INTERNATIONAL LAW AND THE REGULATION OF FOREIGN PRIVATE INVESTMENT IN CAMEROON

Written By ***Manga Bineli Timothée***

Ph.D Student, Faculty Of Law, University Of Ngaoundéré (Cameroon)

ABSTRACT

International law is fundamental to the regulation of foreign private investment in Cameroon. Through its authority, it has a significant impact on the domestic framework for foreign private investment. The intrusion of international norms limits the autonomy of domestic law in this respect. These standards are essentially legally binding, enabling them to act on internal ones. Where international norms are not prima facie binding, they may be coercive in the domestic order through certain mechanisms. It thus becomes logical that the direct effect and primacy of international law over Cameroon's regulation of foreign private investment can be derived from the authority of international norms.

INTRODUCTION

Today, investments are a vast reservoir of legal concerns involving rules of law of various origins[i]. These concerns are, in large part, due to the increasing relaxation of the sealing of borders between States[ii]. While it is natural that investments made in a State by its own nationals should be subjected to the law of that State, it does not seem that the same logic can be fully followed with regard to those made by foreigners[iii].

In the absence of a consensus on the regulation of foreign investment between developing countries and capital-exporting industrialized countries[iv], there is every reason to believe that the position of most host countries is to regard their domestic laws as self-sufficient and separate from international law. It is in this position that Cameroonian private foreign investment law appears at first sight to be placed in relation to international law.

Cameroonian law is often presented by an authoritative doctrine[v] as an autonomous law based on no foreign norm. This autonomy may, of course, be applicable to Cameroon's regulation of foreign private investment and be perceived both formally and materially[vi].

At the formal level, Cameroonian law is autonomous insofar as it results from the organs or institutions of the State[vii]. At the material level, the autonomy of Cameroonian law is linked to the content of the formal sources of law and of the substantive solutions.

The autonomy of Cameroonian law cannot, however, be fully justified in view of the fact that it is experiencing difficulties in truly flourishing in all its splendour in the light of the realities of the foreign private investment sector[viii]. Foreign private investment almost always relies on international law. The fact that foreign private investment is carried out in a particular State does not mean that it must be subjected to the law of that State[ix]. The trend in case law that prevailed in the 1929's to make foreign private investment subjected to the domestic law of the host State should be limited[x]. This can be easily understood insofar as legal situations grafted with at least one element of extraterritoriality are perceived as international situations since they involve the interests of international trade[xi].

The domain of foreign private investment often goes well beyond the simple relationship between the host State and the foreign investor[xii]. The reason is certainly, as Professor LEVOA AWONA explains, the requirement of proportionality in Cameroonian law of the expulsion of aliens, in these terms : "given the dominant position of the State, it is above all to be feared that only the interest of the State in the preservation of public order must always prevail and that never should the interest of the foreigner to stay on Cameroonian territory, for one reason or another, be taken into account[xiii]". Thus, faced with the risks incurred by the foreign private investor, the host State, on the other hand, also runs various risks, and in particular that of being the subject of pressure from the States of origin of the companies investing in it, often States that are much more powerful than itself [xiv]. These States may take sides in disputes between them and the host State in favour of their nationals, especially if they claim protection on the grounds of dispossession of their property and the violation of international law[xv].

The arguments put forward to support the autonomy of Cameroonian law do not stand up to the very specificity of the field of foreign private investment, which almost always

convokes international law. Then, what is the role of international law in the regulation of foreign private investment in Cameroon ? The answer to this question requires that international law be regarded as the body of legal rules that result essentially from the international legal order and governing foreign private investment[xvi]. In this respect, we sustain that international law plays a fundamental role in the regulation of foreign private investment in Cameroon. In order to demonstrate this, it is important to address the authority of international law on the regulation of foreign private investment in Cameroon **(I)** and analyse the consequences of the authority of international law on the regulation of foreign private investment in Cameroon **(II)**.

THE AUTHORITY OF INTERNATIONAL LAW IN THE REGULATION OF FOREIGN PRIVATE INVESTMENT IN CAMEROON

In general, the authority of a rule of law can be seen as its ability to impose itself and produce effects on the subjects to which it is subject. The authority of international law over domestic law is similar, since domestic norms depend essentially on international law. A state does not adhere to an international treaty and subsequently abides by its own law.

Therefore, in order to better assess the scope of the authority of international law in the area of foreign private investment in the domestic order, it is important to address, on the one hand, the relativity of the autonomy of the domestic regulation of foreign private investment in relation to international law **(A)**, and, on the other hand, the binding force of international law on the domestic regulation of foreign private investment **(B)**.

THE RELATIVENESS OF THE AUTONOMY OF CAMEROON'S REGULATION OF FOREIGN PRIVATE INVESTMENT IN RELATION TO INTERNATIONAL LAW

The autonomy of domestic regulation of foreign private investment in relation to international law is not absolute. Linked mainly to the sovereignty of the state by the theses that support it, this autonomy cannot really be sustainable in any way. The field of foreign

private investment very generally conveys the norms coming from the international legal order. Moreover, to say that there is an inseparable link between the sovereignty of the state and the autonomy of domestic law is to admit that there are other norms alongside those of domestic law. The explanation is that sovereignty does not necessarily express autonomy, in the sense that by legally binding itself through an investment treaty the host state naturally exercises its sovereignty.

Unless international law is a mere fact from the point of view of the domestic order, it cannot really be sidelined in matters of foreign private investment. On the contrary, domestic regulations are dictated by international law **(1)**, which also determines their implementation **(2)**.

CAMEROON'S FOREIGN PRIVATE INVESTMENT REGULATIONS DICTATED BY INTERNATIONAL LAW

It may seem surprising to state that international law dictates to domestic law a set of norms for the regulation of foreign private investment, when we know that this area is basically under the empire of state sovereignty. However, in the light of recent developments in the area of foreign private investment, it is no longer really surprising that domestic law is being framed in the light of international law.

Indeed, international law imposes on domestic law a set of rules aimed at regulating foreign private investment. These rules are largely based on customary international law, and are increasingly reflected in treaties for the promotion and protection of foreign investment. In general, these are the international standards for securing foreign private investment against not only discriminatory measures but also arbitrary measures of the host State.

In the first case, international law is intended to prevent domestic law from discriminating between investments in the territory of the host State. There may be discrimination if similar situations are treated differently. Generally, discrimination is based on the nationality of investors. Two situations may arise in this direction. On the one hand, the host State may issue standards that promote the protection of domestic investment at the

expense of foreign investment. On the other hand, it can discriminate between foreign investments.

International law, notably through the national Treatment rule and the Most-Favoured-nation rule, refocuses the balance of treatment of investments in the domestic order. It is in this sense that the National Treatment rule requires the host State to accord to the foreign investor treatment no less favourable than that accorded to a national investor. As for the Most-Favoured-nation rule, it establishes the principle of equality between foreign investors by aligning itself with the most favourable treatment granted to one of them.

In the second case, international law requires domestic law to take certain measures to avoid arbitrary protection of foreign investment. In the Barcelona Traction case, the International Court of Justice noted that: "once a State admits foreign investments, whether natural or legal persons, in its territory, it is obliged to grant them the protection of the law and assumes certain obligations with regard to their treatment[xvii]". Domestic law is thus required to provide foreign investment not only with fair and equitable treatment but also with full security.

The standard of fair and equitable treatment is not easy to define. It can refer to several realities because of its ambiguity. In order to define it, it seems essential to deal separately with the adjectives which make it up, namely "just" and " fair ". Thus, it would be considered "equitable", "the treatment ensuring that the three parties involved in any international investment relationship, in this case the host State, the investor, the State of nationality of the investor, are in a balance satisfactory to their respective interests[xviii]". On the other hand, it was considered to be " fair ", "treatment in conformity with national law which itself must not be in breach of international law[xix]". The standard of fair and equitable treatment can thus be understood as a minimum standard for the treatment of foreign investment by reference to international law. In L. G. & E .C. Argentina[xx], the arbitral tribunal considered that " the standard of fair and equitable treatment includes the obligation of the host State to conduct itself consistently and transparently, without ambiguity, implying the obligation to establish and maintain a stable and predictable legal framework necessary to satisfy the legitimate expectations of the foreign investor[xxi].

The term "full and complete protection and security", although generic, can be interpreted as an obligation on the part of the host State to ensure not only general protection

and security but also integral security for foreign investment. The host State must take all necessary measures to enable the foreign investor to make full use of his investment.

It should be noted, however, that the content and scope of the full safety standard is difficult to determine. This can be illustrated by the AAPL case in which the court remained confused about the scope of each of the concepts of "protection" and "full security" granted by a host State to a foreign investor in the context of an internal armed disturbance[xxii]. Still, the host state has an obligation to take all necessary measures to ensure the full protection and security of foreign private investment in its territory, even if it needs to amend its own legislation. Moreover, it cannot validly rely on its own legislation to avoid the consequences of such an obligation[xxiii]. An arbitral tribunal in the Amco case formally recalled that" it is a generally accepted rule of international law, clearly expressed in international awards and judgements and commonly accepted by the authors, that the State has the duty to protect aliens and their investments from the unlawful acts of their nationals".

THE APPLICATION OF CAMEROON'S RULES ON FOREIGN PRIVATE INVESTMENT CONDITIONED BY INTERNATIONAL LAW

International law has a significant impact on the application of domestic law in the area of foreign private investment. It is true that, in many situations, the implication of domestic law on foreign investment cannot be ignored, since there are issues that can only be resolved from domestic law. This is the case for acts of the public authorities requiring recourse to the administrative law of the host State for any challenge. The explanation comes from the fact that the relations between the State and the foreign private investor are more public than private relations. In other words, as far as foreign private investment is concerned, the host State does not act as an individual, but as a public authority.

However, the ex-officio use of domestic investment law should not be overestimated, as CPJI appeared to do in the Serbian and Brazilian loans case in 1929, when it stated that " any contract which is not a contract between States as subjects of international law has its basis in a national law ". According to Professor Weil, it is necessary to refer to the Grundlegung understood as the basic legal order of the contract to resolve the conflicts of norms that may

arise[xxiv]. As such, he writes: "unless one considers the agreement of the parties as the generator of a legal order [...] one cannot escape the preliminary question of what is the legal order in which the contract is inserted, where it can its validity and in which it takes its roots. It is only at this second stage, that is to say, once the problem of the legal order on which the contract is based has been settled, that the substantive rules which are called upon, by reference to the basic legal order, to govern the contract materially will be determined[xxv]". The theory of the basic legal order (Grundlegung) or the entrenchment of the state contract is based on the idea that the determination of the law applicable to the contract depends on the legal order in which the contract is rooted and in which it draws its binding force[xxvi]. The implication of international law in determining the law applicable to state contracts is undeniable.

In this sense, international law gives an important place to the will of the contracting parties in determining the applicable law. The logical foundation of such a postulate is the principle of the autonomy of the will[xxvii]. It is the "power granted by a legal order to one or more individuals to create legal situations within it, situations which, without their intervention and in the absence of that power, either do not exist or do exist, but with a different configuration[xxviii]". More concretely, the principle of autonomy is understood to mean "the circumscribed opportunity available to any contractor to choose, through a creative will of the law, the provisions which will govern his relations within the framework of the contractual act[xxix]". This is a general principle of law. The latter is part of international law, particularly under article 31 of the ICJ statute.

Under the first paragraph of article 2 of The Hague convention of 15 June 1955 on the law applicable to international sales of goods, it is clear that the sale is governed by the law of the country designated by the contracting parties. The case law in the famous American Trading Company case, enshrined the principle of autonomy by stating that the parties may choose the law applicable to their contract[xxx]. Thus, article 42 of The Washington convention of 18 March 1965 establishing ICSID provides: "the tribunal shall decide the dispute in accordance with the rules of law adopted by the parties[xxxi]".

The contracting parties have a wide discretion to enforce the law which corresponds to their common intention. If the choice of the contracting parties is based on the law of the state party, there is nothing to prevent them from providing some clarification.

Thus, the insertion by the parties of the inviolability clause in investment contracts is intended to prohibit the use by the contracting state of the exorbitant powers granted to it by its national law[xxxii]. The aim is to prohibit the contracting public person from taking unilateral acts as authorized by its national law in order to modify the content of the contract or even to terminate it[xxxiii]. In the Aramco V. Saudi Arabia award of 1958, it had already been noted that " there is nothing to prevent a state, in the exercise of its sovereignty, from irrevocably binding itself by the terms of a concession and assigning to its concessionaire rights that are irreconcilable ". In the Libyan oil concession that gave rise to the Texaco-Calasiatic award of 1977, the following non-derogable clause was inserted: "The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties ". In this way, the parties express their desire to exclude the possible application of the exorbitant regime provided for by domestic law in respect of state contracts[xxxiv].

The stabilization clause, for its part, when inserted in an investment contract, shall freeze the law of the Contracting State at the date of conclusion of the contract[xxxv]. This does not in any way mean that this clause should be interpreted as prohibiting the state party to the contract from amending its legislation[xxxvi]. It merely seeks to prevent, not adoption, but the application or enforceability of future measures against the contractual relationship[xxxvii]. Any subsequent legislative changes are therefore deemed to have no effect on the agreement. In MINE V. Guinea, the contract was subject to Guinean law, but in its content at the time of the contract[xxxviii]. The clause was worded as follows: "the law of this Convention shall be the law of the Republic of Guinea in force on the date of the signature".

Furthermore, Article 42 (1) of The Washington convention of 18 March 1965 states that " [...] in the absence of agreement between the parties, the Tribunal shall apply the law of the contracting state party to the dispute - including the rules on conflict of laws - and the principles of international law on the subject ". In the absence of agreement between the parties, the second rule of Article 42 (1) provides directly for the resolution of the dispute, without going through a connecting factor. Thus, first and foremost, there is national law, that is, the law of the state of the territoriality of the investment, to the exclusion of the law of the state of nationality of the investor. The law of the contracting state applies without reference to the place of performance of the contract. Second, there are the "principles" of international law "on the subject[xxxix]". In Cameroon V. Klöckner, the arbitral tribunal applied the law of the state

without reference to the " principles of international law on the subject ". The award was set aside to the extent that the arbitral tribunal had not sought the content and applied the relevant provisions of the law of the contracting state[xl].

It should be pointed out that Article 42 of The Washington Convention reserves to the principles of international law a dual role, either complementary, in the event of a " gap " in the law of the contracting state, or remedial, in the event that such state law is not in all respects in conformity with the principles of international law, the binding force of which is undeniable.

THE BINDING FORCE OF INTERNATIONAL LAW ON CAMEROON'S REGULATION OF FOREIGN PRIVATE INVESTMENT

It is envisaged that the binding nature of the norms of international law vis-à-vis domestic norms will be addressed as a matter of mandatory international Law. In the main, only the rules which are the result of the consensus of the member states can really be regarded as binding. On the other hand, international rules that come from outside the will of states, as subjects of international law, seem not to have binding force. However, the place of these rules in foreign investment is well known. They are not, in absolute terms, devoid of any binding force. It is then important to deal successively with the binding force of conventional international law **(1)** and the binding force of non-conventional international law **(2)**.

THE BINDING FORCE OF INTERNATIONAL TREATY LAW IN THE DOMESTIC LEGAL ORDER

Article 26 of the Vienna convention on the law of Treaties of 23 May 1969 provides that " every treaty in force shall be binding on the parties ". The latter must abide by it without the interference of their internal rights. The requirement of compliance with commitments does not, however, imply that one is bound indefinitely by his commitment. Every party to a convention always has the possibility either to withdraw or to make changes to its commitment. They may not derogate from it unless, in particular, reservations have been made. A state may, at the time of signature, ratification, acceptance, approval or accession, make reservations.

However, a reservation was not admissible when it was prohibited by the treaty; or when the treaty provided that only specified reservations, which did not include the reservation in question, could be made. Article 26 of the Vienna Convention on the law of Treaties states that any treaty in force must be performed in good faith by the parties.

Article 27 of the Vienna convention on the law of Treaties states that " a party may not invoke the provisions of its internal law as justification for non-performance of a treaty ". Article 23 of the same convention stipulates that the term treaty refers to an agreement concluded in writing between States and governed by international law, whether embodied in a single instrument or in two or more related instruments.

The International Court of justice, in one case, stated that "under international law ... national laws are mere facts[xli]".

When a judge or arbitrator is called upon to interpret a convention, he or she should avoid relying on domestic law. Article 7 § 1 of the Vienna convention on the international sale of goods states that " in the interpretation of this convention, account shall be taken of its international character and of the need to promote uniformity in its application and to ensure respect for good faith in international trade". The judge is thus invited to dissociate himself from his national conceptions and not to equate the treaty provisions with the corresponding provisions of domestic law.

According to Article 34 of the Vienna Convention, " a treaty does not create obligations or rights for a third state without its consent ". It should be noted that, in general, a third State is a state that has not yet completed the formalities necessary to become a party to the treaty, whether it has not participated in or participated in the conference that prepared the text, but has not completed the formalities necessary to be bound by it[xlii]. This means that a State cannot be bound by an agreement concluded between other States[xliii]. This principle has been enshrined in international case law on several occasions[xliv].

However, through the most-favoured-nation clause, a state may undertake to confer on another state the higher advantages which it has already granted or will grant to states parties to other conventions. For it to be able to operate the clause will have to be based on the simultaneous existence of two treaties: the one containing the clause and the one triggering its application by stipulating more favourable conditions. The duration of the practical effects of

the clause is linked to the duration of the existence of the more favourable treaty. The advantage shall cease to exist for the state benefiting from the clause when the more favourable treaty ceases to exist. In the case of American nationals in Morocco decided by the ICJ judgement of 27 August 1952, the judges followed this approach. In the view of the International Court of justice, since the treaty giving the advantage had disappeared, the clause was not sufficient to create a right that would be independent of the existence of the latter.

The mechanism of stipulation for others may also allow a state to benefit from an international convention to which it is not originally a party[xlv]. This is the situation in which a treaty clause sets out a promise the beneficiary of which is a third State[xlvi]. This mechanism was enshrined in Articles 36 and 37 of the Vienna convention. Article 36 of the convention stipulates that a right arises for a third State from a provision of a treaty if the parties to that treaty intend, by that provision, to confer that right either on the third state or on a group of states to which it belongs, or on all states, and if the third State consents. Consent shall be presumed as long as there is no indication to the contrary, unless the treaty provides otherwise. Accordingly, a state exercising a right under Paragraph 1 of this article shall, in exercising that right, respect the conditions provided for in the treaty or established in accordance with its provisions. This text subordinates the effect of the stipulation for others to the acceptance of the beneficiary, but admits the possibility of presumed consent.

As far as article 37 of the Vienna convention is concerned, it follows that this right cannot be revoked or modified by the parties if it is established that it was intended not to be revocable or modifiable without the consent of the third State[xlvii]. The CPJI, in its judgement of 16 June 1932[xlviii], explained that: "it cannot easily be assumed that advantageous stipulations to a third State have been adopted in order to create in its favour a real right. However, there is nothing to prevent the will of sovereign states from having this object and effect. The existence of a right acquired by virtue of an act passed by other states is therefore a question of fact ; it is a question of ascertaining whether the States which have stipulated in favour of another state have intended to create for it a genuine right which the latter has accepted as such[xlix]".

THE BINDING FORCE OF NON-CONVENTIONAL INTERNATIONAL LAW IN THE DOMESTIC LEGAL ORDER

On the basis of the voluntarist theory[1] of the binding force of international law, it is clear that any norm to which the state has not given its consent cannot be binding in terms of the domestic order. In other words, only acts in which the state has expressed its wish to be legally bound are legally binding. This theory is reinforced by the theory of self-limitation, according to which the state can only be bound by the law if it consents to do so. If he accepts the law in the domestic order, then he is bound by what he has accepted. It may also limit itself in its relations with other states. This could very quickly lead to the conclusion that, apart from international treaties, no other norm is binding in the domestic order. Moreover, the Cameroonian constitution only mentions the priority place of international agreements and treaties in the domestic order.

Could it be concluded that non-treaty international law has no legal force in the domestic legal order with respect to foreign private investment? An affirmative answer would be very hasty insofar as no one can absolutely challenge the implication of this right in the domestic order in the matter of foreign private investment. Legal relationships arising in the field of international investment do not involve only treaty norms of international law. There are many legal rules governing foreign private investment which do not result from the will of states, but which are undoubtedly recognized as binding in domestic law. This can be demonstrated from two angles.

In the first case, the will of the state persists but does not create the unconventional international norm. It simply makes it possible to provide the latter with the mandatory force either lacking or limited. It is precisely the situation of the recommendations of international organizations, which are generally recognized, that they are negatively defined by their absence of binding force. In fact, by adopting a recommendation, the international organization addresses itself to a third party, in particular the state, with a view to requesting it, more or less urgently, to act in accordance with a course of Conduct which it defines with often very relative precision.

In the second case, the will of the state is not necessary for the non-conventional international norm to be given binding force in the domestic order. This is the case of general principles of international law or rules of jus cogens which do not need the consent of the state or their incorporation into the domestic legal order in order to be binding. Thus, in international trade relations, the principle pacta sunt servanda, considered as a fundamental principle of legal

certainty, requires that the international contract be protected from legal rules derived from state laws and producing its annihilation not justified by the protection of superior interests[li]. Also, the principle of the autonomy of Will gives the parties, in the domestic order, the possibility to adjust their international contract according to their will.

THE CONSEQUENCES OF THE AUTHORITY OF INTERNATIONAL LAW IN THE REGULATION OF FOREIGN PRIVATE INVESTMENT IN CAMEROON

In order effectively to assess the authority of international law over Cameroon's regulation of foreign private investment, it is important to draw the implications that flow from it. As a result, international law produces at least two domestic effects with respect to foreign private investment. This is, on the one hand, the direct effect of international law in the domestic order **(A)** and, on the other, its primacy over domestic law **(B)**.

THE DIRECT EFFECT OF INTERNATIONAL LAW IN THE REGULATION OF FOREIGN PRIVATE INVESTMENT IN CAMEROON

To address the direct effect of international law on Cameroon's regulation of foreign private investment, attention should be drawn both to the concept of the direct effect of international law in the domestic order **(1)** and to the content of international law with direct effect in the domestic order **(2)**.

THE CONCEPT OF DIRECT EFFECT OF INTERNATIONAL LAW IN THE DOMESTIC ORDER

Direct effect refers to the ability of an international norm "to create rights or obligations directly for individuals, either in their reciprocal relations (in which case horizontal direct effect) or in their relations with member states (in which case vertical direct effect)". In this

sense, the direct effect of an international norm cannot be confused with the justiciability of an international norm. The latter is a broad concept than that of direct effect. Invocability refers to the possibility for an individual to be able to refer to a rule without being applied on a personal basis.

The direct effect of international law would thus refer to its direct applicability in the domestic order. In the concept of "direct applicability", "direct" means that the international rule can be applied even though the national authorities have not adopted any particular implementing measure. "Enforcement measure" means legislative, regulatory or administrative action intended to give practical effect to the international rule and not action the sole purpose of which is to "introduce" it into the internal order of the authority seized, in accordance with the specific requirements of its constitutional law[lii]. This involvement of national law makes it possible to see the distinction between the immediate applicability of Community Law and the direct applicability of classical international law. The explanation comes from the fact that: "in the latter law, the penetration of external rules into the internal legal order is more or less simplified depending on whether the state adheres to the monist or the dualist conception of the relations between internal law and international law. On the other hand, the relationship between community law and national law is based on the monistic conception, which allows community law, without the intervention of the domestic legal order, to penetrate directly the legal order of the member states ".

Moreover, in order for the concept of direct effect to operate, the international standard would have to have a " self-sufficient "character. The self-sufficient character designates an autonomous applicability of the international rule, characteristic of its own normative capacity. It would not be self-sufficient for an international rule to require a normative complement of international law in order for the prescribed rule to be binding[liii].

THE CONTENT OF INTERNATIONAL LAW WITH DIRECT EFFECT IN THE DOMESTIC LEGAL ORDER

International law as a whole does not enjoy direct effect in the domestic legal order. It appears that only international norms with undisputed binding force have direct effect in

domestic law. This is the case with international conventions that have been ratified and regularly incorporated into domestic law. The CPJI agrees with this view when it states that : "it cannot be disputed that the very object of an international agreement, for the purposes of the contracting parties, may be the adoption by the parties of specific rules, creating rights and obligations for individuals, and capable of being applied by the national courts[liv]". Reference may also be made to the general principles of international law, which are a priority in international economic relations.

THE PRIMACY OF INTERNATIONAL LAW IN THE REGULATION OF FOREIGN PRIVATE INVESTMENT IN CAMEROON

To say that international law takes precedence over domestic law on foreign private investment is to demonstrate that in the vertical relationship between these two legal systems, the latter is subordinate to the former. Thus, after addressing the foundations of the primacy of international law over domestic law **(1)**, the scope of the primacy of international law over domestic law in the area of Foreign Private Investment **(2)** will be addressed.

THE FOUNDATIONS OF THE PRIMACY OF INTERNATIONAL LAW IN THE DOMESTIC ORDER

Among the international stipulations emphasizing the primacy of international law over domestic law was the Vienna convention on the law of treaties, which stated in article 27 that " a party may not invoke the provisions of its domestic law as justification for non-performance of a treaty ". While this provision of the Vienna convention prima facie emphasizes the binding force of international conventions, it also lays the foundations for the primacy of international law over domestic law. A careful reading of article 27 makes it clear that national law cannot justify the non-execution of a treaty. In other words, because the treaty is superior to national law, it cannot be dependent on it.

International jurisprudence has repeatedly affirmed the superiority of international law over domestic law. For example, the International Court of justice has stated in one case that "under international law ... national laws are mere facts[lv]".

Article 45 of the Cameroonian constitution provides that: "international treaties and agreements duly ratified or approved have, from the time of their publication, an authority superior to that of the law, subject for each agreement or treaty to its application by the other party". By thus affirming the primacy of international law over rules of domestic law, the 1996 constitution clearly indicates the place of international conventions in the hierarchy of norms and organizes, more or less precisely, the conditions required for their integration into the domestic order. This constitutional principle of the superiority of standards of external origin confirms a position taken by Cameroonian administrative jurisprudence, from which it follows that: "considering that international conventions are sources of domestic law, that their violation may be invoked in support of an appeal to the Administrative Court"[lvi].

The moderate nature of Cameroon's monism is due to the fact that the law of external origin explicitly mobilized by the Constitution is limited to international treaties and agreements. This situation, which is not unique, may lead one to believe that it is a question of "...a refusal to recognize international law in its entirety"[lvii], or to the conclusion that "...the African constituents have not determined the status of the formal sources of the law of nations, in the same way as custom and the general principles of law"[lviii]. This blind spot in Cameroonian "international constitutional law", which could be filled by an offensive Office of the judges, could be due to the fact that "unwritten international law is the subject of a small number of constitutional methods of integration, by its very nature"[lix].

THE SCOPE OF THE PRIMACY OF INTERNATIONAL LAW IN THE DOMESTIC ORDER

International law has a diminished primacy over domestic law compared with that of Community Law, which is rather strengthened. The explanation comes from the fact that international law "lays down its primacy in the international sphere but does not include any requirement as to its primacy in the domestic sphere"[lx]. Without any further clarification of

domestic law, international law merely affirms its primacy over domestic law. The primacy of community law is imposed on national law, which can neither modify nor contradict it. The closest illustration of the Cameroonian legal system is that of OHADA law, in the sense that this law not only affirms its primacy over domestic law, but also imposes it. In OHADA, "most of the uniform acts contain so-called abrogation provisions which specifically provide for the abrogation of conflicting or identical national laws and prohibit, for the future, the adoption of legislation identical or contrary to their stipulations". It is in this sense that article 10 of the treaty establishing OHADA States: "uniform acts shall be directly applicable and binding in the states parties, notwithstanding any previous and subsequent provisions of domestic law ".

Thus, the attenuated primacy of international law over domestic law implies that, in the event of incompatibility or conflict between a domestic norm and an international norm, the international judge or arbitrator shall declare the former to be unenforceable at the international level without annulling it[lxi]. The conformity of the Cameroonian rules with each other answers a question of validity. However, the question of the conformity of the internal act with the international system was a question of lawfulness[lxii]. It follows that a law which is not in conformity with the treaty constitutes an unlawful act in the international legal order, but is by no means void in the domestic legal order[lxiii]. International law then admits the existence, at the domestic level, of norms that are contrary or incompatible with it.

CONCLUSION

In short, international law does not rank second in the Cameroonian legal order in the area of foreign private investment. An in-depth analysis of Cameroon's foreign investment regulations reveals the fundamental place of international law in the domestic order. Through its authority, international law significantly shapes the content of domestic law and determines its application. The long-established autonomy of domestic law thus becomes relativized. The binding force of domestic law in the domestic order further reinforces this position. This binding force can be seen in particular through investment treaties and the non-conventional rules of international law. Consequently, international law has a certain primacy over Cameroon's regulation of foreign private investment, which really highlights its direct effect, although it is weaker than that of Community Law. In any case, the final observation is that

Cameroon's regulation of foreign private investment is governed by international law. Although domestic law continues to regulate a large part of foreign private investment issues because of the indefeasible sovereignty of the host state, it should be noted that international law does not intend to exclude itself since "the current evolution of international relations and the technique of treaties clearly demonstrate that there is no longer an area in which international law can no longer enter : what is still reserved to domestic law is reserved only provisionally"[lxiv] .

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[vi] *id*., at 28-36.
[vii] *id*., at 28 et s.
[viii] OSMAN (F.), *Vers une lex mediterranea des investissements*, Paris, Bruylant, 1re éd, 2016, p. 30.
[ix] *Ibid*., p. 36.
[x] AUDIT (M.) « La jurisprudence arbitrale comme source du droit international des investissements », *in* LEBEN (Ch.) (dir.), *Droit international des investissements et de l'arbitrage transnational*, Paris, Pedone, 2015, pp. 122 et s.
[xi] L'expression « intérêt du commerce international » provient de la jurisprudence Matter. Il faut par ailleurs noter que l'extranéité et l'internationalité ne se confondent pas nécessairement dans le langage du droit des investissements. Les définitions de l'internationalité mettent habituellement l'accent sur l'objectif de l'investisseur d'acquérir un intérêt dans une entité résidant dans une économie autre que celle de son pays d'origine. Assurément, il s'agit d'un investissement international ; mais cet investissement n'est pas alors forcément étranger par rapport à l'Etat de territorialité étant donné que l'investissement peut être réalisé par un national résidant à l'étranger en direction de son pays.
[xii] *id*., pp. 375 et s.
[xiii] LEVOA AWONA (S.P.), « L'exigence de proportionnalité dans le droit camerounais de l'expulsion des étrangers », RRJ, 2017-4, p. 1570.
[xiv] ARNAUD DE NANTEUIL, *Droit international de l'investissement*, *op*. *cit*., p. 60.
[xv] *id*., pp. 62 et s.
[xvi] CNUCED, *Définition de règles internationales en matière d'investissement,* Études de la CNUCED sur les politiques d'investissement international au service du développement, New York et Genève, Nations Unies, 2008, pp. 12 et s.
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[xix] *Idem*.
[xx] *L.G. & E .c. Argentine*, Affaire CIRDI n° ARB/02/1, sentence du 3 octobre 2006.
[xxi] *Id*., § 131

[xxii] *Asian Agricultural Products Ltd (AAPL) c. République du Sri Lanka*, sentence du 27 juin 1990, *ILM*, 1990, p. 580 ; *JDI*, 1992, pp. 216-232, obs. E. Gaillard.
[xxiii] CIRDI dans l'affaire American Manufacturing & Trading Inc. C. République du Zaïre
[xxiv] WEIL (P.), Droit international et Contrats d'Etat. Mélanges Reutes, *op. cit*, note 12, p. 559 et s.
[xxv] *id*. In this sense, the concept of Grundlegung would contain "both the Pacta and the rules of dispatching" allowing the parties to choose the rules that should govern the contract materially. The author acknowledges the possibility for the parties to choose " a combination of rules of domestic law, rules of international law and general principles of law".
[xxvi] LEBEN (Ch.), « Retour sur la notion de contrat d'Etat et sur le droit applicable à celui-ci ». *Op. cit*., pp. 250 et s.
[xxvii] *Ibidem*.
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[xxx] *Ibidem*.
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[xxxiii] *id*.
[xxxiv] *id*.
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[xxxvii] BERLIN (D.), « les contrats d'Etats et la protection des investissements internationaux », D.P.C.I. 1987, tome 13, n° 2, pp. 232-233.
[xxxviii] See, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No ARB/84/4, Interim Order No 1 on Guinea's Application for Stay of Enforcement of the Award, 12 August 1988; Decision on Annulment of 22 December 1989.
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[xli] See, Certain German interests in Polish Upper Silesia, Germany v Poland, Merits, Judgment, (1926) PCIJ Series A no 7, ICGJ 241 (PCIJ 1926), 25th May 1926, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ], https://opil.ouplaw.com/view/10.1093/law:icgj/241pcij26.case.1/law-icgj-241pcij26
[xlii] CHEMILLIER-GENDREAU (M.), « L'Etat de droit au carrefour des droits nationaux et du droit international », *op. cit*., p. 93.
[xliii] Pellet (A.), « Histoire du droit international : Irréductible souveraineté ? », *op. cit*., p. 12.
[xliv] In the judgment of the PCIJ of 25 May 1926 in the case of the German interests in Upper Silesia, it is clear that a treaty is granted only between the States which are parties to it. See, http://www.worldcourts.com/pcij/eng/decisions/1926.05.25_silesia.htm. This is also the case in the PCIJ judgment of 7 June 1932 in the free zones of upper Savoy and District of Gex case, France v. Switzerland. http://www.worldcourts.com/pcij/eng/decisions/1932.06.07_savoy_gex.htm. The arbitral award of Max Huber of 4 April 1928 in the Palmes island case states that it also seems clear that the treaties concluded by Spain with the third powers, which recognized its sovereignty over the Philippines, could not bind the Netherlands. https://legal.un.org/riaa/cases/vol_II/829-871.pdf
[xlv] TAXIL (B.), « Méthodes d'intégration du droit international en droits internes », *op. cit.*, pp. 113-115.
[xlvi] *id*., at 11.
[xlvii] LAGHMANI (S.), « Suprématie de la Constitution et transfert de souveraineté », *op. cit*., p. 125.
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[xlix] Pellet (A.), "The Case law of the ICJ in Investment Arbitration", *op. cit.*, at 224.
[l] The basic idea of voluntarist theories is that the rule of law has its origin in the expression of a Will: the will of the State.

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[liv] See, jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J. (ser. B) N°. 15 (Mar.3)
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