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Book Review: Law and Investment in Africa: The Governance of Foreign Direct Investment in Zimbabwe,

by Tinashe Kondo, Cape Town, University of the Western Cape Press, 2021, 282 pp., R275 (hardcover) ISBN 9781990995026

Reviewed by Talkmore Chidede

Law and Investment in Africa: The Governance of Foreign Direct Investment in Zimbabwe provides a critical examination of recent investment law developments in Zimbabwe.

The book not only unpacks investment law developments in Zimbabwe but also explores contemporary developments related to investment governance at international, relevant regional and bilateral levels. Tinashe Kondo's meticulous analysis of these developments gives the reader context and perspective of the regulation of foreign direct investment (FDI) in Zimbabwe from international, regional and national positions.

Kondo's book is published at a time when Zimbabwe's economy and investor confidence are deteriorating, and the current government is allegedly making efforts to revive the economy and restore investor confidence.

Kondo undertakes a historical analysis of the investment law and policy developments in Zimbabwe from the early 1980s (when the country attained its independence) to recent times. The analysis shows that the government of Zimbabwe has recently 'intensified its efforts to reform investment law and policy' (Kondo 2021:153) through implementing the Investment Guidelines and Opportunities in Zimbabwe (2018),[1] amending the Indigenisation and Economic Empowerment Act

1 The Investment Guidelines is a new policy document that 'seeks to balance the land redistribution programme (which was improperly executed) and a commitment to protect investing companies. The Investment Guidelines enlists eight principles underpinning investment in Zimbabwe including non-discrimination, protection of property, transparency and good regulatory practices, maintenance of environmental and social standards, promotion of investment retention and avoidance of mandatory performance requirements, facilitation of the entry and sojourn of foreign personnel and pursuance of high standards governance.

2 The IEEA has been amended to apply only to the platinum and diamond sectors. That means at least 51 per cent of the shares of every business in the 'platinum and diamond sectors' must be owned or controlled by indigenous Zimbabweans. Foreigners are limited to owning or controlling 49 per cent only.

3 ZIDA Act provides for the promotion, entry, protection, and facilitation of investment, establishes the Zimbabwe Investment and Development Agency and provides for the One-Stop Investment Services Centre. The Act also repeals several pieces of investment laws including the Zimbabwe Investment Authority Act [Chapter 14:30], the Special Economic Zones Act [Chapter 14:34] and the Joint Ventures Act [Chapter 22:22].

(Chapter 14:33) (IEEA)[2] and enactment of the Zimbabwe Investment Development Agency Act (Chapter 14:37) (ZIDA Act).[3]

Kondo lauds the Investment Guidelines for laying out reform action plans[4] and a timeline of six months. Kondo (2021:98) remarks this as a significant and unique development 'in the sense that, previously, government blueprints were not properly backed by tangible and practical actions to ensure their implementation.'

Kondo further applauds the enactment of the ZIDA Act and for consolidating and streamlining investment processes and procedures,[5] providing investment incentives, balancing the rights and obligations of investors and host states. Kondo (2021:152) further commends the ZIDA Act for allowing both domestic and international arbitration for the settlement of investment disputes because it 'is more practical, balancing treaty protection and domestic procedures.' Conversely, Kondo (2021:151) criticises that ZIDA Act 'does not expressly clarify which courts or tribunals have default competence over investment disputes … also fails to make a distinction between State-State arbitration and investor-State arbitration.' Kondo also disapproves of the ZIDA Act's omission of the right to regulate provisions.

Kondo also undertakes a comparative examination of Zimbabwe and South Africa's investment regimes. The comparison depicts that Zimbabwe's regime – based on the ZIDA Act – attempts to provide investment protection consistent with the international norms and standards on investment. However, South Africa's regime – primarily based on the Protection of Investment Act 22 of 2015 – *inter alia*, diminishes investment protection provided under international law and customary international law. South Africa has adopted a cautious approach towards FDI protection.

The book critically evaluates Zimbabwe's investment obligations under bilateral investment treaties (BITs). The analysis reveals that investment protection provided under BITs (concluded by Zimbabwe) is characterised by many shortcomings including, *inter alia*, limiting the right to regulate and biased towards investors. Kondo proposes the modification of certain provisions to allow investment liberalisation, adoption of more concise definitions of investors and investments, alignment of investor-state dispute settlement (ISDS) provisions with recent trends.

Kondo further scrutinises Zimbabwe's investment standards or practice in comparison to other states in the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA). This scrutiny exposes that the investment standards and practices differ across the region and, in some instances, with Zimbabwe's national investment law. Notable differences are in standards such as definitions of investor and investment, treatment of investors and investments, expropriation and compensation, as well as dispute settlement. Kondo recommends incorporating certain provisions to enhance Zimbabwe's investment regime and align it with the regional investment agreements of COMESA and SADC.

4 The action plans include payment of compensation to commercial farmers for losses suffered during the land reform programme, the amendment of the IEEA and the establishment of special economic zones.

5 The ZIDA Act has streamlined investment processes and procedures through repealing the Zimbabwe Investment Authority Act [Chapter 14:30], the Special Economic Zones Act [Chapter 14:34] and the Joint Ventures Act [Chapter 22:22]. The provisions of these statutes have been integrated into the ZIDA Act.

Provisions concerning the right to regulate and investor obligations on corruption, corporate social responsibility, human rights, environment and labour.

Notwithstanding these significant developments, Kondo (2021:256) concedes that there are 'some teething problems with Zimbabwe's revamped laws and policies relating to foreign investment.' These problems relate to compliance with regional obligations, the need to update the Investment Guidelines to focus on fresh challenges, and government adherence to investment laws and policies or respect of rule of law.

Despite its virtues, the book has a few shortcomings. Kondo overlooked some contemporary developments on international investment law happening at the multilateral level. For instance, the ongoing Investor-State Dispute Settlement (ISDS) reforms under the auspices of the United Nations Commission on International Trade Law (UNCITRAL)[6] and discussions on investment facilitation for development at the World Trade Organization (WTO).[7] These discussions are also relevant to Zimbabwe because once completed, they will have significant implications on investment governance in Zimbabwe.

Furthermore, the version of the COMESA Common Investment Agreement (CIA) Kondo refers to is an old one. The COMESA CIA was revised (in 2017) to include detailed provisions on investor obligations (Part Four) and allow the use of African international arbitral institutions in resolving investment dispute arising under the COMESA CIA (Article 36(2)(a)) and permits a defence of counterclaim or right of set-off when investors violate their obligations (Article 36(7)). The Agreement does not only protect COMESA investors[8] but also investments owned or controlled by non-COMESA nations maintaining substantial business activity[9] in the Member State in which it is duly constituted.

In addition, Kondo discussed non-binding investment instruments (e.g. SADC Model BIT, 2012) adopted yet omitted a very important instrument on investment policy development in Africa – the Pan-African Investment Code (PAIC, 2016). PAIC was negotiated and adopted by African Union Member States as a guiding instrument for African government when negotiating investment treaties among themselves or with external trade and investment partners. PAIC contains provides a balanced investment regime seeking to protect investors and investments at the same time safeguarding the regulatory autonomy of host governments to pursue their public policy or sustainable development objectives. PAIC is highly likely to influence the text of the African Continental Free Trade Area Protocol on Investment and should, therefore, not be overlooked in any discussions concerning contemporary developments in investment law and policy in Africa.

6 See UNCITRAL Working Group III: Investor-State Dispute Settlement Reform available at https://uncitral.un.org/en/working_groups/3/investor-state

7 See WTO Investment Facilitation for Development News Archives available at https://www.wto.org/english/news_e/archive_e/infac_arc_e.htm

8 Article 1 of the COMESA CIA stipulates that 'substantial business activity requires an overall examination, on a case-by-case basis, of all the circumstances, including, inter alia: (a) the amount of investment brought into the country; (b) the number of jobs created; (c) its effect on the local community; and (d) the length of time the business has been in operation.'

Kondo's (2021: 206) assertion that Zimbabwe is a signatory to the Economic Partnership Agreement (EPA) between SADC and the European Union (EU-SADC EPA) and yet to ratify EU-SADC EPA and the EU-SADC Interim Agreement (ESA) is somewhat misleading. Zimbabwe is not a signatory to the EU-SADC EPA which is concluded between six SADC Member States[10] and the EU Member States. Instead, Zimbabwe belongs to the EPA between six Eastern and Southern Africa countries[11] and EU Member States (EU-ESA EPA). Zimbabwe ratified the EU-ESA EPA in 2012.

Although Kondo notes that the inter-state dispute settlement will be determined by the SADC Tribunal, he did not explain the *status quo* of the SADC Tribunal and the implications for investment dispute settlement under the SADC FIP. The SADC Tribunal is currently suspended and not operational, and the SADC Tribunal Protocol (2014) – to revive the Tribunal – is not yet in force awaiting ratification by member states. This means that the envisaged inter-state investment dispute settlement provided under SADC Tribunal is not possible at the moment; until the SADC Tribunal is revived and operational.

Overall, the book is of use to practitioners, policymakers, negotiators, academics, and government agencies working on investment law and policy or investors seeking to understand recent developments in the investment governance Zimbabwe and investment regimes in SADC and COMESA.

9 Article 1 of the COMESA CIA stipulates that 'substantial business activity requires an overall examination, on a case-by-case basis, of all the circumstances, including, inter alia: (a) the amount of investment brought into the country; (b) the number of jobs created; (c) its effect on the local community; and (d) the length of time the business has been in operation.'

10 Botswana, Lesotho, Mozambique, Namibia, South Africa and Eswatini.

11 Comoros, Madagascar, Mauritius, the Seychelles, Zambia and Zimbabwe.