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, an RIA does not apply because of its legal nature as a 'community treaty' but rather based on the quality or exclusivity 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 objectives in the REC. A domestic norm containing better quality standards will therefore be preferred even though such preference setbacks the economic integration project 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. In other words, in ASEAN, the investment treaty (ACIA) governs investment protection when each individual ASEAN MS law is about investment promotion and facilitation. 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 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 expropriation or free transfer of capital. These generic 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 therein 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, MFN 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 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 regional integration through transforming MS FILs into an integrated investment zone; it failed to become a successful reference. The relationship between the SADC IA and SADC MS FILs is contentious. There is an asymmetrical coexistence as SADC MS provide for different solutions. South Africa aligns its FIL to the SADC IA; while Congo and Zimbabwe improve the quality of their domestic standards. 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. The Congo Investments Code provides for FET and ISDS along with a 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. 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 creation of a common market in the region as it is not applicable in SADC MS with high-quality investment laws.

The findings in ASEAN and SADC associated to the emergence of a community law on foreign investment stress a tentative theory of "coexistence" in international investment law. This suggests that State groupings that have failed to reach the EU level of integration are navigating between two dimensions: (i) the normative dimension, and the (ii) quality dimension.

The quality dimension confines itself in the opposite way of the normative dimension. It suggests that, in a co-existential context, irrespective of the "nature" or "hierarchy" of a legal instrument, it is the text providing for better standards that should be preferred. Applying this argument to the SADC, irrespective of the fact that the SADC IA is the one aiming at harmonising investment laws and policies, the Congo investment code, for instance, should be preferred although it undermines the uses and functions of the regional treaty.

The normative dimension favours texts that prioritise the harmonisation of rules *in lieu* of their quality. Irrespective of the fact that an individual country may hold advanced standards, rules that are harmonised should be applied. In this case, the community treaty should be preferred and applied even if it bears poor quality standards. Applying this argument to the SADC, the SADC IA that provides for poor standards should be preferred irrespective of the fact the Congo or Zimbabwe FILs offer better standards. Here, it is not necessary for rules to bear quality. The instrument providing harmonised rules for all countries should have preference. Given that both the ASEAN and SADC aim at the completion of a common market modelled after the EU, the normative dimension should be given the necessary greenlights. This could help clarify the hierarchy between community and domestic rules. There could not be another way around.

As mentioned before, there is a complete lack of clear and detailed rules on hierarchy and relationship between ASEAN and SADC community law and the domestic laws of ASEAN and SADC MS. The principle of supremacy of community law as enshrined in the EU community law is not fully functioning. The lack of a judiciary to consolidate community rules constitutes another weakness of the community rules of ASEAN and SADC. When the TFEU clearly gives the EU exclusive competence regarding FDI, the judiciary, especially the CJEU applies and consolidates this principle leaving no doubt about the applicability of community law. In addition, EU MS do not adopt contradictory laws that could undermine the uses and functions of the TFEU. This facilitates the harmonisation effect, allows the TFEU to be applicable and effective, and renders possible the attainment of integration objectives.

In ASEAN and SADC, the nature of the laws involved yields contradictory outcomes. Both the ACIA and ASEAN IA provide for foreign investment provisions, but it is not clearly asserted that they have precedence or are directly applicable in domestic legal systems. As such, the ACIA exists and applies as well as each ASEAN MS FIL within the ASEAN. Similarly, the SADC IA exists and applies as well as each SADC MS FIL within the SADC. This coexistential framework suggests that the "distribution of norms" and the "quality of norms" determines the applicability and effectiveness of the provisions. In the case of the ASEAN, the distribution of norms is a key concept. It shows that the ACIA is applicable and effective because it is the only instrument to regulate foreign investment protection. ASEAN MS FILs focus on foreign investment promotion and facilitation. Beyond the distribution of norms, the ACIA also contains higher quality standards compared to ASEAN MS FILs. In the case of the SADC, the distribution of norms between the SADC IA and SADC MS FILs is not well carried out. The quality of norms plays a significant role in undermining the SADC IA's functional dimension. Because it provides for poorer quality standards, the SADC IA is not applicable in countries like Congo and Zimbabwe where protection standards are among the most favoured by foreign investors. Thus, the ASEAN coexistence framework is successful whereas the SADC one has failed.

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. This is also crucial for the upcoming African continental free trade area (AfCFTA) investment protocol. It offers an approach through which to well manage the AfCFTA protocol provisions with both the provisions of agreements such as the SADC IA and each country's investment law.

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 could serve as a strong reference when MS would decide to move towards Chaisse's regionalisation of their domestic foreign investment laws and policies.

In conclusion, it is not an easy task to conclude. It is the moment of truth. There is a mixed feeling of having contributed to the development of the field of international investment law; but also, of unfinished business as new perspectives to explore and research weaknesses arise. The journey towards this research has deepened the interest in this field and it is hoped that further research will be conducted in the future to fill the gap and explore other perspectives.

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