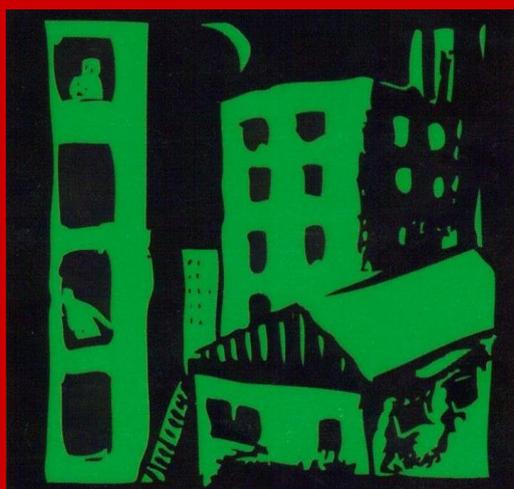


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Book Review

T Kondo (Ed)

Law and Investment in Africa: The Governance of Foreign Direct Investment In Zimbabwe

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1 INTRODUCTION

Tinashe Kondo's book, *Law and investment in Africa*, narrates the efforts of a country to regain the trust [and the love] of foreign investors after several decades of argument and hostility. Encapsulated in the "Zimbabwe is open for business" slogan, these efforts show "how a country can move to regain

¹ I thank Professor Radley Henrico for inviting me to write this book review and for spurring me on while I was drafting the review. Errors and shortcomings in this review are mine, and mine alone.

credibility and commit to global rules despite its recent history”.² This review of Kondo’s book concerns the manner in which readers can take advantage of this immensely useful publication. Particularly, this review looks into the book in order to advise law academics on possible strategies to integrate the book into their curricula in Zimbabwe and elsewhere on the continent.

Generally speaking, *Law and investment in Africa* invests more in analysis than in criticism. The author offers a “commentary and analysis” of the strengths, weaknesses and legitimacy of investment laws in Zimbabwe,³ an analysis that unearths a treasure trove of keen insights. On the other hand, the absence of theories explaining the realities, if not the inequities, of international investment means that the book unknowingly reproduces the Eurocentric and neoliberal ideas that pervade laws governing foreign direct investments (FDIs). For instance, though he acknowledges the disagreements over the origins of international investment law,⁴ the author nonetheless starts the history of that law with Phoenicia (ie present-day Lebanon)⁵ in 1550 BC.⁶ He continues his historical background with the Roman Empire and Euro-American laws and practices,⁷ except for a section on the Calvo doctrine.⁸

The author does not confront the Eurocentric assumptions that place the early evidence of international law and foreign investment law in Western Europe. In a fashion that typifies Eurocentrism,⁹ the author does not mention the colonial origins of, or the role of colonialism in, the development of foreign investment law.¹⁰ Actually, as Miles found out, international investment law has, from its origins, evolved through colonialism.¹¹ Nonetheless, *Law and investment in Africa* constitutes a dramatic initiative to overcome the dearth of scholarship on FDI law in Africa, Southern Africa,

² Kondo T *Law and investment in Africa: the governance of foreign direct investment in Zimbabwe* Stellenbosch : African Sun Media (2021).

³ See Kondo (2021) at 251.

⁴ Kondo (2021) at 15-16 & 69-70.

⁵ Phoenicia mostly comprised present-day Lebanon ; its territory also encompassed parts of modern Syria and Israel.

⁶ Kondo (2021) at 16.

⁷ Kondo (2021) at 17-38.

⁸ Kondo (2021) 22-24.

⁹ Connell R *Southern theory: the global dynamics of knowledge in social science* Abingdon : Routledge (2007) at 65 (explaining that globalization theory tends to “erase” colonialism from social sciences and to deny the relevance of colonialism to the present).

¹⁰ See Kidane W “Contemporary international investment law trends and Africa’s dilemmas in the Draft Pan-African Investment Code” (2018) 50 *George Washington International Law Review* 523 at 526 (stating that international investment law was not made by Africans, but it was made for Africa in efforts to replace colonial rules for the protection of capital).

¹¹ Miles K *The origins of international investment law: empire, environment, and the safeguarding of capital* Cambridge : Cambridge University Press (2013) at 32.

and especially Zimbabwe. This book plugs a gaping hole in existing scholarship by adding to the scant literature on FDI law in Zimbabwe.¹² Chitsove¹³ and Chidede¹⁴ count among the handful of scholars who have immersed themselves in this subject. Still, Kondo's book stands out as the first law book to address foreign investment law in Zimbabwe in the post-Mugabe era.

This book will prove singularly useful to four constituencies in Zimbabwe, Africa, and beyond: (1) universities (ie students and lecturers), (2) practitioners (for example, attorneys, judges, law enforcement agents, and advisors), (3) government (ie senior officers and policymakers); and (4) scholars (jurists and postgraduate researchers). This book review clarifies for these audience members the ways in which they can make the most of this academic gem.

The scope of the book extends beyond the borders of Zimbabwe. Insofar as it speaks to regional legal instruments that bind or guide African countries, or the economic communities to which the Southern African region belongs, this book deals more broadly with FDI law in Africa. *Law and investment in Africa* also reflects Africa by embodying "the paradox of plenty". Indeed, one of the most intriguing aspects of the book is that it seems paradoxical. How can a country seen as the poster child of hyperinflation manage to attract foreign investments? It is a country with ineffable resource wealth, yet which presents capital owners with high political risks? A country

¹² Kuvuya ME *Foreign investment and the curse of property rights in Zimbabwe* (unpublished LLM mini-dissertation, University of Pretoria, 2019); Chitsove E "Indigenisation laws and bilateral investment treaties in Zimbabwe" (2017) 24 *University of Botswana Law Journal* 70; Chidede T *Legal protection of foreign direct investment: a critical assessment with focus on South Africa and Zimbabwe* Hamburg : Anchor Academic Publishing (2016); Mapaure C "*Chinese investments in Zimbabwe and Namibia: a comparative legal analysis*" Centre for Chinese Studies, Stellenbosch University (2014); Murombo T "Regulating Mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation" (2013) 9 *Law, Environment and Development Journal* 31; Games D "Multinationals and foreign investment in Zimbabwe: a development and human rights perspective" in Besada H (ed) *Zimbabwe. Picking up the pieces* New York : Palgrave Macmillan (2011) 203; Phiri L "The issue of discrimination in international investment law: The case of *Mike Campbell and Others v the Republic of Zimbabwe Revisited*" (2011) 42 *Zambia Law Journal* 197; Zongwe D "The contribution of Campbell v Zimbabwe to the foreign investment law on expropriations" (2009) CLPE Research Paper 50/2009 available at <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1158&context=clpe> (accessed 7 August 2021); Gwenhamo F "Foreign direct investment in Zimbabwe: The role of institutional factors" (2009) University of Cape Town, Working Paper No 144 available at https://econrsa.org/system/files/publications/working_papers/wp144.pdf (accessed 9 August 2021); Richardson CJ "The loss of property rights and the collapse of Zimbabwe" (2005) 25 *Cato Journal* 541; Ubezonu C "Foreign investment in Zimbabwe" (1995) 23 *International Business Law* 126; Allen T "The law relating to private foreign investment in manufacturing in Botswana, Zambia and Zimbabwe" (1992) 4 *African Journal of International and Comparative Law* 44; Back JHP "Legal aspects of doing business in Zimbabwe" (1982) 22 *Zimbabwe Law Journal* 162.

¹³ See generally Chitsove (2017).

¹⁴ See Chidede (2016).

that boasted Africa's fastest growing economy in 1997,¹⁵ yet that posted the world's "fastest shrinking economy outside a war zone" a decade later.¹⁶

I will first sketch the book's contents. Then, I will underscore the usefulness of the book. Lastly, I will depict the place of *Law and investment in Africa* inside the law curriculum and recommend further readings that can complement the invaluable information enshrined in the book, highlighting the aspects of FDI law that the author has not focused on. In essence, the author desires to help Zimbabwe tell the world a compelling story. For Kondo, the story told by the government of President Emmerson Mnangagwa sends mixed signals and sounds insincere and Janus-faced. In the author's own words:¹⁷

"Such is Zimbabwe's case with foreign investment: A tale of two stories. Positive strides to secure investment are often undone by political decisions which cloud earlier positive steps."

2 A PEEK INSIDE LAW AND INVESTMENT IN AFRICA

The substance of *Law and investment in Africa* divides into four parts, the bulk of which appears analytical in character. "Analysis" drives the book. The author writes that, through his book, he seeks to analyse the governance of the FDI regime in Zimbabwe and to "critically analyse" the country's bilateral investment treaties (BITs).¹⁸ After he deplores the two-story tale that the Zimbabwean government peddles, the author describes, in the second section of his book, the history of international FDI. The author examines the concept of "FDI", traces the origins of the rules and core principles governing FDIs, and outlines the current framework for foreign investments.

In the third act, the author offers "a detailed analysis with commentary" of the changes brought about by President Mnangagwa¹⁹ following Mugabe's "fall from grace".²⁰ To do so, the author provides context by explaining how Zimbabwe's investment laws evolved;²¹ he unpacks the existing policies and laws; and he compares Zimbabwe's FDI legal framework with that of its neighbour, South Africa. This exercise will edify scholars, jurists, and comparatists as the author identifies commonalities and dissimilarities between the investment laws of Zimbabwe and South Africa, a

¹⁵ Power S "How to Kill a Country" (2003) *Atlantic Monthly* available at <https://www.theatlantic.com/magazine/archive/2003/12/how-to-kill-a-country/302845/> (accessed 9 August 2021).

¹⁶ See Games (2011) at 203.

¹⁷ See Kondo (2021) at 6.

¹⁸ See Kondo (2021) at 7.

¹⁹ See Kondo (2021) at 70.

²⁰ See Kondo (2021) at 69.

²¹ See Kondo (2021) at 70-95 & 104-111.

jurisdiction with the same Roman-Dutch common law tradition. Importantly, this analytical exercise allows the author to identify cracks in Zimbabwe's legal armory and to suggest avenues for filling those gaps. Conversely, it assisted the author in spotting flaws in South Africa's Protection of Investment Act 22 of 2015.

The fourth chapter of the book broaches the question of BITs. The author sets the scene by remarking that, since 12 September 1990, Zimbabwe has signed 54 BITs but ratified only 10 of them.²² He attributes this low number of ratifications to the land reform programme:²³

"Here, the argument is that BITs had hampered the government's efforts to redistribute land to the masses in the early 2000s as they gave farm owners whose countries had BITs with Zimbabwe, protection against expropriation."

The author demonstrates that, though the provisions in Zimbabwe's BITs largely conform to customary international law and the Zimbabwean Constitution, they do not align with best practices.²⁴ This aspect of the book dovetails with the author's comparison of Zimbabwe and South Africa with respect to their FDI legal frameworks. International trade lawyers and investment experts will likely prefer chapter 5, where the author considers foreign investments in the context of regional economic integration. While focusing on Zimbabwe, the author nonetheless throws light on foreign investments in the context of the Southern African Development Community (SADC) Model BIT and the freshly-adopted African Continental Free Trade Area (AfCFTA) Agreement.²⁵ The author concludes that Zimbabwe has incorporated in its domestic investment law regime the majority of its obligations under regional agreements, such as, those of the African Union, the Common Market for Eastern and Southern Africa (COMESA), and the SADC.²⁶

The author spotlights the AfCFTA Agreement's pending Protocol on Investment (Protocol). He points out that the Protocol will benefit its Member States because it aims to harmonise the spaghetti bowl of disparate and conflicting BITs and instruments in the continent's sub-regional economic communities.²⁷ As for investors, they stand to gain from the Protocol because it will enable them to achieve economies of scale and overcome market fragmentation.²⁸ The author imagines how Member States could shape the Protocol and how the Protocol may affect investment laws in Zimbabwe.²⁹

²² Kondo (2021) at 155.

²³ Kondo (2021) at 156.

²⁴ Kondo (2021) at 203.

²⁵ See Kondo (2021) at 205-249.

²⁶ Kondo (2021) at 249.

²⁷ Kondo (2021) at 210.

²⁸ Kondo (2021) at 210.

²⁹ Kondo (2021) at 209-214.

This discussion will appeal to other African countries as they are all learning to handle, internalise, invoke and implement the AfCFTA Agreement.

In the book's closing paragraphs, the author puts forward investment policy proposals to resolve Zimbabwe's teething problems. These proposals include complying with Zimbabwe's competing regional obligations; and updating the Investment Guidelines to address new challenges, mainly problems in adhering to investment laws and policies.³⁰ Crucially, the author argues that Zimbabwe must balance the rights and duties of investors and host States.³¹

3 WHY THE INVESTMENT LAWYER NEEDS THIS BOOK ON HER SHELF

Practitioners (for instance, investment lawyers, attorneys, judges, and law enforcers) will reap the richest rewards from reading *Law and investment in Africa*, not least thanks to that book's methodology, which suits practitioners perfectly. In terms of methodology, the author has embraced the traditional route, sometimes referred to as "black letter" law or doctrinal legal research. This methodology relies on doctrines and constructs arguments based on authoritative sources, such as, a constitution, Acts of Parliament or legislation, court judgments, or the writings of established lawyers.

For many jurists, if not most of them, doctrinalism is precisely what makes research "legal".³² Hutchison maintains that, even when scholars choose a methodology other than doctrinalism, for example, empirical legal research, doctrinalism nonetheless remains the starting point for their non-doctrinal research.³³ Doctrinal methods deliver, as *Law and investment in Africa* illustrates, a number of advantages for the readers of this type of research. Among others, the book portrays post-Mugabe Zimbabwean investment law practically, accurately, logically and holistically.

3.1 Practicality, certainty, logic and breadth

First and foremost, the methodology employed by the author has the advantage of practicality. For one, students will know quickly which laws, rules, principles, and norms constitute Zimbabwe's FDI legal framework. Similarly, lecturers can utilise *Law and investment in Africa* as a quick and basic reference – a practicality that the author has augmented with the clear and limpid style that he displays.

³⁰ Kondo (2021) at 256.

³¹ Kondo (2021) at 157.

³² See Hutchinson T "Doctrinal research: researching the jury" in Watkins D & Burton M (eds) *Research Methods in Law* 2nd ed Abingdon : Routledge (2018) at 8 (observing that many lawyers consider that the doctrinal methodology best describes the "distinctly legal approach to research").

³³ See Hutchinson (2018) at 38.

Related to the foregoing virtues, the book's methodology helps readers ascertain what the law *is*, as opposed to what people wish it would be. This sort of certainty proves extremely crucial if those who participate in running the legal system wish to ever attain the goals of the rule of law. Furthermore, this sort of clarity and legal certainty greatly contributes to making the investment climate investor-friendly as investors can reliably determine which laws apply to the capital they have invested or that they plan to plough into a country. As the author states:

*"Over the last two decades, laws and policies on investment in Zimbabwe have evolved. For many investors, it becomes a major challenge to understand what the current legal position is."*³⁴

The author stresses that his book responds to that challenge.³⁵ The book enriches readers' grasp of Zimbabwean investment law by the sheer logic and explanatory power of its text. Take the example of the indigenisation policy. The author deftly chronicles the history of that policy from its genesis in the 1980s to its present complexion.³⁶ These accounts of the whys and the wherefores of legal concepts, rules, principles and interpretations characterise the doctrinalists.³⁷

What it may have lost in depth (absence of theoretical framework) the book has compensated for by its breadth. The vast net of inquiry that the author casts on the broad area of FDI law in Zimbabwe will provide other scholars with stepping stones on which they could build more theoretical and more concept-driven research.

3.2 What caused Zimbabwe's degraded investment climate ?

Readers will discover the book's brightest jewel in the spotlight that it shines on the investment climate of Zimbabwe and the laws enacted to attract foreign investments. The author begins by quoting Bond's summary of the six main models advanced by scholars to explain which event in history triggered Zimbabwe's economic conundrum,³⁸ namely : (1) the land invasions that started in 2000; (2) the "Black Friday" that decimated the country's currency in 1997; (3) Zimbabwe's military intervention in the Democratic Republic of the Congo (DRC) to support the ruling government in that country earlier in 1997; (4) the stock market crash that followed the implementation of the structural adjustment program in 1991; (5) Robert Mugabe's

³⁴ Kondo (2021) at 251.

³⁵ Kondo (2021) at 251.

³⁶ Kondo (2021) at 101-104 & 113.

³⁷ See van Hoecke M "Legal doctrine: which method(s) for what kind of discipline?" in Van Hoecke M (ed) *Methodologies of legal research: which kind of method for what kind of discipline?* London : Hart (2011) at 7-9.

³⁸ Kondo (2021) at 3.

ascent to power in the 1980s; or (6) the downward slope in gross domestic product (GDP) per capita that began in 1974 and that, ever since, has never stopped.³⁹

Bond offers a seventh model,⁴⁰ though it also takes place in 1974 like the drop in GDP per capita.⁴¹ For Bond, Zimbabwe's economic crisis is mostly caused by "overaccumulation". He defines this phenomenon as occurring when excessive investment leads to a situation where producers can no longer market their goods profitably (leaving capital to pile up in sectoral bottlenecks and speculative outlets) or where they can no longer reinvest capital productively.⁴² When an economy reaches the overaccumulation stage, the government will struggle to marshal these resources profitably to satisfy what society needs.⁴³ Bond submits that the Zimbabwean economy entered this stage in the 1970s.

In contrast to Bond's Marxist thesis, Kondo situates the original sin in the late 1990s. The author insists that the complex interplay of four factors caused the crisis: first, the controversial land reform program; second, government overspending (for example, the intervention in the DRC); third, Mugabe's governance; and, fourth, economic sanctions by the United States of America (US) and the European Union (EU).⁴⁴ Notably, the author believes that the US-EU sanctions, coupled with the maladministration of the State, pushed the country off the cliff by leading Zimbabwe into a period of hyperinflation that peaked in 2008 when it posted the world's second-highest hyperinflation ever recorded in history.⁴⁵

3.3 Foreign investment laws in Zimbabwe

Readers will relish the information that the book imparts about foreign investment laws in Zimbabwe. As mentioned above, the existing literature on FDI law lacks such information. Moreover, as the author observes, the policy space in international investment law has shifted from international treaties and codes to domestic laws.⁴⁶ Herein lies the significance of the book under review. The author's exposé of Zimbabwe's new investment policy will captivate readers, investment lawyers, and researchers. Under the "Zimbabwe Is Open for Business" mantra, President Mnangagwa broke away from Mugabe's investment policies. Before Mnangagwa's "Zimbabwe Is

³⁹ Bond P "Competing explanations of Zimbabwe's long economic crisis" (2007) 8 *Safundi: The Journal of South African and American Studies* 149 at 149.

⁴⁰ Bond (2007) at 153-154.

⁴¹ Bond (2007) at 153.

⁴² Bond (2007) at 153 & 157-161.

⁴³ Bond (2007) at 154.

⁴⁴ Kondo (2021) at 4-5 & 6.

⁴⁵ Kondo (2021) at 4-5 & 6.

⁴⁶ Kondo (2021) at 10.

Open for Business” mantra, the Indigenisation and Economic Empowerment Act (Indigenisation Act or IEEA) served as the de facto investment policy.⁴⁷ The author also notes how regional instruments, such as, the SADC Protocol on Finance and Investment as well as the SADC Model BIT, have helped shape Zimbabwe’s new FDI regime.⁴⁸

3.3.1 *The Investment Guidelines (2018)*

Mangagwa set up a new framework for attracting FDIs. He began this new process by drafting and publishing on 18 January 2018 the Zimbabwe Investment Guidelines and Opportunities in Zimbabwe (Investment Guidelines).⁴⁹ These Guidelines generally aimed to signal the commitment of the Mnangagwa government to sound investment principles and international best practices, for example, non-discrimination (ie the national treatment rule and the most-favoured nation principle).

Through the Guidelines, the Zimbabwean government undertook to comply with its bilateral, regional and international obligations. Crucially, it pledged (1) to compensate the farmers expropriated during the land program, (2) to amend the Indigenisation Act, (3) to enact a new law to regulate foreign investments and streamline promotion efforts, (4) to establish special economic zones, and (5) to reduce bureaucracy involved in admitting and regulating investments.⁵⁰ The author notes that Mnangagwa’s government succeeded in implementing most of this new agenda,⁵¹ even though the government has not actually compensated the expropriated farmers because it does not have money to pay them, and thus hopes to settle this obligation through debt and foreign aid.⁵²

3.3.2 *The new investment law (2020)*

On 7 February 2020, Zimbabwe implemented a new investment law by publishing it in the Government Gazette. The Zimbabwean Parliament passed the Zimbabwe Investment and Development Agency Act [Chapter 14:34] (ZIDA Act) to achieve three objectives: to regulate investments in Zimbabwe; to establish the Zimbabwe Investment and Development Agency (ZIDA) and the One Stop Investment Services Centre (OSISC), and to repeal certain laws (namely, the Zimbabwe Authority Act [Chapter 14:30], the

⁴⁷ Kondo (2021) at 69.

⁴⁸ Kondo (2021) at 3.

⁴⁹ Kondo (2021) at 69.

⁵⁰ Investment Guidelines and Opportunities in Zimbabwe. See also Chidede T “Zimbabwean government issues investment guidelines” (2018) Tralac available at <https://www.tralac.org/blog/article/12625-zimbabwean-government-issues-investment-guidelines.html> (accessed 16 August 2021); and Kondo (2021) at 70 & 95-100.

⁵¹ Kondo (2021) at 70.

⁵² Kondo (2021) at 130.

Special Economic Zones Act [Chapter 14:34], and the Joint Ventures Act [Chapter 22:22]).⁵³

Though primarily aimed at establishing an investment promotion agency,⁵⁴ the ZIDA Act has practically become the foremost investment law in Zimbabwe. In addition to ZIDA, the Act provides for investor guarantees and non-discrimination, imposes a number of duties on investors, addresses investments in special economic zones (ECZs), and governs public private partnerships, and investment dispute settlement. Among the major domestic investment laws, the author of the book also mentions the Indigenisation Act, but the content of the ZIDA Act makes it undoubtedly the centerpiece of Zimbabwe's new investment architecture.

The author highlights that the ZIDA Act marks the first time that Zimbabwe introduced substantive provisions on investments.⁵⁵ The ZIDA Act also consolidated and streamlined the fragmented rules on foreign investment. In the past, these rules were scattered over three pieces of legislation: the Zimbabwe Authority Act, the Special Economic Zones Act and the Joint Ventures Act.⁵⁶ While his analysis of Zimbabwe's investment laws does not prominently feature the factors that attract or chase away foreign capital, the author does point out that two factors upset investors: the land reform program and the Indigenisation Act.⁵⁷

3.3.3 *Indigenisation Act (2008)*

President Mugabe signed into law the Indigenisation and Economic Empowerment Act [Chapter 14:33] on 17 April 2008. The law supplied the government's longstanding work on indigenisation with its first legal basis.⁵⁸ Initially, the Act obliged every public company and every business to cede at least 51 per cent of its shares.⁵⁹ This obligation to give 51 per cent ownership to indigenous Zimbabweans extended to all sectors of the economy and to all foreign investments.⁶⁰ In 2018, the government of President Mnangagwa amended the Indigenisation Act by dint of the Finance Act, section 42 of which restricted the 51 per cent indigenous ownership requirement to the diamond and platinum sectors.

⁵³ Long title of the ZIDA Act.

⁵⁴ Long title of the Zimbabwe Investment and Development Agency Act [Chapter 14:37] (2020).

⁵⁵ Kondo (2021) at 153.

⁵⁶ Kondo (2021) at 131 & 154.

⁵⁷ See Kondo (2021) at 69. Also, the author briefly shows that the Indigenisation Act adversely affected FDIs in Zimbabwe and quantifies this effect. See Kondo (2021) at 124-127.

⁵⁸ Kondo (2021) at 113.

⁵⁹ Section 3(1)(a) of the Indigenisation Act.

⁶⁰ Section 3(1)(e) of the Indigenisation Act.

3.3.4 *Parallels between Zimbabwe and South Africa*

Law and investment in Africa sparkles when the author draws parallels between the investment laws of Zimbabwe and South Africa systematically. Over two dozen pages, the author compares the ZIDA Act with South Africa's Protection of Investment Act (PIA). In assessing the ZIDA Act's conformity to international standards, the author compares the provisions of these two Acts on a slate of matters, such as, freedom of investment, non-discrimination, incentives, and expropriation.⁶¹ The book's passages on expropriation and the host State's right to regulate deserve particular attention.

That said, I found it strange that the author chose South Africa's investment law as a comparator. As the author himself realizes, South Africa's PIA is deeply flawed.⁶² South Africa's own business community believes that the PIA means that South Africa is closed for business. Actually, capital inflows to South Africa have been declining sharply after 2017, two years after the PIA came into force.⁶³ From these facts, South Africa's PIA emerges as the antithesis of an investment law. It is therefore a bit surprising that one would use the PIA as an example or a comparator.

4 HOW TO COMPLEMENT YOUR READING OF *LAW AND INVESTMENT IN AFRICA*

In the light of the above, where could *Law and investment in Africa* stand in the law curriculum? Universities and educators would ideally recommend this book in a module on international trade or foreign investment. They would pitch that module at NQF Level 9, which in South Africa connotes a module in a Master's degree programme. Given that, in their four-year LLB programmes, several universities in Southern Africa, for example, the University of Namibia and the University of Pretoria, teach International Law in the third year and International Economic Law in the final year of study, law faculties should place the foreign investment module in their LLM programmes. Alternatively, they could structure the module as a final year elective, pitched at the level of an honours degree module (NQF Level 8).

In such a postgraduate LLM module, law faculties and lecturers must deepen the information that the author of *Law and investment in Africa* has compiled, analysed, and criticised. Similarly, scholars and policy makers will have to complement this information with further readings. These readings must convey (more) critical

⁶¹ See Kondo (2021) at 132 (discussing the conformity provision of the ZIDA Act), 134 (discussing the freedom of investment provision of the Act), 136-137 (analysing the national treatment principle of the Act), 138 (the most-favoured nation principle of the Act), 139 (the employment of senior expatriate staff in terms of the Act), 141-142 (the fair and equitable treatment provision of the Act), 146-147 (the expropriation clause of the Act), 148 (the transparency provision of the Act), 149 (provisions on transfer of funds), 151 (provisions on incentives), and 152 (provisions on dispute settlement).

⁶² See Kondo (2021) at 132-152 & 154 (concluding that South Africa's PIA "has many gaps that need to be addressed").

⁶³ World Bank "Foreign direct investment, net (BoP, current US\$) – South Africa" (2021) available at <https://data.worldbank.org/indicator/BN.KLT.DINV.CD?locations=ZA> (accessed 18 August 2021).

perspectives, theories of foreign investment, and alternative methodologies. Approaching the book in this fashion would sit well with the ongoing crusade to decolonise the law curriculum, especially in South Africa.⁶⁴ Hence the imperative of (more) critical perspectives.

4.1 (More) critical perspectives

First of all, readers may wish to add a theoretical perspective to the author's exposé of Zimbabwe's FDI legal framework. The author has highlighted the positives of FDI, noting, for example, that foreign investment stimulates human and economic development, links economies, enables technology transfer, and builds capital and local productive capacity.⁶⁵ However, the author has not engaged with the theories that have challenged the premises of traditional investment law. Tirades against BITs exemplify the recent critical engagement with international investment law. For a long time a fixture of foreign investment law, BITs have over the decades become very controversial. On the one hand, many States still regard BITs as the most efficient mode of attracting FDIs.⁶⁶ An offspring of neoliberalism,⁶⁷ the BIT underpins traditional FDI law.⁶⁸

On the other hand, critics have pointed out the financial devastation that BITs have wrought on the finances of developing countries, as dramatically illustrated by the decision in *Occidental v Ecuador*. In that 2012 case, the Arbitral Tribunal awarded the staggering amount of 1,7 billion US dollars to the investor against the State of Ecuador.⁶⁹ At the time, this arbitral award represented the largest in the history of foreign investment law. In recent years, a growing number of scholars have revisited or criticised the history and present state of foreign investment laws. Linarelli et al observed that, at the roots of foreign investment protection, lies violence or coercion.⁷⁰ African States had little say and input in the development of the rules governing FDIs.⁷¹

⁶⁴ See Council on Higher Education *The State of the Provision of the Bachelor of Laws (LLB) Qualification in South Africa: Report on the National Review of LLB Programmes in South Africa* (2018) 54 (recognising the imperative to decolonise and Africanise higher education curricula).

⁶⁵ Kondo (2021) at 1-2 & 9.

⁶⁶ Johnson AR "Rethinking bilateral investment treaties in Sub-Saharan Africa" (2010) 59 *Emory Law Journal* 919 at 966.

⁶⁷ See Johnson (2010) at 966.

⁶⁸ Vandeveld KJ "Investment liberalization and economic development: the role of bilateral investment treaties" (1998) 36 *Columbia Journal of Transnational Law* 501 at 526.

⁶⁹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador* (II)(ICSID Case No ARB/06/11).

⁷⁰ Linarelli J, Salomon M & Sornarajah M *The misery of international law: confrontations with injustice in the global economy* Oxford : Oxford University Press (2018) at 154.

⁷¹ Lipson C *Standing guard: Protecting foreign capital in the nineteenth and twentieth centuries* Berkeley : University of California Press (1985) at 12.

Accordingly, campaigns to reform the traditional FDI regime usually try hard to strike a fairer balance between investor rights and host States' rights to regulate.⁷²

4.2 Theories of foreign investment

Readers can supplement the author's critical analysis with theory rich publications. Incidentally, criticisms levelled against international investment law have taken on the neoliberal economic philosophy that guides most of FDI law. According to Johnson, BITs have failed to produce their intended outcomes for developing countries precisely because they could not depart from their neoliberal bearings.⁷³ Provisions that embody neoliberalism curtail the ability of host States to regulate their societies and economies, and formulate policies aimed at fostering development.⁷⁴

The lack of theoretical perspectives does not count against the author of *Law and investment in Africa* because he never intended to theorise foreign investments in Zimbabwe or in developing countries. Rather, he sought to "critically analyse" foreign investments in Zimbabwe. Still, these perspectives will propel policymakers and jurists who strive to understand what drives foreign capital in and out of host countries. In fact, the author himself assumes that reviewing some of the provisions of Zimbabwe's BITs will "induce greater FDI flows"⁷⁵ but he does not proffer any theory of FDI determinants. Scholars and government belong to the group that would want insights informed by theories as these insights, like the voluminous literature on FDI determinants,⁷⁶ will put them in a better position to determine which policy or incentive attracts foreign capital and which one does not.

To leverage this book, readers must therefore complement it with publications heavy on theory. Their reading list should feature decoloniality, Third World Approaches to International Law (TWAIL),⁷⁷ and critical theory. With respect to

⁷² See Kidane (2018) at 579.

⁷³ See Johnson (2010) at 966.

⁷⁴ See Johnson (2010) at 966.

⁷⁵ Kondo (2021) at 157.

⁷⁶ See for example Jaiblai P & Shenai V "The determinants of FDI in Sub-Saharan economies: A study of data from 1990–2017" (2019) 7 *International Journal of Financial Studies* 43; Assunção S, Forte R & Teixeira AAC, "Location determinants of FDI: A literature review" (2011) FEP Working Paper No 422 available at <https://repositorio.inesctec.pt/bitstream/123456789/2412/1/PS-07575.pdf> (accessed 18 August 2021); BA Blonigen "A review of the empirical literature on FDI determinants" (2005) National Bureau of Economic Research Working Paper No 11299 available at https://www.nber.org/system/files/working_papers/w11299/w11299.pdf (accessed 18 August 2021); Faeth I "Determinants of foreign direct investment – a tale of nine theoretical models" (2009) 23 *Journal of Economic Surveys* 165.

⁷⁷ See for example Anghie A, *Imperialism, sovereignty and the making of international law* Cambridge : Cambridge University Press (2004) and Gathii J "TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography" (2011) 3 *Trade Law and Development* 26.

decoloniality, the author's treatment of the Indigenisation Act suggests that the decolonial theory or the mass empowerment ideals that inspired have failed to yield the desired outcomes. This awareness could spark illuminating research projects on effective strategies to lure foreign capital. Another type of philosophical approach readers could add to their reading of the author's book is those relating to sustainable investment. Mbengue and Schacherer see in the theory of sustainable development an opportunity for African countries to innovate.⁷⁸

4.3 Alternative methodologies

Readers may also consider supplementing their reading of this book by consulting publications that have approached the question of FDI law in Africa from methodologies other than doctrinal legal research. They could probe that question by leaning on methods from political economy, such as, the "resource curse" theory, Marxism (like Bond mentioned above), dependency theories, or theories based on the development State. After all, the doctrinal method arose from a Eurocentric past. From the Renaissance to the Enlightenment to the ongoing neoliberal globalisation, Eurocentrism has over the centuries disqualified non-European knowledge and the customary laws.⁷⁹ In that process, modern science and modern law catalysed the extraordinary rise of modernity/coloniality.⁸⁰

4.4 Deeper excavations of foreign investments in Zimbabwe

Though the author himself believes that it would interest people to know how the domestic and regional FDI laws will influence the way Zimbabwe approaches foreign investment,⁸¹ he does not systematically dig deeper to discover – let alone evaluate – the effects of those laws.⁸² On the one hand, it seems overhasty to engage in such an exercise since the Zimbabwean government passed some of these laws (for example, the ZIDA Act) recently. For one thing, COVID-19 has already shaken the pre-pandemic investment paradigm. Given that the Zimbabwean government implemented the ZIDA Act exactly six weeks before the country reported its first case of COVID-19 infection in 2020,⁸³ this pandemic may have rendered the ZIDA Act obsolete almost as soon as it

⁷⁸ Mbengue MM & Schacherer S "The 'Africanization' of international investment law: The Pan-African Investment Code and the reform of the international investment regime" (2017) 18 *The Journal of World Investment and Trade* 414 at 448.

⁷⁹ Santos B de S "The resilience of abyssal exclusions in our societies: Toward a post-abyssal law" (2017) 22 *Tilburg Law Review* 237 at 251; Motshabi KB "Decolonising the university: A law perspective" (2018) 40 *Strategic Review for Southern Africa* 104 at 108.

⁸⁰ See Santos B de S *Toward a new legal common sense: law, globalization, and emancipation* Cambridge : Cambridge University Press (2012) at xvi.

⁸¹ See Kondo (2021) at 3.

⁸² The author does, however, mention that regional legal instruments have influenced Zimbabwe's new FDI regime. See Kondo (2021) at 3.

⁸³ Zimbabwe confirmed its first case of COVID-19 on 20 March 2020.

became law. On the other hand, however, established theories of foreign investment and its determinants would equip readers with the tools to predict – even at this apparently premature stage – the effects of investment policy changes on capital flows in Zimbabwe.

5 CONCLUSION

Overall, I recommend this book to the legal fraternity and the general educated public. It definitely broadens our understanding of foreign investment law in general and in relation to Africa. It fills a glaring contextual hole in that literature. While publications abound on FDI law, very few have tackled the question of foreign investment law in Zimbabwe. No doubt the author has really put his back into writing this book. The richness of the information that it contains attests to this fact. The author should be commended for accomplishing this Herculean task.

To make the most of this useful PhD level book,⁸⁴ policymakers and scholars must complement it with publications heavy on theory, for instance, the literature that draws from decoloniality or political economy. Integrated in this manner, *Law and investment in Africa* can upskill investment lawyers and groom well-rounded law graduates in Africa. Subscribing to more critical perspectives on foreign investment law does not amount to endorsing Mugabe's ill-advised investment policies. Rather, this attitude recognises that, to ensure that capital inflows trickle down to the broader society, policymakers must be fully aware of the skewed nature of these inflows and the political-economic forces that drive them.

In the final analysis, the greatest beneficiary of the *Law and investment in Africa* is the foreign investor. While investors usually complain about complex, intricate, arcane or archaic laws, Kondo offers to “demystify and outline”⁸⁵ Zimbabwe's investment laws, policies, and institutions. Though the author may have never envisioned himself in a role as Zimbabwe's tour guide, few people seem as qualified as he is to wear this mantle. Perhaps, the pragmatic way for the Zimbabwean government to talk to the investing world and to weave the most sensible story about Zimbabwe is simply to hire Kondo as Chief Investment Officer and to recommend *Law and investment in Africa* as the essential investment guide.

⁸⁴ This book derives from its author's doctoral thesis.

⁸⁵ See Kondo (2021) at 251.

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