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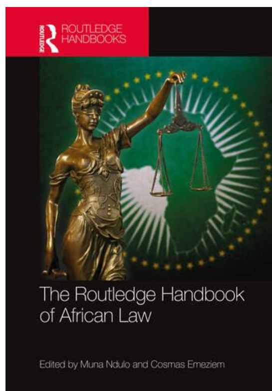

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The Pan-African Investment Code and its impact on investments and resource extraction in Africa

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THE PAN-AFRICAN INVESTMENT CODE AND ITS IMPACT ON INVESTMENTS AND RESOURCE EXTRACTION IN AFRICA

Dunia P. Zongwe

Introduction

This chapter digs into the likely impact that the Pan-African Investment Code, if implemented, will have on extractive activities and capital inflows in Africa. African independent experts drafted, on behalf of the African Union (AU), the Pan-African Investment Code (PAIC or the "Code"), whose final draft was published in 2016. The Code recognizes the right of AU member states "to regulate all aspects relating to investments within their territories and with a view to meeting national policy objectives and to promoting sustainable development objectives" (AUC 2016, Preamble), but the provisions of the Code, especially the heavy obligations that it imposes on foreign investors, dramatically increase the cost of doing business on the continent.

This chapter assumes—or rather fears—that partially removing the burden of sustainable development from host countries' shoulders and largely shifting it to investors will jeopardize the sort of development that host states so eagerly strive to spur and shape. However, capital flows to resource-rich Africa will not dry up, if only because of the relatively strategic importance of the minerals with which the continent is so well endowed. Still, the consequences of executing the investment policy enshrined in the Code will prove costly, far-reaching in any event. Although African nations should translate their unique values and vision of development into actions, the Code does not seem the place, the time, or the way to carry out such translation, given the present global environment of falling or low commodity prices and slow or reduced investment flows to the continent. The Code will not have the intended effects of increasing capital flows to Africa and intra-Africa cross-border investments, because its drafters were not pragmatic.

In verifying this conclusion, the question that this chapter seeks to answer concerns the ideal structure of a model foreign investment law. In so doing, the chapter contrasts the continent's traditional foreign investment policies with the skeptical investment stance adopted, since 2002,

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by some nations in both the developed and the developing worlds, such as the Bolivarian states, Namibia, and South Africa.

Since this book focuses on African law, the question this chapter tackles offers a golden opportunity to seriously ponder the international investment law as states conceive and apply it in Africa. Mbengue and Schacherer (2017, 415) affirm that the Code embodies Africa's consensus on how to shape international investment law, but, as this chapter shows, African scholars and AU delegates disagree on more than one aspect of the Code. Despite those disagreements, the Code remains an essential piece of African law. It informs investment treaties that African nations enter into with nonmember states (see Kidane [2018, 527]), even though it is but a draft and a nonbinding model treaty. The chapter also catches a glimpse of what the future of international investment law in Africa may look like. Indeed, observers expect the Code to guide AU delegates in drafting the investment protocol of the newly enacted African Continental Free Trade Agreement (AfCFTA).

Also, this chapter's angle is important because investment flows to the region concentrate on the mining and oil and gas sectors and because a majority of states in Africa rely mainly on foreign direct investment (FDI) in mining for their revenue. In addition to and partly as a result of these factors, the political economy of foreign investment and extractive industries in Africa stands out and makes this inquiry worthwhile.

To complete this major inquiry, the chapter proceeds through five substantive sections. It first exposes the internal inconsistencies of the Code, then situates this discussion within the broader philosophical framework of international investment law. Next, it looks over FDIs in Africa, underlining the continent's extractive sector and the provisions of the Code. The subsequent section assesses the Code's impact, using economic efficiency as the glass through which this chapter views the Code. Crucially, that section designs a flexible model that fixes the Code's fatal flaws.

The conundrum of attracting investments in Africa

The primary goal of international investment law

Only a handful of scholars systematically analyzed and carefully thought about the recently finalized Code and its likely effects. Won Kidane, Makane Mbengue, and Stephanie Schacherer belong to that tiny minority. Accordingly, this chapter directly engages these three scholars on the Code and how it impacts FDIs in Africa, especially in resource extraction.

The three scholars all analyzed the text of the Code, but they part ways when it comes to their prime research objectives. Kidane (2018) assessed the Code in light of its purposes and of the existing and emerging trends in international investment law. Mbengue and Schacherer (2017) presented and contextualized the provisions of the Code, some of which they described as Africa-specific, unique, and innovative.

Like Kidane's (2018) article, this chapter evaluates the Code in light of its purposes, but stands apart from Kidane's paper by using a different object of inquiry, different criteria, and a different approach. This chapter does not focus on the provisions of the Code, but their impact. In doing so, it draws on economic insights and resorts to efficiency as a basic criterion for evaluating the Code. Regarding its approach, while recognizing the importance of relying on purposes when evaluating policy alternatives, this chapter posits that consequences, and not purposes or intentions, matter the most. As Sowell (2015, 5) remarked, a better way to understand the consequences of economic decisions is to look at them, not in terms of the goals they pursue, but in terms of the incentives they create.

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In this regard, it bears mentioning that international investment law primarily aims to attract foreign capital, which should ultimately bring about development. The conventional wisdom holds that, by enhancing stability and predictability, international rules to protect investment attract FDIs (Dolzer and Schreuer 2012, 23). Similarly, the primary objective of the Code is "to promote, facilitate and protect" FDIs, including intra-African cross-border investments that foster sustainable development (AU 2016, 3; AUC 2016, art. 1).

The Code's internal contradictions

In drafting the Code to achieve the legitimate goal of attracting greater FDIs, the drafters have unfortunately produced a number of internal inconsistencies. Already, during the Code's negotiations, some government delegates pointed out those tensions inside the Code (see AU [2015, 5]). Kidane observes that the Code lacks "technical clarity" (2018, 576) and shows "doctrinal confusion" (2018, 578).

International investment law, an old field of law, carries over a sometimes contradictory and lingering history (Kidane 2018, 526; Miles 2013). To this day, it continues to confuse doctrine and raise suspicion (Kidane 2018, 526).

The fundamental contradiction

AU member states' desire to nurture "an attractive investment climate" (AUC 2016, Preamble) contradicts the many obligations they impose on foreign investors. Specifically, the private-sector motivations of the Code (AUC 2016, Preamble) clash with the heavy restrictions on foreign investors. The Code obliges member states to introduce incentives to attract investors (AUC 2016, art. 5), but it is not at all clear—nor is there any empirical evidence of—how these taxing obligations can work to attract foreign capital. This dilemma forms the heart of this chapter's outlook on the Code.

The legal nature of the Code

Another tension exists between the drafters' plan to use the Code as a "guiding instrument" and to make it a legally binding instrument (AUC 2016, Preamble). Apparently, the very decision to call the Code an "agreement" or a "Code" hinged on what AU member states would eventually agree as the legal nature of the Code (AU 2015, 5–6).

The Code's position is somewhat contradictory because, although member states have settled on a "guiding instrument" (AUC 2016, art. 2(1)), the provisions of the Code oblige member states to "endeavour to adopt appropriate measures to apply the rules contained in this Code" (AUC 2016, art. 45(1)), to cooperate and assist one another in implementing the Code (AUC 2016, art. 46, art. 47), and to take the Code into account as far as possible when they enter into any new agreement with a non-AU country (AUC 2016, art. 3(3)). In any event, individual member states may choose to make the Code binding (AUC 2016, art. 2(1)).

It appears from AU reports on experts meetings held in 2015 and 2016 on the draft Code (AU 2015, 4–5; AU 2016, 7) that participants in those long deliberations deadlocked over the legal nature of the Code and whether it should bind or simply guide as a model code. If AU delegates had kept the Code strictly as a guiding instrument, other delegates and this chapter would not object to the Code. After all, such international organizations as the United Nations Commission on International Trade Law (UNCITRAL) and UNIDROIT have resorted to guides, model codes, and other forms of soft law successfully. However, the provisions cited in

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the paragraph preceding this one manifest the ambition of some delegates that the Code binds states. More worrying, the AU expressly recommended that its members use the Code as they craft the AfCFTA protocol on investments (AU 2016, 8).

Although some of the participants worried about the effect of a binding investment law on the ongoing negotiations for the AfCFTA investment protocol and the Tripartite Free Trade Area (TFTA) (AU 2015, 4–5; AU 2016, 7), the real danger lies elsewhere. The AU decision to keep the draft as soft law, against the advice of AU experts to make the Code provisions binding (Mbengue and Schacherer 2017, 420), saves African governments from danger, because a binding legal instrument would leave them with very little flexibility in negotiating the terms of investment treaties and agreements. This self-imposed rigidity can cripple those states and cost them multibillion dollars in lost investment opportunities and human welfare. This is particularly true considering the unrealistically high burdens the Code heaps on foreign investors.

Self-defeating consequences

Kidane (2018, 568) described the Code as harboring a "protectionist agenda." In his own words, "[t]he PAIC rewrote some of the most entrenched substantive principles of IIL [international investment law] and added more provisions protective of the states' right to regulate and shrunk the investor's latitude."

Ironically, the primary victim of its "protectionist agenda" is Africa itself (Kidane 2018, 568, 572).

The Code does not affect the rights and duties of member states arising from any existing investment agreements, unless they agree otherwise (AUC 2016, art. 3), and member states may agree that the Code replaces intra-African bilateral investment treaties (BITs) or investment chapters in intra-African trade agreements (AUC 2016, art. 3(2)). These provisions allow the Code to coexist with BITs.

Although many countries may welcome these provisions, because they still regard BITs as the most efficient means to attract FDIs (Johnson 2010, 966), those provisions are in fact self-punishing. Traditionally, BITs raise protection standards higher than the Code, implying that traditional BITs secure investments better than the Code. If Kenya entered into a traditional BIT with Canada and another investment agreement with Ethiopia under the Code, Kenya's investments would incubate more safely under the BIT with Canada than under the Code with Ethiopia.

This reality would discourage member states from signing investment agreements with fellow African states under the Code. As Kidane (2018, 566) remarked, by using national standards instead of international minimum standards, the Code denies intra-African investments the higher protection it affords non-AU foreign investors. This defeats the Code's whole point. By treating intra-African investments less favorably than non-AU foreign investments, the AU, through the Code, shoots itself in the foot.

The philosophies of international investment law

Kidane (2018, 579) denounced the Code's doctrinal dilemmas and confusion, and he recommended that the drafters of the Code go back to the drawing board and redraft the Code. Both Kidane and the author of this chapter believe that the Code, as currently designed, will not meet its goals. However, unlike Kidane, the author does not recommend that the AU rewrite the Code, because it is confused and disjointed. The author does not advise the AU to redraft the Code from scratch, but to infuse flexibility into the Code. The Code lacks

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pragmatism, and it will not have the intended consequences unless the AU turns it into a flexible instrument by, chiefly, retaining its non-binding form and shedding some of its wide and demanding obligations for foreign investors.

To understand how it arrives at such a conclusion, this chapter sketches the philosophies that breathe life into international investment law. It endorses the view that international investment law did not evolve historically to further the interests of developing nations. As Sornarajah (2010, 19) observed, the international standards for the treatment of foreign investment were set to advance the interests of states who had the capacity to expand their trade overseas. Violence or coercion, insofar as it imposes through power, lies at the very roots of foreign investment protection (Linarelli, Salomon, and Sornarajah 2018, 154). More relevantly, as Kidane (2018, 526) summed up, "international investment law is not made *by Africa*, it was made *for Africa* as a replacement for colonial rules for the protection of capital." In other words, African states played little to no role in developing the rules that regulate international investment (Lipson 1985, 12).

In light of this truism, the question for African policymakers relates to the best ways to turn a system designed to serve powerful nations into an instrument for the long-term growth of the world's poorest, yet resource richest, continent. This tall challenge calls on policymakers to deeply rethink the basic assumptions underlying the safeguarding of foreign capital in Africa.

Brief historical background

Some of the earliest evidence of international investment rules dates as far back as the 16th century (Lipson 1985, 13). International investment law originated in the arrangements, anchored on reciprocity, among European nations after the treaties of Westphalia in 1648 (Miles 2013, 21). One must highlight, as Miles (2013, 21) did, that, at the time, European nations enjoyed more or less equal power to bargain, and they sought to secure minimum standards of treatment for their citizens investing in other countries within the region.

From its earliest origins in Europe, international investment law developed through colonialism and the "manipulation of legal doctrines to acquire commercial benefits" (Miles 2013, 32) in the 18th and 19th century (Sornarajah 2010, 19–20). Following the end of the Second World War, many countries in Africa and Asia gained their political independence from their colonial masters, and the rules of investment law had to be adapted to noncolonial contexts.

Disputes concerning who should control resources led to weaker states claiming permanent sovereignty over natural resources. The Third World demands for a New International Economic Order (NIEO) emerged from those claims. Though the NIEO marked the first time that nations had articulated an alternative construct in international law since Westphalia (Linarelli, Salomon, and Sornarajah 2018, 95), it gradually faded. Linarelli, Salomon, and Sornarajah (2018, 99) saw in the NIEO's demise an ideological backlash to reassert norms to reflect the interests of "actors with private power" (that is, the multinational corporations) and "actors with public power" (that is, the developed states).

Disputes also revolved around minimum standards for the treatment of foreign investment (Anghie 2004, 209). Emer de Vattel advocated in 1758 a standard for the treatment of foreign capital higher than the treatment of domestic investment in order to protect foreign capital from the shortcomings in the domestic systems of investment protection (see Sornarajah [2010, 19]). Vattel's theory of treatment standards for foreign capital gave rise to the controversial Hull doctrine developed in the United States, in which host countries must pay adequate compensation if they decide to expropriate foreign-owned property.

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By contrast, the Argentine jurist Carlos Calvo rejected Vattel-inspired standards of treatment for foreign investment, arguing that they contravene "the law of equality of nations" (see Lowenfeld [2008, 473]). He also argued that foreign investors should settle their disputes according to the host state's national law and refrain from calling on their home states to intervene in the disputes (Anghie 2004, 209).

To counter this resistance movement, international investment law built norms and institutions, such as BITs and the International Center for the Settlement of Investment Disputes (ICSID) in the middle of the 19th century. In 1964, when the World Bank invited the newly independent African nations to join ICSID, most of them did, although Latin American states refused to do so (Kidane 2004, 561–2). African states surmised that joining ICSID would draw greater FDIs. Instead, many African states appeared before ICSID in 97 cases brought against them by foreign investors (UNCTAD 2018a). Another notable feature of the ICSID: African states accepted the manner in which powerful, capital-exporting nations interpreted the investment treaties that nations on the continent entered into (Kidane 2014, 572).

Critique of the traditional investment regime

Policymakers have recently stood against traditional international investment law. BITs and investor-state arbitration became the object of scathing criticisms. States in Africa, Europe, North and Latin America, and Asia initiated reform in the field of international investment law. The bulk of these reform efforts try to strike a fair balance between investor rights and host states' right to regulate (Kidane 2018, 579). In 2018, the South African President Cyril Ramaphosa signed into law the Protection of Investment Act 22 of 2015 (PIA), which excludes investor-state arbitration and phases out BITs (Republic of South Africa 2015, §§13 and 15). Similarly, Namibian President Hage Geingob promulgated the Namibia Investment Promotion Act 9 of 2016 (NIPA), which requires foreign investors to resolve their disputes domestically, and thereby rules out international arbitration (Namibia 2016, 28(4) read with §18).[1] The PAIC is very much part of that trend.

The current international investment regime came under attack not only from developing nations, but developed nations as well. When the international standards of treatment for foreign capital and their application by a limited pool of international arbitrators started to affect the interests of the North, capital-exporting states started to challenge the wisdom of allowing private decision-makers with wide discretion to sit in judgment of matters of public policy (Kidane 2018, 579). In the South, in *Occidental v. Ecuador*,[2] the arbitral tribunal awarded, in 2012, the inordinate amount of US$1.7billion to the claimant against the state of Ecuador. At the time, the largest arbitral award in the history of international investment, the *Occidental* case shocked many policymakers.

With reference to BITs, they were derived from Eurocentric and colonial treaties. They constitute a basic foundation of the international FDI regime (Vandevelde 1998, 526). They are also inspired by liberal philosophies, which may explain why their terms seldom vary across nations (Johnson 2010, 966). No evidence, however, conclusively demonstrates that BITs benefit developing countries more than they cost them (Johnson 2010, 926).

Johnson (2010, 966) contended that BITs have failed precisely because they strictly stick to their neoliberal theoretical model. Provisions, which reflect the neoliberal belief that market rather than government should determine economic decisions, drastically reduce the host country's policy space and stymies legitimate government objectives (Johnson 2010, 966). As a consequence, BITs seldom consider the particular circumstances of home states and host states

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alike (Johnson 2010, 966). In short, BITs and the existing international investment regime have not lured the kind of FDIs that lead to sustainable development.

The sustainable developmentalism of the Code

The philosophy that motivates the PAIC is sustainable development, coupled with private sector development. The Code's preamble expresses some of the foremost ideals that prompted the investment policy contained in the Code. The two legal instruments of the AU that led to the PAIC are the African Union Agenda 2063 and the Abuja Treaty that established the African Economic Community. Specifically, the Code is embedded within Agenda 2063, a broader continental normative framework that promotes a more inclusive and sustainable growth, "the engine of structural transformation on the continent" (AU 2015, 3). The New Partnership for African Development (NEPAD), the Sustainable Development Goals (SDGs), and the Investment Policy Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD) also inspired the Code.

The Code's angle on sustainable development appears from its provisions on the sustainability of financially sound enterprises (AUC 2016, art. 19(3)(b)); on investors' contribution to the economic, social, and environmental progress (AUC 2016, art. 22(3)); and on environmental impact assessments (EIAs) and the protection of the environment (AUC 2016, art. 37(3), (4)). The huge emphasis on FDIs that foster sustainable development is, as Kidane (2018, 563) remarked, "unusual." However, this does not mean necessarily that emphasis is misplaced.

Sustainable development could advance the interests of states in several respects. Mbengue and Schacherer (2017, 448) thought that the strong emphasis put on sustainable development could assist policymakers outside Africa as a source of innovation. Still, the question arises as to whether that emphasis most effectively increases capital inflows to the continent. Although hardly anyone could gainsay sustainable development, a world of difference separates that which governments actually do in the name of sustainable development and the best way for governments to attain development that is sustainable.

The private sector

The Code clearly aims to develop the private sector (AUC 2016, Preamble). It champions an environment conducive to a more vibrant and dynamic private sector within member states to strengthen job creation, technology transfer, long-term economic growth, and the fight against poverty (AUC 2016, Preamble).

Stressing private sector development in the Code conforms to the AU Commission's strategy, which is firmly anchored to the belief that the private sector acts as a powerful catalyst for economic transformation and for inclusive and sustainable growth (AU 2015, 3–4, 10).

The drafters of the Code bore in mind "the role played by investment and the private sector in productive capacity, increased economic growth and sustainable development" (AUC 2016, Preamble). Both the West and the newly independent states in the 1960s understood that they could not dispense with private actors, the multinational corporations (MNCs), in spurring development. They understood that new states enjoyed vast natural resources endowments, but that their exploitation needed the investments and expertise of MNCs (Anghie 2004, 223). Studies have shown a strong positive relationship between domestic investments and foreign investments in Africa (Ndikumana and Verick 2008, 24). Thus, insofar as developing the private sector generates greater domestic investments, private businesses significantly contribute to attracting FDIs in Africa.

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The emphasis on the private sector clearly implies that the Code's sustainable developmentalism is market-friendly, if not neoliberal. And, to the extent that it assumes that the private sector should drive its sustainable development project, the Code's theoretical premises do not stem from developmental state theories. They do not expressly make room for the state-led investments like those that characterize China's foray into Africa.

Mining investments in Africa

This section of the chapter unpacks mining, investments, and the political economy in Africa to throw light on mining investments and the PAIC. Because the extractive sector weighs heavily on the economies of resource-rich African states, analyses of the Code and FDI in Africa generally must concentrate attention on how the Code relates to or impacts the continent's extractive sector.

Foreign direct investments

The Code has a peculiar, enterprise-based understanding of "investment" (AU 2015, 6). It defines investment as "an enterprise or a company … established, acquired or expanded by an investor" (AUC 2016, art. 4(4)). It borrowed that definition from the SADC Model BIT (Mbengue and Schacherer 2017, 423).

By requiring the establishment, acquisition, or expansion of physical assets, this definition excludes portfolio investments. Inserting portfolio investments in the definition would have made it difficult for regulators and law enforcement to locate them. Indeed, investors can easily and remotely move their capital across borders and jurisdictions. Therefore, barring portfolio investments from its definition of "investment" enables the Code to resolve the issue of location.

The Code sets criteria for business activity to qualify as investment. Formulated in the *Salini v. Morocco* arbitral decision,[3] these criteria comprise: substantial business activity; commitment of capital and other resources; the expectation of gain or profit; the assumption of risk; and a significant contribution to the host state's economic development (AUC 2016, art. 4(4)).

The definitional requirement of significant contribution to the host state's economic development poses some challenging questions. What is a "significant contribution?" At which exact moment does investment become "significant?" If the Code required just a contribution, it would not have caused any problem, but requiring that the business activity contribute significantly to the host state's development may exclude many business activities ordinarily regarded as FDI. The significant contribution element is not universally accepted. The US Model BIT, the Trans-Pacific Partnership (TPP), and the Comprehensive Economic and Trade Agreement (CETA) do not include this element in their definitions of investment (Mbengue and Schacherer 2017, 424).

The continent's context

The importance of FDIs for African countries lies in, among other things, the fact that, together with aid, they often are the only source of finance (Johnson 2010, 919; De Wet and Eyden 2005, 22). Governments over rely on FDI and aid as sources of finance due to the low levels of income and domestic savings on the continent (Johnson 2010, 927).

Alongside investment chapters in subregional free trade agreements, such as the treaties establishing the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS), governments have deployed BITs as a principal

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mechanism to protect FDIs in Africa. As of 2018, Africa had 985 BITs and treaties with investment provisions (TIPs) (UNCTAD 2018a). And, of the 2,358 BITs in force, African countries had signed 923 BITs (UNCTAD 2018a). Intra-African BITs numbered 173 (UNCTAD 2018a). Most of these agreements followed the traditional investment model (Mbengue and Schacherer 2017, 416).

FDIs failed in Africa in the sense that they did not fuel sustainable economic growth (Johnson 2010, 919–20). Though investments increased over the years, the actual amounts flowing to Africa remain fairly small, especially if capital inflows to the extractive sector are excluded (Johnson 2010, 920). After FDI inflows had contracted sharply in 2016 and 2017, FDI inflows in Africa increased by 11 percent (UNCTAD 2019, x, 36–7). However, this average increase can easily mislead. For one thing, the continent has not yet come close to recovering the losses in FDIs that it has accumulated since 2014. From 2014 to 2018, FDIs have dropped by a cumulative 32 percent (see UNCTAD 2018b, 38; UNCTAD 2017, 44; UNCTAD 2016, 38; UNCTAD 2015, 32).

Moreover, intra-Africa investments remain modest. If intra-African investments only account for roughly one-tenth of overall investments in Africa (FDI Intelligence 2015, 6), to which countries will the Code and the AfCFTA investment protocol really apply? And, given that South Africa accounts for nearly half of intra-African investments (UNCTAD 2019, 34), is South Africa practically the sole major beneficiary or duty holder of the Code and the upcoming investment protocol? If not tackled, these challenges may strip the Code and the protocol of their practical relevance.

The majority of foreign investors do *not* find the African continent alluring for several reasons. These include questions of perception and geographical location. First, investors perceive the continent as inherently risky (Johnson 2010, 927), and poor information about the continent by foreign investors compounds this problem. In addition, some make sweeping "Africa-is-a-country" generalizations. Like Berman (2013) illustrated, a Ghanaian delegation in New York, pitching their business to a group of US investors, were asked questions about the then unfolding genocide in Rwanda instead of questions about their business in Ghana, located in West Africa more than 3,000km away from Rwanda in East Africa. *This observation about investors' perception of Africa can assist policymakers in designing policies to bring FDIs in the region.*

Closely related to the first reasons for the dearth of FDIs in Africa is the issue of geographical location. FDI inflows to Africa respond less sensitively to increased rates of return on investment, improved infrastructure, and greater economic openness than similar reforms in other developing regions (Johnson 2010, 927). *This further reinforces the point that the key to the lower capital inflows to the continent resides much less in host country investment policies than in the representations of those countries and their resource endowment or geographical location.*

Policies matter, however, if only because they can go a long way in burnishing a country's image. Johnson (2010, 928) argued that, because BITs enhance the credibility of a host country's reforms, they should encourage foreign investors to focus more on economic determinants and less on Africa's reputation as a risky place for doing business. However, the fact that the continent still does not attract much investment, despite signing about 39 percent of all BITs in force, appears to contradict Johnson's argument. The answer, it is submitted, consists in enhancing the image of the continent *both* by improving the credibility of African nations' commitments to protect FDI and by better communicating with potential investors.

Better communication with potential investors will enable them to make informed decisions that take into account a host country's unique opportunities and comparative advantages (Johnson 2010, 298). Since ascending to the country's presidency in 2018, South African President Ramaphosa has apparently communicated more effectively with foreign investors,

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launching, among other measures, a big investment promotion drive to woo investors, both domestically and abroad. At a local investment summit in October 2018, President Ramaphosa laid out his plan to attract US$100 billion in FDIs in the next five years. By July 2019, his FDI drive had attracted US$55 billion in total pledges (Winning and Bavier 2019), as FDIs to South Africa jumped by 165.8 percent (UNCTAD 2019, 34, 38).

Home states could play a central role in convincing or inducing their corporate citizens to invest in Africa. Particularly, the state in China owns many Chinese firms investing in Africa, and it encourages them to expand on the continent (see Alden et al. [2008, 7, 16). Therefore, African governments should not direct their improved communication exclusively to private businesses, but to home states as well.

A country needs time and sustained efforts to clean up its image. In this regard, the policy interventions and ad hoc reforms in Africa do not help minimize this image problem (Johnson 2010, 927).

The extractive sector

For decades, international capital inflows to the African continent have concentrated on resource-rich countries. And, in those resource-rich countries, capital inflows flock to strategic hydrocarbons (oil and gas) and minerals (copper, diamonds, etc.) (Johnson 2010, 920). As explained earlier, this is a colonial relic. And investment inflows in Africa rose last year, largely due to an uptick in FDIs in natural resources (UNCTAD 2019, 36–7). This long-standing feature of FDIs into the continent is visible in successive *World Investment Reports* by UNCTAD (UNCTAD 2019, 36–7; UNCTAD 2018b, 38; UNCTAD 2017, 44; and UNCTAD 2016, 38).

Nature generously endowed the continent. Africa possesses about 30 percent of all global mineral reserves (African Natural Resources Center 2016, 3). Regrettably, unlike countries such as Botswana, Namibia, and South Africa, resource wealth in many African nations turned out to be a curse rather than a blessing, with negative repercussions on the political risks faced by foreign investors.

Thus, little FDI goes to areas vitally important for the development of African countries, most notably, in infrastructure (UNCTAD 2009, 47). This situation should alarm policymakers and the drafters of the Code, because it thwarts their sustainable development agenda.

The Pan-African Investment Code

The Code was reasonably expected to form part of the investment protocol of the AfCFTA adopted by the AU in March 2018. The AU expressly recommended that its member states use the Code as reference in negotiating the AfCFTA investment protocol (AU 2016, 8). If or when the continent reaches the stage of a common market, as envisaged in the Constitutive Act of the African Union, intra-African BITs will become inconsistent with the single-market rules of the AU (see Kidane [2018, 577–8) or will become otherwise redundant.

Drafting

The Code represents the first continent-wide model investment treaty developed under the aegis of the AU (Mbengue and Schacherer 2017, 446). In 2008, a request was made to the AU Commission to “develop a comprehensive investment code for Africa with a view to promoting private sector participation” (AU 2015, 3). In 2012, the AU Commission undertook to study the possibility of a continent-wide investment instrument (UNECA 2016, x; AU

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2015, 3). The study mainly aimed to create a favorable environment to attract more FDIs in Africa and increase intra-Africa investments so that the continent's economic integration could succeed (AU 2015, 3).

The draft of the Pan-African Investment Code went through a series of consultations at both regional and continental levels (AU 2015, 3). It also underwent thorough analyses, article-by-article discussions, and series of in-depth revisions and amendments (AU 2015, 4). Eventually, the AU adopted the final draft of the Code in 2015 (Mbengue and Schacherer 2017).

Those who analyze the Code may rightly question whether Africa needed such a comprehensive investment guide at all. The Code's preamble "recogniz[es] the need for a comprehensive guiding instrument on investment for all African Union Member States" (AUC 2016, Preamble). Yet, of the challenges that the continent faces with regard to FDI, the lack of a continental comprehensive investment instrument does not count as one of them. Nor is there any evidence that Africa needs to ensure "national and international coherence in investment policymaking" (AUC 2016**,** Preamble). The continent must not approach FDIs in Africa in a "one-size-fits-all" fashion, as investment policies that work in one African country may not work in another.

Overview

Mbengue and Schacherer (2017) conducted a detailed rundown of the Code's provisions, such that this section of the chapter confines itself to offering a bird's-eye view of the Code in the following paragraphs before delving into provisions that pertain to the chapter's purposes. Overall, the Code rewrites traditional treaty language, ignores well-entrenched principles such as fair and equitable treatment (FET), and introduces a number of innovations. It is not a revolution against international investment law; it is rather a recalibration (Mbengue and Schacherer 2017, 447).

The Code has seven chapters and 52 articles. The chapters deal with: (1) general provisions; (2) standards of treatment of investors and investments; (3) development-related issues; (4) investors' obligations; (5) investment-related issues; (6) dispute settlement; and (7) procedural issues and institutional arrangements.

The Code covers a myriad of investment-related issues. It addresses performance agreements (art. 17); national lists of scheduled investment sectors (art. 18); intellectual property rights, including traditional knowledge (art. 25); competition (art. 28); the transfer and acquisition of appropriate technology and know-how, including environmental technologies and transfers (arts. 29 and 30); foreign exchange (art. 31); taxation (art. 39); and capacity building, especially building the capacity of the youth, women, and other vulnerable groups (art. 36(1) and (2)). Over and above specific exceptions, such as exceptions to most-favored-nation treatment (art. 8), national treatment (arts. 10 and 18(3)), and transfer of funds (art. 16), the Code provides for general exceptions (art. 14) (AUC 2016).

Innovative features

The PAIC does not approach FDI in a completely new way, although it introduces a number of important innovations (Kidane 2018, 562). The very structure of the Code is atypical. Modern BITs seldom vary, and they typically comprise five basic provisions, namely: (1) scope of application; (2) conditions for entry of FDI; (3) standards for treatment; (4) protection against expropriation and compensation for expropriation; and (5) dispute settlement (Mosoti 2005, 116). The Code, on the other hand, built on those provisions with chapters on development and investors' obligations.

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The Code contains other novel and innovative features. These include exceptions to the nondiscrimination principle (AUC 2016, art. 8, art.10); investors' obligations; counterclaims (AUC 2016, art. 43); and the recognition of the role of women, youth, and the free movement of people in sustainable development (AUC 2016, Preamble).

Critical provisions

Standards of treatment of investors and investments

The Code provides for the two normative pillars of the international trading system, namely, the most-favored-nation treatment (AUC 2016, art. 7) and the national treatment principles (AUC 2016, art. 9). Oddly, the Code leaves out two core standards of international investment law—fair-and-equitable treatment (FET) and "full protection and security" standards. African states, on numerous occasions, have been brought before ICSID proceedings on the grounds that they violated those two standards (Kidane 2018, 567). Built by arbitral jurisprudence, FET is the most invoked and the most successful claim in investment disputes (Dolzer and Schreuer 2012, 130).

Mbengue and Schacherer (2017, 429) raised the question of whether the FET principle serves the ends of sustainable development. They noted that the principle, more than other standards, could limit the host state's right to regulate, especially in sensitive social and environmental areas. FET could also lead to abuse in litigation (Mbengue and Schacherer 2017, 429–30).

In fact, the Code gets rid of useful principles because of the real or perceived abuse by arbitration tribunals, and, in doing so, it mistakenly blames the principles, rather than the absence of checks and balances in international investment law (Kidane 2018, 575).

As a general principle, the Code prohibits expropriation, nationalization, or similar measures, except where a host state complies with the general criteria for expropriation accepted under international law, including, notably, compensation (AUC 2016, art. 11(1)). The Code obliges member states to pay "adequate compensation" to investors for the expropriated investments (AUC 2016, art. 12). It normally assesses "adequate compensation" in relation to the "fair market value" of the expropriated investment (AUC 2016, art. 12(1)), or, where appropriate, in relation to an "equitable balance between the public interest and interest of the investor affected" (AUC 2016, art. 12(2)). The Code follows a compensation formula less strict than the Hull's rules that compensation should be prompt and effective. Strict compensation provisions make it hard for host states to intervene in the economy and correct market imperfections (Johnson 2010, 966). And it is abundantly clear, from those expropriation provisions, that the Code rejects the Hull's rules.

Investors' obligations

BITs tend to overemphasize the protection of investors and neglect the interests of host countries in Africa (Johnson 2010, 921). Several attempts have been made to rebalance the interests of foreign investors and host countries (Johnson 2010). The Code represents the latest attempt.

The Code seeks to strike an overall balance of the rights and obligations between member states and foreign investors (AUC 2016, Preamble, art. 26(1)). Though investors' obligations were neither part of nor widely accepted in international investment law (Mbengue and Schacherer 2017, 434–5), they have grown popular (Kidane 2018, 563) (although foreign investors always had obligations under the domestic laws of the host states).

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The Code burdens investors with a host of legal obligations. Failing to comply with those obligations may result in denial of treaty protection or, in the host country, filing a counterclaim in the event of a dispute (Mbengue and Schacherer 2017, 437, 445). For example, investors must:

- "encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises" (AUC 2016, art.19(3)(b));
- "adhere to socio-political obligations including … respect for national sovereignty and observance of domestic laws … respect for socio-cultural values; and non-interference in internal political affairs" (AUC 2016, art. 20(1));
- "contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State" (AUC 2016, art. 22(3)); and
- protect the environment, carry out Environmental Impact Assessments (EIAs), and—where their activities damage the environment—take reasonable steps to restore it. (AUC 2016, art. 37(3) and (4))

Other important obligations relate to corporate governance, bribery (AUC 2016, Preamble, art. 21), corporate social responsibilities, and business ethics and human rights.

Most relevantly, art. 23 of the Code broadly tells investors how they must use natural resources:

1. Investors shall not exploit or use local natural resources to the detriment of the rights and interests of the host state.
2. Investors shall respect rights of local populations and avoid land grabbing practices vis-à-vis local communities.

AUC 2016, art. 23

Is the African negotiator in a position to bargain?

The wasteful incentive of the Code

When the Code rewrote the rules of international investment law, they were guided by "a sense of enduring victimization," Africa's experience with the North, and its frustration from dealing with the North (Kidane 2018, 568, 579). In response, the Code presents African states with an inefficient investment policy. One effective way of assessing the impact of a policy or legislation is economic efficiency. Economics can enlighten government strategists in identifying bottlenecks and potentially wasteful policy options.

The Code possesses a few virtues—for instance, its sustainable development philosophy, the place of pride it gives to private actors, and its enterprise-based understanding of investment—but the Code also suffers from profound weaknesses. The biggest one is that *the Code creates an incentive to foreign investors to plow their money elsewhere* because the obligations it places on them raise the costs to the extent that they are inclined to take their much-needed capital to other states or otherwise allocate it to other uses.

In 2015 and 2016, respectively, the South African and Namibian governments enacted new investment laws (the PIA and the NIPA) that, like the Code, reshape the traditional investment law regime and contain a number of provisions resembling those of Code. World Bank data show that, since 2014 (one year after the government tabled the new investment bill in Parliament), FDIs to South Africa have plummeted (World Bank 2019). Even if FDIs shot up

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in 2018, they principally consisted of intra-company loans (UNCTAD 2019, 38), and South Africa had not recouped all the losses that had piled up from 2014. Likewise, in October 2018, Finance Minister Calle Schlettwein reported that the Namibian economy lost about US$620 million in direct investments in 2017, one year after the president promulgated the NIPA (Ngatjiheue 2018, 1).

Although the obligations that the Code foists on foreign investors constitute, to a large extent, the "truly novel features" of the Code (Mbengue and Schacherer 2017, 434), they weigh unusually more heavily and more intrusively than both the traditional and emerging trends (Zongwe 2017, 302–7; Kidane 2018, 567). As a result, the Code is a normative white elephant, too heavy to interest foreign investors and investors from the continent.

Even if embraced by a small minority of African states, the Code stands to adversely affect their economies. The ease of doing business strongly depends on the nature and content of policies, including legislation. This means that the Code can have far-reaching consequences on the ease of doing business in Africa and the attractiveness of its mining sectors.

Resource-rich countries can afford to demand a lot from foreign investors and still attract more of their capital, but resource-poor countries cannot. Tanzania and the Democratic Republic of the Congo (DRC) passed mining laws that impose more duties on foreign investors or require them to accept less protection,[4] but countries such as Mauritius cannot enact the restrictive laws or the Code without scaring away investors.

Kidane (2018, 579) sees the "misplaced" and "protectionist agenda" of the Code as sabotaging FDIs and regional integration in Africa: He writes:

> The existing draft does not take the African Economic Community project forward. It under-appreciates the role of local parochialism in discouraging foreign investment and over-appreciates the value of regulatory space in the intra-Africa investment context by assuming that the challenges of regulating intra-Africa investments are similar to the regulation of investment from the North.
>
> *Kidane 2018, 572*

Just like the most recent experience with the drop in commodity prices, the Code, if made binding and if scrupulously applied, will harm resource-rich economies such as Nigeria, South Africa, Angola, and Mozambique. And the odds that, if enforced, the Code will wreak havoc on resource-rich economies in Africa shorten.

The policy choices in the Code will exacerbate crises during economic downturns. To compound matters, the near future does not look bright as global FDIs have decreased in 2018 for the third year in a row (UNCTAD 2019, 1), thus dimming prospects of bigger FDI flows to Africa. At a time when commodity prices are either falling or threatening to fall, the Code's policy direction will push up the risks, so that foreign investors will search for opportunities elsewhere or wait until commodity prices pick up.

A better model

Commodity prices reveal the relative scarcity of primary commodities. The fact that commodities prices have tumbled these past few years shows that foreign investors have most probably found more profitable uses for their capital.

A consequence of lower commodity prices, government negotiators stand in a weaker bargaining position vis-à-vis foreign investors. When they succeed in concluding an investment

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treaty, the terms of their agreement will reflect the weaker position of the negotiators (Zongwe 2017, 315–6). *The ideal investment law would afford host–state negotiators enough flexibility to adjust the terms of their agreement to commodity booms and busts.* The ideal law works with much less rules than the Code (Georgakopoulous 2005).

That said, an efficient investment law would not suffice for African states to hit their Sustainable Development Goals. Governments will need to use revenue from FDIs or resource extraction to develop critical infrastructure, whether through normal budget allocations or through other means, including resource-for-infrastructure deals. They will have to prioritize the infrastructure that boosts intra-African FDIs and regional integration. This point cannot be overemphasized, because the Code alone will not result in greater intra-African cross-border investments if almost all states do not build their capacity to expand their capital overseas. For long-term development, African governments must prefer intra-African trade to North–South investments, because their bargaining powers do not differ markedly. As Miles (2013, 21) noted, international investment law started with European countries of more or less equal bargaining power. Last, but not least, host states in Africa must complement an efficient and flexible investment law with an active FDI road show in selected capital-exporting countries. These complementary actions in infrastructure and diplomacy show that answering the conundrum of winning over more foreign investors goes beyond investment law to a few other crucial areas of policymaking.

Conclusion

While the PAIC embodies lofty and noble ideals, its design and contents are unrealistic and devoid of any solid empirical foundations. Given historical evidence, informed observers will find it hard to see how the restrictions in the Code will do anything toward making the continent more attractive to foreign investors.

Sustainable development drives the provisions of the PAIC, but no evidence suggests that this pan-African investment policy instrument will achieve its intended goals. To the contrary, available information and recent experience point to a higher probability that the Code will set back development on the continent by undermining its attractiveness. Brillo (2014, 174–5, 183) even warned countries tempted to emulate Brazil's anti-BIT stance to refrain from it, because Brazil has a uniquely large internal market that draws massive foreign capital, though Brazil has not signed any BIT, unlike the other major economies. Brillo's warning speaks particularly to the Code and those who intend to apply it, because the Brazilian experience seems to have inspired the Code and South Africa's new investment law.

Policymakers must adopt a pragmatic approach to questions of mining investments and development in general. Host-country governments may have compelling reasons to adopt a philosophy more in line with how they envision the future of their respective nations, but the added value of pragmatism is that, while not necessarily ideologically coherent or desirable, the policies based on it tend to hit their targets.

Pragmatism does not equate with neoliberalism. The resource-for-infrastructure contracts yielded tangible results precisely because they were pragmatic (see Zongwe 2018a, 56; and Zongwe 2018b, 654), not neoliberal. The Code is ill-advised if intended to operate as a comprehensive and binding single undertaking, but the AU could give the Code much flexibility if deployed as a framework for negotiating investment contracts by AU member states. Negotiating delegates from member states could then cherry-pick and tailor-make individual provisions of the Code to suit their prosperity aspirations.

Notes

1 Namibia Investment Promotion Act. Law No. 199 of 2016.
2 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (II)(ICSID Case No. ARB/06/11).
3 *Salini et al. v. Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (July 23, 2001) para. 52.
4 The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act No. 6 of 2017 (Tanzania) and the law that DRC adopted in 2018 to amend its 2002 Mining Code (that is, Loi n°18/001 du 09 mars 2018 modifiant et complétant la Loi n° 007/2002 du 11 juillet 2002 portant Code minier).

References

African Natural Resources Center. 2016. "Catalyzing Growth and Development Through Effective Natural Resources Management." African Development Bank Group, Côte d'Ivoire. www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/AfDB_ANRC_BROCHURE_en.pdf.

Anghie, Antony. 2004. *Imperialism, Sovereignty and the Making of International Law*. Cambridge, UK: Cambridge University Press.

AU (African Union). 2015. Final Report of the Meeting of Experts on the Consideration of the Pan African Investment Code, November 30 to December 2, Kampala, Uganda. Addis Ababa, Ethiopia: AU. https://au.int/sites/default/files/documents/32844-doc-report_of_meeting_of_experts_on_the_consideration_of_the_paic_december_2015.pdf.

AU (African Union). 2016. Report: Meeting of Member States Experts on the Consideration of the Pan African Investment Code (PAIC) and the African Inclusive Market Excellence Center (AIMEC), November 21–23, Kenya. Addis Ababa, Ethiopia: AU. https://au.int/sites/default/files/documents/32844-doc-report_aimecpaic.pdf.

AUC (African Union Commission). 2016. "Draft Pan-African Investment Code." Economic Affairs Department, December, https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf.

Alden, Christopher, Daniel Large, and Ricardo Soares de Oliveira, eds. 2008. *China Returns to Africa: A Rising Power and a Continent Embrace*. New York: Columbia University Press.

Berman, Jonathan. 2013. *Success in Africa: CEO Insights from a Continent on the Rise*. Brookline, Massachussetts: Bibliomotion.

Brillo, Romulo. 2014. "Living Without Investment Treaties." In *International Economic Law and African Development,* edited by Laurence Boulle, Emmanuel T. Laryea, and Franziska Sucker, 172–83. Cape Town: Siber Ink.

De Wet, Albert H., and Reneé Van Eyden. 2005. "Capital Mobility in Sub-Saharan Africa: A Panel Data Approach." *South African Journal of Economics* 73 (1): 22–35.

Dolzer, Rudolf, and Christoph Schreuer. 2012. *Principles of International Investment Law*. Oxford: Oxford University Press.

FDI Intelligence. 2015. "The Africa Investment Report 2015: An FDI Destination on the Rise." www.africanbusinesscentral.com/2016/01/04/the-africa-investment-report-2015-an-fdi-destination-on-the-rise-fdi-intelligencethis-is-africa-report/#slides.

Georgakopoulos, Nicholas L. 2005. *Principles and Methods of Law and Economics: Basic Tools for Normative Reasoning*. Cambridge, UK: Cambridge University Press.

Johnson, Alec R. 2010. "Rethinking Bilateral Investment Treaties in Sub-Saharan Africa." *Law Journal* 59 (4): 919–67.

Kidane, Won. 2014. "The China-Africa Factor in the ICSID Legitimacy Debate." *University of Pennsylvania Journal of International Law* 35, 559.

Kidane, Won. 2018. "Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code." *George Washington International Law Review* 50: 523–79.

Linarelli, John, Margot E. Salomon, and M. Sornarajah. 2018. *The Misery of International Law: Confrontations With Injustice in the Global Economy*. Oxford: Oxford University Press.

Lipson, Charles. 1985. *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*. Berkeley: University of California Press.

Lowenfeld, Andreas F. 2008. *International Economic Law*. Oxford: Oxford University Press.

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Mbengue, Makane Moïse. and Stefanie Schacherer. 2017. "The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime." *Journal of World Investment and Trade* 18 (3): 414–48.

Miles, Kate. 2013. *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*. Cambridge, UK: Cambridge University Press.

Mosoti, Victor. 2005. "Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?" *Northwestern Journal of International Law & Business* 26 (1): 95–138.

Namibia. 2016. Law No. 199 of 2016: Namibia Investment Promotion Act. Official Gazette No. 6110 of August 31, 2016. https://investmentpolicy.unctad.org/investment-laws/laws/178/namibia-investment-promotion-act.

Ndikumana, Leonce, and Sher Verick. 2008. "The Linkages Between FDI and Domestic Investment: Unravelling the Developmental Impact of Foreign Investment in Sub-Saharan Africa." IZA Discussion Paper No. 3296, Institute for the Study of Labor, Berlin. www.iza.org/publications/dp/3296/the-linkages-between-fdi-and-domestic-investment-unravelling-the-developmental-impact-of-foreign-investment-in-sub-saharan-africa.

Ngatjiheue, Charmaine. 2018. "Nam Loses N$8,4b in Direct Investments" *The Namibian* 1, October 12, 2018. www.namibian.com.na/182215/archive-read/Nam-loses-N$84b-in--direct-investments.

Republic of South Africa. 2015. Protection of Investment Act 22 of 2015. www.gov.za/documents/protection-investment-act-22-2015-15-dec-2015-0000.

Sornarajah, M. 2010. *The International Law on Foreign Investment*. Cambridge, UK: Cambridge University Press.

Sowell, Thomas. 2015. *Basic Economics: A Common Sense Guide to the Economy*. New York: Basic Books.

UNCTAD (United Nations Conference on Trade and Development). 2009. *World Investment Report: Transnational Corporations, Agricultural Production and Development*. Geneva: United Nations. https://unctad.org/system/files/official-document/wir2009_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2015. *World Investment Report: Reforming International Investment Governance*. Geneva: United Nations. https://unctad.org/system/files/official-document/wir2015_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2016. *World Investment Report: Investor Nationality: Policy Challenges*. Geneva: United Nations. https://unctad.org/system/files/official-document/wir2016_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2017. *World Investment Report: Investment and the Digital Economy*. Geneva: United Nations. https://unctad.org/system/files/official-document/wir2017_en.pdf

UNCTAD (United Nations Conference on Trade and Development). 2018a. *Investment Policy Hub*. https://investmentpolicy.unctad.org/ Accessed June 6, 2021.

UNCTAD (United Nations Conference on Trade and Development). 2018b. *World Investment Report: Investment and New Industrial Policies*. Geneva: United Nations. https://unctad.org/system/files/official-document/wir2018_en.pdf.

UNCTAD (United Nations Conference on Trade and Development). 2019. *World Investment Report 2019: Special Economic Zones*. Geneva: United Nations. https://unctad.org/system/files/official-document/wir2019_en.pdf.

(UNECA) United Nations Economic Commission for Africa. 2016. *Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration*. Addis Ababa: UNECA.

Vandevelde, Kenneth J. 1998. "Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties." *Columbia Journal of Transnational Law* 36 (3): 501–27.

Winning, Alexander, and Joe Bavier. 2019. "Ramaphosa Is 'Last Hope' for South Africa, Chinese Diplomat Says." Reuters, Johannesburg, July 29. https://cn.reuters.com/article/us-safrica-china/ramaphosa-is-last-hope-for-south-africa-chinese-diplomat-says-idUSKCN1UO1XG.

World Bank. 2019. Foreign Direct Investment, Net Inflows (BoP, current US$) – South Africa. Data, World Bank. https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=ZA.

Zongwe, Dunia P. 2017. "Playing Hard to Get in a Sea of Many Fish: The Practical Implications of Saddling Foreign Investors with Host-Country Development." In *The Law Reform and Development Commission of Namibia at 25: A Quarter Century of Social Carpentry,* edited by Dunia P. Zongwe and Yvonne Dausab. Windhoek: Law Reform and Development Commission, Ministry of Justice.

Zongwe, Dunia P. 2018a. "How Africans Trade Their Riches for Roads and Bridges: Three Stories." In *New African Thinkers: Agenda 2063: Culture at the Heart of Sustainable Development*, edited by Olga Bialostocka, 36–60. Cape Town: HSRC Press.
Zongwe, Dunia P. 2018b. "African Can Drum Up Large Infrastructure Deals With Food." *American University International Law Review* 34 (3): 637–70.

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