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A LEGAL ANALYSIS OF GHANA'S SECURITIES LAWS IN LIGHT OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSION'S PRINCIPLES OF SECURITIES REGULATION

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30 MAY 2014

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Declaration

I, ABENA OHENEWA DANSO, hereby declare, that this mini-dissertation is my own work, and the results of my own research effort. It has never, on any previous occasion been presented in part or whole to any institution or Board for the award of any degree.

I further declare that secondary information used has been duly acknowledged in the work. I am responsible for any error whatever the nature in this work.

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Abstract

The protection of investors; a transparent, efficient and fair market; and a reduction of systemic risks are the market objectives of a prudent securities regulator. The implementation of a sound legal framework can achieve the aforementioned objectives and will put a country's stock exchange in the prime position to function at its optimum. A well functioning stock exchange provides governments and industry with the opportunity to raise long term capital and finance new projects. The Ghanaian government, recognizing the benefits to be derived from a well functioning stock exchange, established the Ghana Stock Exchange, and promulgated legislation to govern the securities industry.

In 2011 the International Monetary Fund performed an assessment of Ghana's financial markets and identified the securities industry legislation as archaic and required amendment. The International Monetary Fund endorsed the IOSCO objectives and principles of securities regulation, by suggesting that Ghana align its securities industry laws with the IOSCO objectives and principles. IOSCO principles have been identified as one of the key standards and codes for a sound financial system and their implementation should be prioritised. Following the report by the International Monetary Fund, the Ghanaian Securities Exchange Commission announced a comprehensive review of the legislation regulating the securities industry. A draft Securities Industry Act, 2013 was prepared, and is yet to accepted by parliament and promulgated by the president.

This mini-dissertation performs an assessment of the current securities industry laws against the IOSCO principles and finds that the current legal framework is not aligned with the IOSCO principles. An assessment of the proposed Securities Industry Act, 2013 against the IOSCO principles is performed and it is found that the draft bill when promulgated and implemented will bring Ghana's securities industry laws in line with the IOSCO principles. An analysis of the securities industry laws of Nigeria and South Africa is conducted, with the aim of identifying lessons, which Ghana can learn from the aforesaid jurisdictions, whose securities industry laws are aligned with the IOSCO objectives and principles.

This mini-dissertation concludes by recommending the adoption of the proposed Securities Industry Laws, 2013 by the Ghanaian parliament. It recommends that the Securities Exchange Commission adopts: Nigeria and South Africa's methodology to enhance its financial independence and operational independence; South Africa's risk-based system to ensure the

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prevention of systemic risk; aspects of South Africa and Nigeria's methodology for the enforcement of regulations to enhance its enforcement powers; and Nigeria's domestic remedies which have been implemented to enhance its cooperation with foreign regulators.

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Key Terms

- securities regulation
- IOSCO objectives and principles for securities regulation
- Ghana
- South Africa
- Nigeria
- stock exchange

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Acronyms

(“**AHC**”)	Administrative Hearings Committee
("**ERP**")	Economic Recovery Programme
(“**EC**”)	Enforcement Committee
(“**FINSAP”**)	Financial Sector Adjustment Programme
(“**FSB**”)	Financial Services Board
(“**GSE”**)	Ghana Stock Exchange
(“**IMF**”)	International Monetary Fund
(“**IOSCO**”)	International Organization of Securities Commissions
(“**JSE**”)	Johannesburg Stock Exchange
(“**MOF**”)	Minister of Finance
(“**MOU**”)	Memorandum of Understanding
(“**ISA 2007**”)	Investments and Securities Act No 29 of 2007
(“**IST**”)	Investment and Securities Tribunal
(“**SOF**”)	Secretary of Finance
(“**SEC**”)	Securities Exchange Commission
(“**SECR**”)	Securities and Exchange Commission Regulations
(“**SRC**”)	Securities Regulatory Commission
(“**SIA**”)	Securities Industry Act, 2013
(“**SIL**”)	Securities Industry Law, 1993 (PNDCL 333)
(“**SIAA**”)	Securities Industry Amendment Act 2000, Act

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Chapter 1

1. GENERAL INTRODUCTION

1.1. Background to the Problem

Following independence in 1957, the Ghanaian economy was characterised by heavy state involvement in all economic sectors, the resultant effect being dominance by the public sector in areas of production and employment.[1] Accordingly, by the early 1980s, Ghana's economy displayed the effects of a long period of economic deterioration which was evidenced in the negative gross domestic product growth, declining export revenue and the deterioration of infrastructure.[2] The steady economic decline over the 1957-1980s period resulted in most state enterprises facing low productivity and poor financial results which culminated in government being required to further subsidise industries to keep them afloat.[3]

As a result of its economic challenges, Ghana, like other Sub-Saharan African countries, was compelled to accelerate the promotion of a renewed economic growth strategy which would have the effect of ensuring the economic growth necessary to reverse the rising unemployment rates.[4] In 1983, in a bid to reverse the economic decline, the Government of Ghana launched an Economic Recovery Programme ("ERP").[5] Following the implementation of the ERP, Ghana's economy was strategically placed to embrace globalization with the increased interaction with other economies which had the effect of exposing the economy to greater and freer external trade and capital inflows.[6]

In 1968, almost two decades prior to the implementation of the ERP, a feasibility study on establishing a stock exchange was conducted. The study was published in 1969 in what

[1] Amoako S *Analysis of the Impact of Globalization and Capital Market returns on the Ghana Stock Exchange* (2012) Unpublished dissertation, Atlantic International University at 7
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid
[6] Ibid.

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became known as the Pearl Report by the Commonwealth Development Finance Co Ltd.[7] The Pearl Report recommended the establishment of a stock exchange within the space of two years and provided suggestions and modes of implementation to make the recommendation come to fruition.[8] The year 1971 saw the promulgation of the Stock Exchange Act however, owing to political instability and the financial crisis which hit Ghana from 1983 to 1988, the stock exchange, which had been envisaged in the Pearl Report, was not established until 1989.[9] The catalyst for the establishment of the GSE was the Financial Sector Adjustment Programme ("FINSAP") in 1988, as one of its main objectives was to "improve the mobilization and allocation of financial resources, including the development of money and capital markets."[10] Undoubtedly the government had recognised the central focus of developmental economics, namely the mobilization of resources for national development.[11]

The theory of developmental economics provides that for sustainable growth and development, funds must be effectively mobilized and allocated to enable businesses and the economy to harness their human, material and management resources for optimal output.[12] Stock markets give governments and industry the opportunity to raise long-term capital for financing new projects.[13] The stock market is an economic institution, an organized market for the trading of financial assets including securities, equities and debts.[14] In essence, the stock market establishes a trading facility to ensure prompt clearing and settlement orders.

The Ghana Stock Exchange ("GSE") was initially incorporated as a private company with limited guarantee in terms of the Companies Code of 1963; it later changed its status to a public company limited by guarantee in April 1994.[15] In October 1990, the GSE attained

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[7] S Mensah *Financial Markets and Institutions: Ghana's Experience* (1997) at 16
[8] Ghana Stock Exchange *About Us* [Available at http://www.gse.com/gh accessed 22.11. 2013]
[9] S Mensah (note 7) at 15
[10] S Mensah (note 7) at 11
[11] Abrokwa, Bediako et al *The Impact of Ghana Stock Exchange on the Growth of the Capital Market of Ghana* (2013) Unpublished dissertation, Christian Service University at 1
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ghana Stock Exchange (note 8)

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the status of a stock exchange and commenced trading on 12 November 1990.[16] The Securities Industry Law ("SIL") was promulgated in 1993 as an umbrella piece of legislation intended to cover all facets of the securities industry.[17] From its date of promulgation it has only undergone one amendment which took place in 2000 and led to the promulgation of the Securities Industry Amendment Act ("SIAA"). The SIL provided for the creation of a Securities Regulatory Commission ("SRC"), set out licensing requirements for market participation and provided terms for market conduct of parties listed on the stock exchange. The SIAA amended provisions in the SIL and renamed the SRC, the Securities Exchange Commission ("SEC") and amended the composition of the SEC. Prior to the enactment of the SIAA, regulatory powers rested with the Bank of Ghana.[18] The SIAA further amended the provisions of the SIL relating to mutual funds and unit trusts. The SIAA also provided for a settlement of disputes mechanism in the form of the creation of the Administrative Hearings Committee ("AHC").

1.2. Problem statement

Notwithstanding the aforesaid there are various inefficiencies in Ghana's securities market which need to be improved. The inefficiencies have been identified by the International Monetary Fund ("IMF") namely: there is a need for the SEC to be independent[19]; the SEC should have complete oversight of all securities activities[20]; the minimum capital requirements for intermediaries need to be increased[21]; the securities industry laws need to be modernized and be in compliance with the International Organization of Securities Commissions ("IOSCO") principles[22]; a need for the introduction of a separate and more flexible framework for the issuance of non-governmental bonds[23]; enforce post trade transparency for government bonds by requiring trade reporting of over the counter trades to a central place within a specified time for dissemination to the wider public[24]; the SEC

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[16] Ibid
[17] S Mensah, (note 7) at 15
[18] Ibid
[19] International Monetary Fund *Ghana: Financial System Stability Assessment Update* (2011) Country Report No 11/131 at 37
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.

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should support the establishment of a locally- based credit rating agency[25] and a need to be able to share information with local regulators as well as foreign counterparts.[26]

In 2011 the SEC announced a comprehensive review of the securities industry laws with a view of bringing them in with the IOSCO standards of securities regulation.[27] Unfortunately the GSE has not played a major role in resource mobilization and long term financing of the economy.[28] This has been as a result of equities dominating the industry and the debt market consisting predominantly of government securities.[29] Notwithstanding the capital market's accelerated growth, it lacks depth and liquidity.[30] The inefficiencies of the securities market are further compounded by the outdated pieces of securities legislation, which are not in line with the IOSCO standards, which govern the securities market. Accordingly, this study attempts to undertake a critical analysis and review of Ghana's laws regulating the securities market.

1.3. Thesis Statement

This study argues that Ghana's current securities laws are inadequate, and, in order to enhance the efficiency of the Ghanaian securities market, the legislation will need to be amended in line with the IOSCO principles and comparable best practices in Africa.[31]

1.4. Research question (s)

As discussed above, this research seeks to critically analyze the current state of the legal framework of Ghana's securities laws with a specific focus on the Securities Industry Law Act and the Securities Industry (Amendment) Act. To achieve this goal these questions will be addressed and answered:

(a) What are the IOSCO securities standards?

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[25] Ibid.
[26] *Securities Industry Law is under review* (9 March 2011) [available at http://www.ibrokerghana.com/news accessed on 12.11. 2013]
[27] Ibid.
[28] International Monetary Fund (note 19) at 28
[29] Ibid.
[30] Ibid.
[31] The relevance of the IOSCO principles and reason for the comparative analysis using countries in Africa will be explained in section 1.7 below

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(b) How do Ghana's securities laws deviate from the IOSCO securities standards? In particular to what extent do they deviate from the IOSCO securities standards relating to the regulator, enforcement of securities regulation and co-operation?

(c) What will be the effect on investors on the GSE, if Ghana's securities laws are brought in line with the IOSCO securities standards?

(d) What lessons can be learned from South Africa and Nigeria who recently amended their securities laws in line with the IOSCO standards?

1.5. Significance of Research

Ghana boasts of an investor - friendly environment aimed at attracting foreign investment in as many, if not all the sectors of the Ghanaian economy.[32] Ghana further boasts of a stable regulatory environment that is said to provide transparent and fair treatment to all investors with no distinction being made in respect of local or foreign investors.[33]

Ghana has undertaken significant institutional and regulatory reforms over the past decade in a bid to increase the efficiency of the financial markets.[34] Stock markets have been associated with economic growth as a result of its role as a source of new private capital. An overhaul of the financial institutions and regulatory reforms will not be complete if steps are not taken to improve the legal efficiency of the securities market. Accordingly it is necessary to undertake a review of the securities laws of Ghana to ensure that the GSE is not just another African stock exchange which promises and delivers great returns but lacks strong legislative regulations and accordingly market participants can enjoy the legislative loopholes.

The aim of the study is to contribute to the knowledge on the subject and to bring a legal angle to the academic discussion surrounding African stock markets. As, at present, the bulk of the literature is economic in nature.

[32] R Kudoadzi & D Imadi *Ghana Getting the Deal Through* (2013) Foreign Investment Review at 40
[33] African Development Bank / OECD *Economic Outlook Report - Ghana* (2008) at 334
[34] Ibid at 339

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1.6. Literature review

As discussed above this research takes the form of a critical analysis of the current legal framework of Ghana's securities market. The writer has not come across any literature which specifically deals with or comments on the current legal framework which governs Ghana's securities market. Accordingly, this literature review will be in respect of the substantive issues which underpin the reason for this research. The literature review will consider authors who have written about stock market development in Africa and the constraints that impede the rapid development of the securities market.

The last twenty years has seen rapid growth in the number of stock exchanges in Africa and in particular in Sub-Saharan Africa. There are currently twenty-nine exchanges in Africa which represent thirty-eight nations' capital markets.[35] The rapid increase of stock exchanges has been as a result of countries taking part in extensive financial sector reforms.[36]

Kehl[37] writing on emerging markets in Africa notes that they are characterized by remarkably high returns while simultaneously being characterized by substantial high risks.[38] Kehl notes that there is not a universally accepted definition of emerging capital markets.[39] However, in his re-assessment of what constitutes an emerging market he characterizes Ghana as an emerging market.[40]

Mwenda's[41] central thesis is that notwithstanding that emerging markets[42] represent a fast growing part of the economy, imperfect market conditions can affect the capital structure

[35] [Available at http://en.m.wikipedia.org/wiki/List_of_African_stock_exchanges accessed on 14.11.2013]
[36] LW Senbet and I Otchere *African Stock Markets* presented at African Finance for the 21st Century High Level Seminar organized by the IMF Institute in collaboration with the Joint Africa Institute Tunis, Tunisia (March 4-5, 2008)at 1
[37] JR Kehl *Emerging markets in Africa* (2007) 1(1) African Journal of Political Science and International Relations 1-8
[38] Ibid at 1
[39] Ibid at 3
[40] Ibid at 5
[41] K Mwenda *Securities Regulation and Emerging Markets: Legal and Institutional Issues for Southern and Eastern Africa* (2000) 7(1) Murdoch University Electronic Journal of Law 1-30
[42] Mwenda defines emerging markets to encompass Africa's emerging markets

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decisions of corporate investor.[43] Mwenda[44] has identified problems which stifle the development of African stock exchanges namely, unfavourable macroeconomic and or political environments and/or unfavourable tax regimes, restrictive foreign exchange controls, restrictive stock exchange membership regulation, insufficient protection of smaller investors from practices of insider trading and lack of liquidity.[45] Mwenda's study converges with that of the writer when he further notes that the inefficiencies and problems that stifle the development of African stock exchanges are correlated with the regulatory framework[46]; he says "where a market lacks depth it is not easy to appreciate the extent to which a relatively untested regulatory framework contributes to a competitive stock exchange."[47]

According to Yartey[48], stock market development is expected to accelerate economic growth by providing a boost to domestic savings and increasing the quantity and the quality of the investment, this forms the backbone of Yartey's hypothesis.[49] Yartey further puts forward the argument that stock markets can encourage economic growth by providing an avenue for growing companies to raise capital at lower costs.[50] In addition companies in countries with developed stock markets are less dependent on bank financing. [51] Yartey finds that the aforesaid is evident in the case of firms on the GSE, as the average quoted firm on the GSE finances a large proportion of its growth of total assets from external sources and relies to a smaller extent on internal finance, which leads to the conclusion that the GSE plays an important role in providing finance to Ghanaian firms.[52] Yartey's thesis converges with that of the writer as he concludes that owing to the important role which external debt financing plays in the growth of African countries policy makers should spend more time developing financial systems and implementing policies, which the writer

[43] K Mwenda (note 41) at 3
[44] Ibid.
[45] Ibid at16
[46] Ibid at 17
[47] Ibid at 17
[48] CA Yartey *The Stock Market and the Financing of Corporate Growth in Africa: The Case of Ghana* (2008) IMF Working Paper WP/08/32
[49] Ibid at 8
[50] Ibid
[51] Ibid.
[52] Ibid at 22

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is of the view includes legislation, which have the effect of reducing risks associated with listings on stock exchanges.[53]

Carvajal and Elliott's[54] propose is that the effectiveness of securities regulation relies on the existence of a sound framework.[55] They further note that where there is an absence of a sound basic legal framework, the development of stock markets are negatively affected.[56] Carvajal and Elliott are in agreement with Yartey in respect of the role which securities markets play in the economic growth and financial stability of an economy.[57] They, in agreement with Yartey, take the view that the primary purpose of securities markets is to transform savings into financing for the real sector and accordingly the securities market is an alternative to bank financing.[58] Carjaval and Elliot's discussion of the importance of securities regulation and their notation that the importance of a sound regulatory framework will ensure, smooth functioning of trading and clearing and settlement mechanisms, that will prevent market disruption and foster investor confidence, converges with that of the writer.[59] Carjaval and Elliot reach the conclusion that securities regulatory systems suffer from persistent weaknesses in a number of countries and need to be improved[60] as they fail to provide the regulator with sufficient independence, powers and resources to effectively regulate and supervise market participants.[61] Carjaval and Elliott further conclude that a regulator's power to effect regulation on the securities market is impaired where there is a lack of power and authority, lack of resources and skill and the inability to enforce compliance with existing rules and there being a lack of political will.[62]

Yartey and Adjasi[63] consider the factors relevant to the development of stock markets in

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[53] Ibid at 21
[54] Carvajal A & Elliott J (2007) *Strengths and Weaknesses in Securities Market Regulation: A Global Analysis* IMF Working Paper WP/007/259
[55] Ibid at 5
[56] Ibid at 5
[57] Ibid.
[58] Ibid .
[59] Ibid at 6
[60] Ibid at 5
[61] Ibid at 6
[62] Ibid at 5
[63] CA Yartey & Adjasi *Stock Market Development in Sub-Saharan Africa: Critical Issues and Challenges'* (2007) IMF Working Paper WP/07/209

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Africa. The centrality of Yartey and Adjasi's hypothesis is that a sound macroeconomic environment, well developed banking sector, transparent and accountable institutions and shareholder protection are necessary preconditions for the efficient functioning of stock markets in Africa.[64] In respect of institutional quality, Yartey and Adjasi take the view that an efficient and accountable institution tends to broaden the appeal and confidence which investors have in equity investment.[65] They further take the view that the following need to be in place for the development of stock markets in Africa, namely: the need to increase automation, demutualization of exchanges, regional integration of exchanges, promotion of institutional investors, regulatory and supervisory improvements, involvement of foreign investors and educational programmes.[66] Yartey and Adjasi further note that there is a need to strengthen regulation and supervision of African stock exchanges as regulation and supervision is aimed at protecting investors from opportunistic behavior by insiders.[67] This converges with the writer's views. In this regard, they confirm that disclosure, transparency and enforcement form an integral part of regulation and supervision.[68]

The literature discussed above has, identified as a possible solution to the problems facing African stock exchanges, the implementation of a strong institutional and regulatory framework. There, however, remains a gap in the literature with respect to how the implementation of the IOSCO principles of securities regulations can form a basis for the creation of a legal framework which will ultimately have an effect on the efficiency of a country's securities market. In addition, there remains a gap in respect of the benefits a sound legal framework will have on the GSE. This research seeks to close these gaps or at least lay a foundation to fill the lucunae.

1.7. Research methodology

This mini-dissertation is a qualitative study with a descriptive and analytical approach. The research is conducted through desktop review and the substance of the investigation is based on research conducted from primary and secondary sources. These include library

[64] Ibid at 16
[65] Ibid at 17
[66] Ibid at 18
[67] Ibid at 24
[68] Ibid at 25

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research, legislation, books, the internet, journal articles, newspaper clippings, and conference and seminar reports. There is also reliance on best practices from other countries as well as documentation from IOSCO.

In respect of the reliance on best practices from other countries, the writer will focus on Nigeria and South Africa who recently amended their securities industry laws in line with IOSCO principles. The writer is aware that Kenya also amended its securities industry laws inline with IOSCO principles, however the nature of this mini-dissertation precludes the writer from considering all the three countries. The rationale for electing to focus on Nigeria and South Africa stems from the geographical proximity of the former to Ghana and the fact that representatives from both countries Stock Exchanges are currently participating in discussions to integrate the West African capital markets. The rationale for a consideration of South Africa's Stock Exchange, the Johannesburg Stock Exchange ("JSE"), is Africa's largest, oldest, most efficient, dynamic and regulated stock exchange.

1.8. Overview of chapters

The study consists of five chapters as set out below:

Chapter one is an introductory chapter covering the background to the study, problem statement, thesis statement and research questions, the significance of the study, literature review and methodology of the study

Chapter two defines securities regulation, provides an overview of the IOSCO objectives and principles of securities regulation and considers the effectiveness of the IOSCO principles as a measurement tool for securities regulation.

Chapter three is an overview and critical analysis of the existing legal framework of Ghana's securities market. The analysis is conducted by way of assessing the existing legislation against three categories of the IOSCO principles, namely principles relating to the regulator, principles relating to enforcement and principles of cooperation.enhancing investor confidence and increasing market efficiencies.

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Chapter four will be a critical assessment of the proposed Securities Industry Act, 2013. The assessment will consider whether the proposed legislation cures the defects identified in the current legal framework. This chapter will also consider lessons which can be learned from Nigeria and South Africa, who have benchmarked their securities laws against the IOSCO principles for securities regulation.

Chapter five is a conclusion of the study and provides recommendations.

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Chapter 2

2. OVERVIEW OF IOSCO STANDARDS FOR SECURITIES REGULATION

2.1. Introduction

The question this chapter will attempt to interrogate is: what are the IOSCO securities standards? In answering this question this chapter will attempt to contextualize the framework within which the IOSCO securities standards operate. This will be done by defining securities regulations and providing an overview of IOSCO as a body and its objectives and principles of securities regulations. This chapter will also consider the effectiveness of the IOSCO principles as a measurement tool for securities regulations.

2.2. Defining securities regulation

Regulation refers to a set of binding rules which are either issued by a private or a public body.[69] Mwenda notes that regulations are rules that are applied by regulators in the fulfillment of their function.[70] MacNeil highlights that, the term regulation is often understood "to refer to rules and procedures created by statute and administered by dedicated agencies."[71] Collins defines securities regulation as a process based on laws, which, state regulatory objectives in terms of investor protection, fair and orderly markets, competition and the control of systemic risk.[72]

Securities regulation encompasses the regulation of all parties that play a role in the securities industry namely securities regulators, public issuers of securities, asset management institutions, intermediaries and secondary markets. Regulation is focused on enhancing the dissemination of information between issuers and investors; clients and financial intermediaries and between parties to transactions.[73] In essence securities regulation is to ensure the smooth functioning of trading and clearing and settlement mechanisms that will prevent the disruption of the market and will promote investor

[69] Mwenda *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (2006) Law, Justice and Development Series The World Bank at 5
[70] Ibid.
[71] MacNeil *An Introduction to The Law of Financial Investment* (2012) at 20
[72] Collins *Regulation of Securities, Markets and Transactions: A guide to the New Environment* (2011) p xvii
[73] Carjaval (note 54) at 6

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confidence.[74] The objectives that underpin securities regulation are the protection of investors, the creation of fairness, efficiency and transparency in the markets, as well as the curbing of systemic risk.[75]

2.3. The International Organization of Securities Commissions

IOSCO was established in 1983 in Quito, Ecuador at a meeting of the inter-American regional association which comprised of eleven securities regulators, representing countries in North and South America.[76] The move from a regional association to an international organisation, allowing international participation of securities regulators, was in recognition of the evolving worldwide financial sector and a need for interactions and understanding between regulators.[77]

IOSCO has been described as a multilateral actor and has been categorized alongside the Basel Committee on Banking Supervision, the International Association of Insurance Supervisors, the IMF and the Organization for Economic Co-operation, as a conduit for national based actors to influence multilateral trading environments, especially their regulatory character.[78] IOSCO's membership comprises of securities regulatory bodies representing over 115 jurisdictions.[79] Membership is voluntary, but with the recognition of IOSCO as the global standards setter in the securities industry sector, there is international pressure for regulators to be signatories to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and Exchange of Information ("MMoU").[80] The MMoU is an understanding of cooperation between the signatories and it provides the signatories with "tools for combating the cross-border fraud and misconduct that can weaken global markets and undermine investor confidence."[81]

[74] Ibid.
[75] IOSCO Objectives and Principles of Securities Regulation (2003) p i
[76] G Gilligan *IOSCO 1: The story to date* [Available at http://www.clmr.unsw.edu.au/article/accountability/regulatory-design/iosco-i-story-date accessed on 27.05.2014]
[77] Ibid
[78] Ibid.
[79] IOSCO Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulations (2013) at 8
[80] Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the exchange of Information [Available at www.iosco.org accessed 27.05.2014]
[81] Ibid

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2.4. IOSCO's objectives and principles of securities regulation

In 1998, the IOSCO President's Committee approved the principles which set a benchmark for securities markets worldwide.[82] In 2003, the principles were revised and IOSCO published a sixty-eight page document dealing with the objectives and principles of securities regulation. At the time there were thirty principles of securities regulation which had been identified by IOSCO. In June 2010, eight more principles were included to the initial thirty principles. The additional eight principles were included after a review of developments in securities markets and the financial crisis of 2007.[83] There are now thirty-eight principles of securities regulation.

2.4.1. The IOSCO Principles

IOSCO takes the view that if the thirty-eight principles are practically implemented under a legal framework, they would have the effect of achieving the aforementioned three objectives. The rationale behind the objectives and principles is as a result of the pivotal role which securities and derivatives markets can play in an economy.[84] The thirty-eight principles have been segmented into eight categories, namely, the principles relating to the regulator, principles of self-regulation, principles for the enforcement of securities regulation, principles for cooperation in regulation, principles for issuers, principles for auditors, credit ratings agencies, and other information service providers, principles for collective investment schemes, principles for market intermediaries and principles for the secondary market. The principles will be discussed in more detail below.

2.4.1.1. Principles relating to the regulator

The first eight principles relate to the regulator. The first principle provides that the regulator's responsibilities should be clear and objectively stated.[85] A regulator is able to conduct its work in a fair, effective and responsible manner when its responsibilities are clearly defined in law. There should be adequate checks and balances which require the cooperation between all bodies responsible for various aspects of securities regulations,

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[82] IOSCO (note 79) at13
[83] Ibid
[84] Ibid at iv
[85] IOSCO (note 73) at 9

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governmental law enforcement agencies as well as other relevant financial regulatory bodies.[86] The second principle provides for operational independence of the regulator and makes provision for accountability of the regulator in the exercise of its functions and powers.[87] Independence of a regulator implies that it is able to operate separately without sectoral interests or pressures influencing its decisions and regulations. This also encompasses the notion of the regulator conducting its work without political and or commercial interference.[88] Accountability puts forward the concept of the regulator being subject to scrutiny and review.[89] To fulfill this function adequate powers and proper resources should be at the disposal of the regulator.

The aforesaid as well as the requisite capacity to perform its functions and exercise its powers make up the third principle. The fourth principle prescribes the need for the regulator to adopt clear and consistent regulatory processes.[90] The fifth principle relates to the individuals hired by the regulator and specifies that they should maintain high ethical standards while at work this includes maintaining the appropriate levels of confidentiality.

The sixth principle puts forward the notion of a regulator contributing to a process which is appropriate to its mandate, to mitigate and manage systemic risk. The seventh principle suggests that a regulator should have or contribute to a process of review. The last principle relating to the regulator provides that a regulator "should seek to ensure that conflicts of interest and misalignment of incentives are avoided, eliminated, disclosed or otherwise managed."[91]

2.4.1.2. Principles for self-regulation and for the enforcement of securities regulation

The ninth principle is in respect of self regulation and it takes into account the possibility of there being delegation by the regulator to an organization which has expertise in various areas of securities regulation and accordingly provides that a self regulatory organization

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[86] IOSCO (note 79) footnote 13 at 9
[87] IOSCO Objectives and Principles of Securities Regulation (2010) at 4
[88] IOSCO (note 79) at 25
[89] Ibid.
[90] IOSCO (note 75) at 4
[91] Ibid.

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should be subject to the oversight of the regulator and should "observe standards of fairness and confidentiality when exercising powers and delegated responsibilities." The next three principles relate to the enforcement aspect of regulation and provides for a regulator to have wide reaching powers of surveillance, investigation, inspection and enforcement.[92] It also provides that a regulatory system should have in place an effective compliance programme which monitor the effective and credible use of the aforesaid powers.[93]

2.4.1.3. Principles for cooperation in regulation

Principles 13, 14 and 15 focus on the dissemination of information and the creation of information sharing mechanisms between domestic and foreign regulatory bodies.[94]
Principle 13 provides that the regulator should have authority to share both public and non-public information with domestic and foreign counterparts. Regulators should establish information sharing mechanisms that set-out when and how the sharing of public and non-public information will occur between domestic and foreign counterparts, this makes up principle 14.[95] Principle 15 provides for the regulatory system making allowance for the of assistance to foreign regulators "who need to make inquiries in the discharge of their functions and exercise of their power."[96]

This requirement of cooperation between regulators flows as a result of the rapid growth of technology which allows for the cross border financial activities and the global market. Accordingly, the failure of cooperation between regulators can result in financial services escaping the surveillance and control of a regulator which creates avenues for insider trading, market manipulation, fraud and other illegal activities.[97] The principle of cooperation between regulators is also of significance at a domestic level, as in certain instances the functions of securities regulators overlap with the functions of other financial regulators. Another effect of cooperation between regulators is to guard against and to reduce systemic risk, it also allows for the confirmation of information to enable the

[92] Principles 10 and 11 IOSCO (2010) at 5
[93] Principle 12 IOSCO (2010) at 5
[94] IOSCO(2010) at 7
[95] Principle 14 IOSCO (2010) at 7
[96] Principle 15 IOSCO (2010) at 7
[97] IOSCO(note 79) at 70

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authorization of a firm or individual to work in a particular capacity.[98]

In order to effectively cooperate regulators will require knowledge of the agencies at a domestic level it needs to cooperate with and in respect of the nature of information it would be required to share. Further the regulator would need to be aware of national laws which prohibit it from being able to share information with other regulators. Accordingly, the ability of a regulator to cooperate is closely linked to its powers to obtain and keep confidential the information requested nationally as well as by its foreign counterparts.

2.4.1.4. Principles for issuers

The principles for issuers are captured in principles 16 to 18 and focus on the protection of investors and shareholders and provide for the full, accurate and timely disclosure of all information which would be material to informing the decisions of investors.[99]

2.4.1.5. Principles for auditors, credit ratings agencies and other information service providers

Principles 19 to 21 focus on the auditors and illustrates that a balance must be struck between the independence of the auditors as well as the need for there to be a body which has oversight of the auditors. Principle 22 is in respect of credit rating agencies and suggests that they should be subject to registration and ongoing supervision.[100] The twenty-third principle provides that "other entities that offer investors analytical or evaluative services should be subject to oversight and regulation appropriate to the impact that their activities have on the market or the degree to which the regulatory system relies on them."[101]

2.4.1.6. Principles for Collective Investment Schemes

Principles 24 to 27 provides for the creation of: standards by the regulatory system for the eligibility, governance, organization and operational conduct of parties who want to market

[98] Ibid
[99] Principle 16 IOSCO (2010) at 8
[100] IOSCO (2010) at 9
[101] Principle 23 IOSCO (2010) at 8

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or operate collective investment schemes;[102] rules which govern the legal form and structure of collective investment schemes and both the segregation and protection of client assets;[103] disclosure requirements similar to those suggested for issuers to enable investors to evaluate the suitability of a particular investment scheme;[104] a disclosed basis for the valuation of assets and the pricing and redemption of units in a collective investment scheme.[105] Article 28 requires the creation of checks and balances for hedge funds, hedge funds managers and hedge funds advisers.[106]

2.4.1.7. Principles for Market Intermediaries

Provision is made for the setting of a minimum entry standard for market intermediaries.[107]The implementation of checks and balances for market intermediaries is suggested, and should take the form of ongoing and initial capital and prudential requirements reflective of the risks undertaken by market intermediaries.[108] This notion is carried on in Principle 32 which requires the creation of procedures which take cognizance of systemic risk to minimize damage and loss to investors in the instances of failure of a market intermediary.[109] Principle 31 makes provision for the establishment of "an internal function by market intermediaries which delivers compliance with standards for internal organization and operational conduct, with the aim of protecting the interests of clients and their assets and ensuring proper management of risk, through which management of the intermediary accepts primary responsibility for these matters."[110]

2.4.1.8. Principles for secondary markets

These principles are focused on implementing oversight provisions to ensure the integrity of the trades through fair and equitable rules which strike a balance between the demands of various market participants. Principles 35 to 38 make provision for the creation of a

[102] IOSCO (2010) at 10
[103] Principle 25 .IOSCO (2010) at 10
[104] Principle 26 IOSCO (2010) at 10
[105] Principle 27 IOSCO (2010) at 10.
[106] IOSCO (2010) at 10
[107] Principle 29 IOSCO (2010) at 11
[108] Principle 30 IOSCO (2010) at 11
[109] Principle 32 IOSCO (2010) at 11
[110] IOSCO (2010) at 11

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framework to: promote transparency;[111] detect and deter the manipulation of unfair trading practices;[112] properly manage large exposures, default risk and market disruption;[113] and reduce systemic risk.[114]

2.4.2. The IOSCO Objectives

The necessity for the IOSCO principles is illustrated in its stated objectives namely: the protection of investors, ensuring the markets are fair, efficient and transparent; and the reduction of systemic risk.

2.4.2.1. The protection of investors

The securities market is characterized by the offering of intangible assets to willing consumers who are referred to as investors. Accordingly, there is a need to protect investors from the possibility of "misleading, manipulative and or fraudulent practices"[115] which include insider trading, front running and the misuse of client assets.[116] In order for investors to be protected, there is a need for the enactment as well as enforcement of securities laws which can be utilized by investors when the need arises.[117] Full disclosure of all information material to informing an investor's decision has been identified as the most important means for ensuring the protection of would-be investors.[118] As full disclosure puts investors in a position to better assess the potential risks or rewards which a particular transaction has the potential to yield.[119]

The regulation of market intermediaries goes hand in hand with the protection of investors as market intermediaries are the go between the investor and the corporation in which the investor invests.[120] Accordingly, it is necessary to ensure that the minimum standard for participation in the market as a market intermediary has the effect of bringing together a conglomerate of intermediaries who have the requisite expertise to ensure the smooth

[111] Principle 35 IOSCO (2010) at 12
[112] Principle 36 IOSCO (2010) at 12
[113] Principle 37 IOSCO (2010) at 12
[114] Principle 38 IOSCO (2010) at 12
[115] IOSCO (note 79) at 10
[116] Ibid.
[117] Ibid.
[118] Ibid
[119] Ibid.
[120] IOSCO (note 79) at 11

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functioning of the capital market environment.

2.4.2.2. Ensuring that markets are fair, efficient and transparent

The creation of a fair, efficient and transparent market is closely linked to the protection of investors. As the creation of such a market has the effect of guarding against and preventing unfair trading practices which have a direct effect on the investor. A fair market means that steps are taken to ensure that certain individuals are not favoured over other market participants.[121] Regulation which "detects, deters and penalizes market manipulation"[122] is necessary for the materialization of a fair, efficient and transparent market. An efficient market is characterized by the timeous and widespread dissemination of information.[123] The term transparency, refers to the degree to which pre-trade and post-trade information is made available to the public on a real-time basis.[124] Pre-trade information refers to the information necessary for an investor to know whether they can make a bid and at what price to bid.[125] Post-trade information refers to the information in respect of the prices and the volume of all individual transaction actually concluded.[126] Transparency and disclosure are also critical components in being able to identify the development of systemic risk within a market.[127]

2.4.2.3. The reduction of systemic risk

Systemic risk is also closely connected to investor protection. The connection is because the inherent nature of investing includes, an aspect of risk. Accordingly, regulators should take steps to provide an effective tool to manage risk for investors and to ensure that capital and prudential requirements sufficiently address and absorb potential risks and losses.[128] This is not to say that the regulators should be tasked with preventing financial failure but regulations should be focused on reducing the risk of failure through capital and internal control requirements.[129] This goes back to the proper regulation of market intermediaries.

[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid at 40
[128] Ibid at 11 and 12
[129] Ibid at 12

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2.5. The effectiveness of the IOSCO principles as a measurement tool

As illustrated above the eight subdivisions of the IOSCO principles identify key areas in any securities market. The IOSCO principles have been identified by the Financial Stability Board as one of the key standards and codes for a sound financial system and deserve priority implementation.[130] In addition, the European Bank for Reconstruction and Development, which endorses international standards developed by international financial institutions to promote transparent and efficient capital markets and sound corporate governance practices has endorsed the IOSCO principles.[131] ISOCO has developed a methodology to measure the level of implementation of its principles, which will be dealt with in detail in chapter three below.

The effectiveness of the IOSCO principles as a measurement tool for securities regulation is evidenced by the visible impact adoption of these standards, even when only in part, has on securities markets. When regulators implement sound legal frameworks for the regulation of securities markets it boosts investor confidence because the investor is assured that there are checks and balances on a regulatory level to protect its investments. Furthermore it enhances market fairness, improves transparency and puts into place a risk matrix to protect against systemic risk. Implementation of a sound legal framework has been shown to reduce the cost of equity as has been seen in Australia, France, Germany, United Kingdom and the United States of America.[132] A sound legal framework has been shown to boost investor confidence as is apparent on the JSE which is currently ranked as the nineteenth largest stock exchange in the world by market capitalization and the largest in Africa.[133] In chapter 5 the writer will identify some lessons which Ghana can learn from South Africa. Accordingly, the implementation of the IOSCO principle can have a catapulting effect on a country's securities industry.

[130] Ibid at 14

[131] [Available at http://www.ebrd.com/pages/sector/legal/securities/standards.shtml accessed on 25 May 2013]

[132] K Malcolm, M Tilden et al *Assessing the Effectiveness of Enforcement and Regulation* (2009)[Available at www.cityoflondon.gov.uk/economicresearch accessed on 09.05.2014] at 43

[133] Johannesburg Stock Exchange: An Overview [Available at www.jse.co.za accessed on 29.05.2014]

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2.6. Conclusion

This chapter contextualized the framework within which the IOSCO securities standards operate. The need for securities regulation was illustrated as a prerequisite for ensuring the presence of a stable and efficient financial system which can dynamically impact a country's economic development. It was further noted that the threat of systemic risk is what necessitates the need for prudential regulation of the securities industry. A descriptive consideration of the IOSCO standards, principles and objectives was conducted and the rationale for various principles was explained in the process. The broad conceptual level at which the IOSCO principles are drafted was illustrated to show how it can guide regulators to draft a regulatory framework which will have the effect of enhancing the domestic securities market. It was concluded that the IOSCO principles are an effective measurement tool for the assessment of the effectiveness and efficiency of a securities market.

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Chapter 3

3. GHANA'S SECURITIES LAWS CONSIDERED IN LIGHT OF THE IOSCO SECURITIES STANDARDS

3.1. Introduction

This chapter seeks to answer the following question: How do Ghana's securities laws deviate from the IOSCO securities standards? In particular the principles relating to the regulator, enforcement of securities regulation and cooperation. To assist in answering this question first, a skeletal mapping of the SIL and a brief introduction into the IOSCO assessment methodology will be provided. Second, an assessment using the aforesaid methodology will be conducted to determine the SIL's compliance with the aforementioned principles. Only the sections of the SIL which show a misalignment with the three aforementioned principles will be the focus of the assessment. The principles will be assessed in the same order they are mentioned above.

Following the assessment of three principles an analysis and illustration of the manner in which the aforesaid principles play out in the Ghanaian securities market will take place under these respective headings: the nature of the regulatory agency established under the SIL; the manner in which the regulatory agency is required to carry out its enforcement powers as provided for in the SIL and the manner in which the regulatory agency cooperates with other regulators. The latter exercise will emphasize additional gaps in the legislation, and that will further highlight the deviations of the SIL from the IOSCO securities standards.

3.2. A birds eye view of the Securities Industry Law, 1993

The SIL is the main piece of legislation which regulates the securities industry in Ghana. It is read in tandem with the SIAA and the Unit Trusts and Mutual Funds Regulations[134] and the SECR.[135] The SIL is divided into eleven sections in the following order, securities and exchange commission; functions of the commission; stock exchanges; unit trusts and

[134] Securities and Exchange Commission Regulations, 2003 L.I 1728
[135] Unit Trusts and Mutual Funds Regulations, 2001 L.I 1695

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mutual funds; licences; registers of interests in securities; conduct of securities business; accounts and audit; fidelity funds; trading in securities and lastly miscellaneous provisions. As set out in chapter 1, one of the recommendations made by the IMF, following its assessment of Ghana's securities industry was that there was a need to reform the securities industry laws and align them with the IOSCO principles for securities regulation.[136] Accordingly an assessment of the SIL against the IOSCO principles must be performed.

3.3. An assessment of Securities Industry Law, 1993 against the IOSCO principles of securities regulation

As alluded to in chapter 2[137] IOSCO published a methodology[138] of assessing a country's compliance to its principles of securities regulation. The methodology sets down questions that an assessor should pose and should obtain answers for.[139] There are various questions to be posed in determining the level of implementation of each of the 38 principles. IOSCO provides benchmarks under each principle which if met will illustrate a country's level of implementation namely, fully implemented, broadly implemented, partly implemented and not implemented. When all the questions for each principle is answered in the affirmative the principle has been fully implemented.

The writer will assess the implementation of selected IOSCO principles relating to the regulator, enforcement of securities regulation and cooperation. The rationale for this selection is that these principles, in the view of the writer, lay the foundation for the proper functioning of any securities market. A securities market cannot function at its optimum if it does not have an independent and accountable regulator. In order for the regulator to carry out its functions on a securities market it requires sufficient enforcement powers to regulate market participants and guard against the creation of systemic risk. Moreover, with the increased speed of development of financial services activities, regulators need to be in the position to coordinate and share information with other regulators. By so doing

[136] See 1.2
[137] See 2.5 above
[138] Methodology for Assessing Implementation of the IOSCO Objective and Principles of Securities Regulation
[139] The methodology does not designate an assessor but all the assessments viewed by the writer have been carried out by the IMF.

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regulators are able to protect their markets by being placed in a position of awareness of various financial services providers, enabling the regulator to focus its powers of surveillance on these service providers and to guard against market manipulative behaviour.

3.4. Principles relating to the regulator

Principle 2 requires the regulator to be operationally independent and accountable in the exercise of its functions and powers. A key issue to take into consideration in assessing the independence of the regulator is whether the regulator is free from both political and commercial interference.[140] Section 140 of the SIL empowers the Minister of Finance ("MOF")[141] to issue 'directions of a general or specific character as to the exercise of the Commission's functions.'[142] The section further specifies that it will be the duty of the SEC to give effect to the directions of the MOF. This clause has the effect of negating the political independence of the SEC. It is a clear reflection of political interference and it has the potential to threaten the faith that investors and other market participants have in the SEC's ability to issue regulations based on criterion of objectivity and fairness.[143] However it must be noted that the MOF does not take part in the day to day running of the SEC.

Another key issue which requires the cognizance of the assessor is whether the regulator is financially independent.[144] To achieve financial independence, the regulator requires a stable source of funding which is sufficient to enable it to exercise its powers and responsibilities.[145] Section 6 of the SIL deals with the manner in which the SEC can obtain funding. The SEC's mode of funding includes grants received from the government; loans granted by the government or any body or person; money accruing to the SEC in the course of the performance of its functions and grants made by donors approved by the MOF.[146]

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[140] IOSCO (note 79) at 25
[141] The legislation refers to the Secretary of Finance however that position no longer exists and the holder of that post is known as the Minister of Finance.
[142] s140 of the Securities Industry Law, 1993
[143] Ibid
[144] Ibid.
[145] Ibid.
[146] s6 of Securities Industry Law, 1993

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Section 45 of the SECR imposes a transaction levy to be paid by the purchaser and seller of securities and requires the remittance of the levy to the SEC.

Notwithstanding the SEC being able to keep transaction levies and licence fees, the monetary values are not sufficient to enable the SEC to exercise is powers and responsibilities. Furthermore, there is no certainty in respect of the amount of money which will accrue to the SEC within a particular financial year. Although levies and licencing fees are a source of funding, in order for the SEC to plan and budget it would be required to make its budget proposal based on governmental grant figures. Accordingly, the current nature of the SEC's funding makes it highly dependent on government as a source of funding, the further requirement that the MOF is required to approve donor funds received by the SEC places it in an even more financially dependent position.[147]

In respect of operational accountability, the SIL requires the SEC in section 7 to keep proper books or accounts and maintain financial records which are to be submitted to the Auditor General. The Auditor General is to conduct an audit and the SEC is required to submit the audited financial report to the MOF. However there is only provision for financial accountability and there is no requirement for the publishing of a document attesting to the operational accountability of the SEC.

The above three identified situations puts a dent in the possibility of attaining full marks in the independence and accountability assessment of the SEC. In that their effect is the creation of a financially dependent and operationally unaccountable regulator. An independent and operationally unaccountable regulator affects the credibility of the securities industry. Moreover, at the time of conducting a due diligence exercise on prospective markets in which to invest, a savvy investor might rethink placing its investments in a country without an independent and accountable regulator.

[147] s6(1)(d) of Securities Industry Law, 1993

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3.4.1. The nature of the regulatory agency established under the Securities Industry Law, 1993

The SIL establishes and creates a regulatory agency. A key feature of establishing a regulatory agency is deciding how it will function within the parameter of the government. There are four agencies in the government to which the task of regulating securities markets can be assigned.[148] The four identified agencies are the Ministry of Finance, the Central Bank, the office of the President and an independent commission.[149] The SIL attempts to establish an independent commission, however the SEC created by the SIL is closely connected to and at times controlled by the MOF.

The general rationale for locating the securities regulator within the MOF is often because in an ideal world the MOF is in the prime position to coordinate policies and supervise a country's financial sectors namely: the banking sector; securities market; insurance and taxation sectors.[150] Consequently, the MOF would be able to ensure that there are no regulatory overlaps within the different financial sectors and would be best placed to ensure there are no gaps in the laws regulating the aforementioned sectors.[151] It has been argued that on the surface the positing of the securities regulator within the MOF is most logical and it has far reaching benefits. However, in reality, when a securities regulator is so positioned, things do not always play out as theorized.[152]

An identified problem of locating the securities regulator within the Ministry of Finance, is conflict of interest. In most countries, the work of the MOF is to raise funds for the government by way of taxes and the issuing of government bonds.[153] The fundamental role of the MOF raises the possibility of conflict of interests with prudential regulations because governments might impose taxes or require investors to accept government securities and this could have the detrimental effect of hindering the growth and development of the

[148] P.A Wellons *Prototypes of Securities Regulation for Africa: Key Issues* (1999) CAER Discussion Paper 47 at 24
[149] Ibid.
[150] Ibid at 25
[151] Ibid.
[152] Ibid.
[153] Ibid at 26

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securities market. The conflict of interest is clear and, in all likelihood, the securities regulator in that situation would lack the requisite independence to counteract the conduct of the government.[154]

Independence of the regulator is an important factor in securities regulation and accordingly, the establishment of a securities commission best serves that ideal.[155] The idea behind an independent agency is that notwithstanding the fact that its members are selected by the executive and its budget is often approved directly by the legislature, the agency is formally independent of the government.[156] Therefore, it is able to independently champion the cause of securities interest when securities are threatened by proposed governmental policies.[157] The financial dependence of the SEC on government is not a unique phenomenon and it is often the case in developing securities markets where the market is so small and levies by market participants will not be able to fund the agency. Notwithstanding, it is a prevalent characteristic of regulatory agencies in developing markets, which erodes the independence of the regulator. The SIL does not make provision for blanket levies for market participants and only makes provision for a transaction levy for the purchaser and seller of securities. The majority of the monies received from market participants are licence fees and fines for contraventions, this increases the financial dependence on government. There is a need for the reframing of the levies provisions in the SIL.

Another way the independence of the regulatory agency is further eroded is by the composition of its members. When a regulatory agency consists of high ranking government officials, it is not free from executive and legislative politics and it will become intertwined in the political soiree.[158] The composition of the SEC includes a Director or a more senior officer from the Bank of Ghana as well as a director or more senior officer from the MOF.[159] Accordingly the independence of the SEC is further

[154] Ibid.
[155] Ibid at 27
[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] s2(1)(d) and (e) of the Securities Industry Amendment Act, 2000

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compromised. To improve the independence of the SEC there needs to be a reduction in its financial dependence on government as well as it being composed of fewer governmental officials.

3.5. Principles for the enforcement of securities regulation

Principle 10 requires the regulator to have comprehensive powers of inspection, investigation and surveillance. To attain a completely implemented grade there are six criteria which must be met. The first criteria is whether the regulator is empowered to inspect a regulated entity's business operations including its books and records on-site and without prior notice.[160] The SIL empowers the SEC to request disclosure of books reflecting the business or affairs of a stock exchange,[161] books illustrating any dealings in securities, unit trusts and mutual funds,[162] books and records of advice concerning securities or the issuing or publication of a report or analysis concerning securities,[163] as well as books which reflect the financial position of any regulated entity.[164] The SEC is further empowered in section 18 of the SIL to request the disclosure of any acquisition or disposal of securities, the name of the person from, through whom or on whose behalf the securities were acquired or disposed of and the nature of the instructions given to the dealer in respect of the acquisition of or disposal. The request however hinges on the proviso that the SEC must consider it necessary for the protection of the investors.[165] There is no categorical provision for, neither is there a prohibition against, an on site inspections. The SIL does not categorically require the SEC to give notice of its intention to request disclosure, and accordingly the situation of the SEC contacting a regulated entity or arriving on site and requesting immediate disclosure can be foreseen. However there is no indication that this takes place in practice.

The second criteria is whether the regulator is empowered to obtain records, request date from regulated entities without judicial notice notwithstanding there being no suspicion of

[160] IOSCO (note 79) at 59
[161] s10(2)(a)
[162] s10(2)(b) and (c)
[163] s10(2)(d)
[164] s10(2)(e)
[165] s18(1)

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misconduct either in response to a particular inquiry or on a routine basis. The SIL makes provision for the SEC to request disclosure when it has 'sufficient cause,'[166] 'considers a person may have contravened a provision"[167] and "for the protection of investors.'[168] In the three instances, no judicial notice is required and the SECR makes provision for the quarterly and annual disclosures of regulated entities, which meets the requirements of a routine inspection.[169]

The third criteria is whether the regulator has the power to conduct or supervise surveillance of trading activity on its authorized exchanges and regulated platforms.[170] One of the SEC's functions is to 'maintain surveillance over activities in securities,'[171] part five of the SECR makes provision for reporting by the stock exchange dealers and investment advisers. This will undoubtedly aid the SEC in fulfilling its surveillance function. The SIL further empowers the SEC to issue directions to the stock exchange for the benefit of the interests of the public.[172] This is further illustrative of the surveillance powers of the SEC.

However section 31 of the SIL empowers the SEC to issue a prohibition of trading in certain securities on a stock exchange. Section 31 further requires the rationale for the prohibition to be for the protection of the interests of the public and the SEC must give notice of and reasons for its decision to the stock exchange. Section 31 then empowers the stock exchange to request that the SEC refer the matter to the MOF and the MOF can direct the SEC to revoke its decision. The decision of the MOF is final. The writer is of the view that this section almost disempowers the SEC and negates its enforcement of its surveillance powers. Furthermore in determining compliance with principle 11, which requires the regulator to have 'comprehensive enforcement powers,' a criterion that must be met is the regulators ability to order suspension of trading in securities or to take other appropriate actions. Section 31 dilutes the enforcement function of the regulator. Section

[166] s10(1)
[167] s19(1)(b)and(c)
[168] s18(1)
[169] Regulations 30 -33
[170] IOSCO(note 79) at 59
[171] s9(b)
[172] s30(1)

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31 of the SIL has the effect of scoring the implementation of principles 10 and 11 as not implemented.[173]

3.5.1. The manner in which the Securities and Exchange Commission's enforcement powers are exercised under the Securities Industry Law, 1993

There are three identified forms of enforcement powers often granted to securities regulators: negligible enforcement powers, powers of inspection and powers to investigate and sanction.[174] The enforcement powers of the SEC falls within the last two listed powers. The SEC's enforcement mandate is carried out by the Legal and Enforcement Department. The department's mandate is to provide "general legal advice to the Commissions and investigates breaches of the securities laws."[175]

The SEC's powers of inspection as laid out in the SIL enable it to request the disclosure of documents from market participants. When market participants fail to disclose or the SEC has reason to believe that full disclosure has not been made, the SIL empowers it to approach a district magistrate for the issuance of a warrant of search and seizure.[176] The scope of the SEC's inspection powers are inclusive of its powers of surveillance. The surveillance powers of the SEC enable it to to identify persons who deal in securities and to bring an application to the court for an order restraining the person from dealing in anyway with securities.[177] As indicated in the consideration of various aspects of the IOSCO methodology assessment of the SEC's inspection and disclosure powers, no provision is made for ad hoc inspections and on site inspections.

Regardless of the wide disclosure and inspection powers, the SIL empowers the SEC to only initiate its investigatory functions and confines the ambit of an investigation to instances where market participants are suspected of being guilty of fraud or dishonest

[173] The remaining criteria in the determination of the compliance with principle 10 are in respect of the regulator requiring records to be kept by regulated entities. The SIL makes provision for the maintenance of records.
[174] Wellons (note 148) at 38
[175] [Available at http://www..sec.gov.gh accessed on 26.04.2014]
[176] s12 of the Securities Industry Laws 1993 (PNDCL 333)
[177] s22 of the Securities Industry Laws 1993 (PNDCL 333)

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dealings in the market.[178] The SIL allows for the imposition of fines and or imprisonment as a result of a market participant's breach of the laws.[179] The SEC carries out the administrative function of issuing fines to market offenders and it seems that the court and not the SEC makes orders of imprisonment. The SEC is empowered to withdraw the approval of licences, suspend dealings in particular securities and suspend dealings by a stock exchange in particular securities.[180]

The SEC is furnished with quasi judicial powers to examine and settle disputes or violations arising under the SIL before redress is sought in the courts. This is implemented by way of the AHC.[181] The function of the AHC is to 'examine and determine complaints and disputes related to, in respect of, or arising out of any matter'[182]to which the SIL applies, and to perform any duty related to its function The AHC is composed of the chairman of the SEC as well as members of the SEC.[183] The chairman of the SEC is also the chairman of the AHC.[184] The proceedings are conducted in a formal manner and parties can be represented by a lawyer or an expert of its choice and witnesses can be called to testify before the AHC.[185] Every decision of the hearing committee is submitted to the SEC for approval.[186] The SEC is empowered to remit the decision to the AHC for further consideration or to modify the decision.[187] Provision is made for unsatisfied parties to approach a High Court to appeal the decision of the SEC and AHC.[188] The effect of the chairman of the SEC also being the chairman of the AHC is that the same high ranking person sits as part of the panel hearing the matter and sits on the panel which reviews the decision. This creates the potential for the credibility of the review procedure to be questioned as the chances of the chairman making a ruling of an irregularity or remitting the matter for further consideration by the AHC is highly improbable.

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[178] s20 and 21
[179] Sections 14 and19 are examples of such provisions in the SIL
[180] s25(6)
[181] s9 of the Securities Industry Amendment Act 590 of 2000
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid.
[188] Ibid.

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Despite the apparent wide enforcement powers at the disposal to the SEC, a poorly resourced SEC will struggle to meet the regulatory tasks which arise as the financial market expands.[189] When a regulator has a strong focus on the compliance by market participants to the rules of the securities market, the regulator is able to ensure the creation of a regulatory environment which values low levels of risk for the investor.[190] In order for the SEC to be able to achieve such a focus, there is a need for a more efficient and enhanced implementation of its surveillance powers.[191] An effective regulator is a regulator which has the capacity to affect market participant's compliance with regulation.[192] This is done by active supervision and the regulator having the requisite power and ability to bring actions against a person or an entity which has conducted itself in violation of market regulations.[193]

Notwithstanding the identified defects in the enforcement powers of the SEC, the SEC requires a specialized enforcement committee. Whose mandate specifically makes provision for market surveillance, ad hoc and routine inspections of market participants. Further more to ensure the effectiveness of the AHC it should be composed of individuals with specialized skills and expertise and appeals of the SEC's decisions should be directed to a court with judges who have specialized skills and expertise in relation to issues arising from the securities market. Failing which the enforcement powers of the AHC will be further diluted.

3.6. Principles for cooperation in regulation

The SIL does not make provision for the cooperation of the SEC with other regulators at a domestic or foreign level. Accordingly, the SIL falls foul of principles 13, 14 and 15.

[189] The World Bank Report on the Observance of Standards and Codes: Corporate Governance Country Assessment Ghana May 2005 at 4

[190] Peik Granlund *Supervisory approaches and financial market development: Some correlation-based evidence* Journal of Banking Regulation Vol.11(1), 6 - 30 at 12

[191] The World Bank Report (note 190) at 4

[192] Carjavall (note 54) at 19

[193] Ibid.

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3.7. Conclusion

The analysis of the SIL against the IOSCO principles relating to the regulator, principles for the enforcement of securities regulation and for cooperation in regulation has shown that the SIL is not aligned with the IOSCO principles in these three areas. In respect of the findings relating to the independence and accountability of the regulator, it was shown that the SEC is financially dependent on the MOF, as the SEC is not able to recover sufficient funds from licence fees and fines for contraventions to fund its activities and perform its functions. Moreover, fines for contraventions is not a guaranteed source of funding and so the SEC cannot presuppose funds will emanate from that source and accordingly its inclusion in the budget as a source of funding would be a positive estimation by the SEC. Financial dependence erodes the independence of the regulator. The SIL needs to be reframed to make provision for blanket levies for all market operators. To ensure its full independence the SEC must be able to recover the majority of its funding from market participants and not from the government. The SEC's operational independence was also found to be compromised by the presence of high ranking governmental officials within its composition.

In respect of the assessment on accountability, it was found that the SEC is not operationally accountable. The SEC's credibility is eroded by its lack of operational accountability. An accountable SEC compromises the credibility of the securities industry as well as will raise red lights to would-be investors at the market due diligence phase.

The analysis of the SIL against the enforcement principles showed that the SEC's enforcement powers are curtailed in the following ways: the request for disclosure proviso that the request must be necessary for the protection of investors; no powers of to perform ad hoc site visits; before the SEC can obtain records it must be able to show sufficient cause, have reason to believe a contravention of the SIL has occurred and the request is for the protection of the investor. However the SEC's enforcement powers are completely negated by the wide powers of the MOF in section 31 of the SIL. Furthermore it was found that the manner in which the AHC operates erodes its credibility and that of the SEC. Accordingly, an SEC with curtailed enforcement powers cannot sufficiently protect

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investors from market abuse. This affects the credibility of the securities market as whole and will have a negatively impact investor confidence.

It was found that the SIL has no provisions for cooperation between regulators. The resultant effect being that the SEC cannot conclude cooperation agreements with other regulators and so cannot assist regulators in the curbing of market abuse by service providers operating in the Ghanaian securities market and neither can the SEC obtain information from regulators in foreign jurisdictions to assist it in surveillance of market abuse. The resultant effect being that manipulative market behaviour can go undetected. This also affects the credibility of the market, exposes it to systemic risk and destroys investor confidence.

Accordingly, the alignment of the SIL to the IOSCO principles will cure all the aforementioned defects.

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Chapter 4

4. BENCHMARKING GHANA'S PROPOSED SECURITIES INDUSTRY ACT AGAINST SIMILAR LAWS IN NIGERIA AND SOUTH AFRICA

4.1. Introduction

This chapter seeks to answer the question: How will regulations bringing about greater efficiencies, transparency and liquidity in the securities industry laws impact investors on the GSE? To answer the question posed an assessment of the proposed Securities Industry Act, 2013 ("SIA") will be performed to determine its possible effect on Ghana's securities industry. The consideration of the proposed Act will also seek to determine whether it succeeds in closing the loopholes and inefficiencies in the current legislation. This chapter will also benchmark Nigeria and South Africa's securities laws which were recently amended to align with the IOSCO principles against the SIA. The rationale being that, since the SIA is still in draft bill form and at present it is not clear when it will be accepted by parliament and promulgated by the President of Ghana, there are lessons that Ghana can learn from those two jurisdictions to enhance the regulatory framework of its securities market.[194]

4.2. The proposed draft Securities Industry Act (2013)

The memorandum accompanying the SIA provides that its object is to 'revise and consolidate the law relating to the securities industry.'[195] It further provides that the implementation of the SIA is necessary to bring Ghana's securities industry framework in line with the IOSCO principles and objectives of securities regulation and to address the current weaknesses in the existing legal framework.[196] Other identified aims of the legislation are to: 'strengthen the operational independence of the SEC;'[197] 'remove the regulatory overlaps, plug the loopholes in the existing law and remove the provisions that are obstacles to the facilitation of securities market development.'[198] Unlike the SIL, the

[194] See sections 1.7 in Chapter 1 and 2.5 in Chapter 2
[195] Memorandum to the Securities Industry Act, 2013 at 1
[196] Ibid.
[197] Ibid.
[198] Ibid.

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SIA sets out the objective of the SEC. It provides that its objective is to 'regulate and promote the growth and development of an efficient, fair and transparent securities market in which investors and the integrity of the market are protected.'

Unfortunately, by reading through the memorandum, it is not clear which sections of the legislation have been drafted to fulfill the aforementioned aims. Neither are there publicly available draft meeting notes nor law reform commission discussions in respect of the manner and reasons for the removal of certain sections and the maintenance of other sections in the legislation. Otherwise, for the most, part the SIA repeats almost all the provisions of the SIL as discussed in 3.2 of chapter 3 and includes minor alterations to current sections and there are a number of brand new inclusions. The consideration of the SIA will be curtailed to its provisions relating to the independence of the regulator, enforcement powers and cooperation.

4.3. An examination of whether the Securities Industry Act (2013) cures the identified defects in the Securities Industry Laws (1993) which preclude it from complying with the IOSCO principles of securities regulation

To illustrate whether the SIA cures the defects identified in the previous chapter, the examination of the SIA will be by way of cross -referencing the relevant sections of the SIA with those of the SIL which were not in conformity with the IOSCO principles. By so doing the question as to whether the SIA has the effect of bringing Ghana's securities regulations in line with the IOSCO principles will be answered.

4.3.1. Principles relating to the regulator

The SIA attempts to enhance the financial independence of the SEC with the imposition of levies on market operators.[199] It is clear from the phrasing of the section that the rationale is for the market operators to play a more functional role in the covering of the costs incurred by the SEC in the performing of its market regulatory functions.[200] In the SIA, the SEC is empowered to issue directives, guidelines or circulars which will impose levies. The levies will be calculated taking into consideration the net assets of the collective

[199] s14(1)(a) and 15(1)
[200] s14(2)

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investment schemes and funds other than collective investment schemes under the control of a fund manager.[201]

The SIA removes the requirement for grants and donations to be approved by the SOF and allows the SEC to obtain grants from persons or bodies other than the government.[202] The SIA creates a new mode for the collection of funds which can further enhance the financial independence of the SEC namely: the imposition of and collection of interest which accrues on late payments of levies.[203] The SEC is also empowered to impose monetary penalties for non-payment.[204] The inclusion of these sections enhance the financial independence of the SEC, in that the SEC can now more fully fund its budget from market participants and reduce its reliance on governmental funding.

Section 140 of the SIL has been removed and does not form part of the SIA. This exclusion enhances the operational independence of the SEC, as it has the effect of further distancing the SEC from political interference. However, the SIA empowers the MOF to give directions of a general nature to the SEC on matters of policy relating to the capital market and the SEC is required to give effect to the directives. This section can be distinguished from section 140 of the SIL, because section 140 empowered the SOF to give directions as to the manner in which the SEC should exercise its functions. However, the aforesaid section relates to general matters of policy relating to the capital market. It can be argued that the effect of section 10 is not as harsh as section 140. Although it must be noted that it would be preferable if section 10 was removed from the SIA, as the SEC should be solely entrusted with the creation of policies for the capital market.

Unlike section 7 of the SIL, section 17 of the SIA makes provision for operational accountability of the SEC. The SEC is required to publish an annual report "covering the activities and operations of the SEC for the year to which the report relates."[205] This also

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[201] s14(5)
[202] Cross reference section 6(1)(d) of the Securities Industry Laws (PNDCL 333) 1993 and section 14(1)(c) of the Securities Industry Act, 2013
[203] s15(4)(c)
[204] Ibid.
[205] Section 17(1)

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enhances the operational accountability of the SEC.

Accordingly, with the inclusion of the aforesaid sections brings the SEC more in conformity with the IOSCO principles relating to the regulator.

4.3.2. Principles for the enforcement of securities regulation

Section 49 of the SIA cures the defect of section 31 of the SEC as it removes the provision which empowered the SOF to overrule the decision of the SEC. It further provides that in the instance of non-compliance by the securities exchange, the offending party would have committed an offence and will be liable on summary conviction to a fine of one hundred penalty units and to further fine of twenty-five penalty units for each day the non-compliance continues after conviction.[206]

Section 49 of the SIA cures the defect associated with section 31 of the SEC and accordingly the questions posed in the determination of compliance of principles 11 and 12 can now be answered in the affirmative.

The SIA also alters the composition of the AHC and no longer allows the Chairperson of the SEC to be a member of the committee.[207] This alteration is an attempt to preserve the neutrality of the committee and to ensure the independence of the committee in the decision making process.[208] This provision also guards against the possibility of there being an exercise of undue influence by the chairperson.[209] These amendments will have a positive effect in boosting investor confidence in the SEC, as it enhances the credibility of the SEC and the AHC.

4.3.3. Principles for cooperation in regulation

Sections 40 and 41 of the SIA makes provision for the SEC to exchange information and provide mutual assistance as well as cooperate with foreign regulatory authorities. The aforementioned sections allow the SEC to exchange information with other regulatory

[206] s49(4) of the Securities Industry Act, 2013
[207] s18
[208] Memorandum to the Securities Industry Act, 2013 at 3
[209] Ibid.

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agencies if it is satisfied that it can protect the confidentiality of the exchanged information. Section 40 further empowers the SEC to conclude agreements to exchange information as well as to provide mutual assistance that may be required to enable the foreign regulatory agencies to perform their regulatory functions.[210] Section 41 provides immunity to the SEC if the sharing of information with a foreign agencies constitutes a breach of domestic laws.[211] Section 41(3) further empowers the SEC to use its discretion in determining to which foreign agencies it will provide assistance.

Accordingly the SIA cures the defect identified in the SIL with the provision of the proposed sections and is now more aligned with the IOSCO principles for cooperation in regulation.

4.4. The effect which bringing the securities industry laws in line with the IOSCO principles will have on the Ghanaian securities industry

4.4.1. Principles relating to the regulator

The regulatory independence and accountability of the SEC will enhance investor protection and will have the effect of promoting investor confidence in the Ghanaian securities markets. The inexistence of such regulatory independence will result in market participants doubting the regulator's objectivity and fairness and this can have disastrous effects on the integrity of Ghana's securities markets. This could affect companies which are not currently listed to refrain from listing and could result in investors choosing other means to raise money, instead of using the securities market as a platform for fundraising and growth in wealth. The inclusion of the regulator being required to publish annual reports creates greater transparency in the processes followed by the regulator.

4.4.2. Principles relating to enforcement

The removal of provisions which undermine the powers of the SEC and the enhanced supervision, investigation and enforcement powers which the SIA adopts will have the effect of enhancing the creation of a fair and efficient securities market.

[210] s40(2) Securities Industry Act, 2013
[211] s41(2) Securities Industry Act, 2013

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4.4.3. Principles relating to cooperation

With the adoption of the principles relating to cooperation, the Ghanaian securities industry is taking a critical step in the preparation for cross border listings. Cross border listings has been identified as a method of increasing liquidity on stock exchanges. Accordingly, the adoption of the cooperation principles will enable the SEC as well as its foreign counterparts to protect the Ghana securities market from 'fraud, market manipulation, insider trading as well as being able to prevent unauthorized provision of financial services by unauthorized' [212]market operators.

The effect of aligning the securities industry laws with the IOSCO principles will be to enhance the efficient functioning of Ghana's securities market.

4.5. A comparative study of various aspects of securities regulations in various jurisdictions

The SIA is still in draft bill form. It is not clear when it will be presented to and/or accepted by parliament and thereafter signed into force by his Excellency the President of Ghana. Accordingly, it would be wise to consider various features of securities industry laws in other jurisdictions which can enhance the regulatory framework of the Ghanaian securities market and can in due course be considered and adopted in the proposed draft bill.

4.5.1. Lessons from Nigeria

The 2007 Investments and Securities Act ("ISA 2007")[213] regulates the Nigerian securities industry and it repealed the 1999 Investment and Securities Act ("ISA 1999").[214] The IMF conducted an assessment to determine the state of Nigeria's implementation of IOSCO objectives and principles of securities regulation in May 2013. By so doing, it performed an analysis of Nigeria's securities industry laws and engaged with stakeholders on the ground to determine the manner in which the securities industry laws play out in practice. Of the thirty-eight principles which were assessed for compliance, Nigeria received seven fully implemented grades, sixteen partly implemented grades and ten broadly implemented

[212] IOSCO (2013) at 70
[213] 29 of 2007
[214] 45 of 1999

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grades. The consideration of potential lessons that can be learned and practices that can be adopted by Ghana will be limited to Nigeria's implementation of the principles in relating to the regulator, enforcement and cooperation.

4.5.1.1. Lessons from Nigeria in respect of principles relating to the regulator

The SEC has established and maintains a fund into which it pays the funds it obtains from the federal government; penalities, fees, charges and administrative costs of proceedings; and monetary gifts, contributions and other funds.[215] The SEC has managed to ensure that it obtains the majority of its funds from market participants to meet its regulatory and operational needs.[216] As long as the capital market is functioning at its optimum the SEC is completely financially independent.[217] In the event that there is a decline in capital market functionality, the SEC will be able to rely on the finances which have accumulated in its fund to cover the operational and regulatory financial deficits.[218]

In respect of ensuring accountability of the SEC, the SEC is mandated to submit a financial budget not later than the end of September, required to keep records and accounts and submit same to auditors for a yearly audit.[219] Furthermore, the SEC is mandated to submit to the MOF and the National Assembly, a report on its activities and administration in respect of the preceding year.[220] The report must include the SEC's audited financial report.[221]

Criticism which has been levelled against this provision is, the possibility of the SEC being required to repatriate any excess funds to the Nigerian treasury as this will negate the steps which the SEC has taken to become self sufficient.[222]

4.5.1.2. Lessons from Nigeria in respect to principles of enforcement

[215] s19(1) Investment and Securities Act 2007
[216] International Monetary Fund *Nigeria: Publication of Financial Sector Assessment Program Documentation - Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation* (2013) IMF Country Report No 13/144 at 31
[217] Ibid.
[218] Ibid.
[219] s26 Investments and Securities Act, 2007
[220] s27 Investment and Securities Act, 2007
[221] Ibid.
[222] IMF (note 217) at 31

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A unique feature of the 1999 Act which was maintained in the 2007 Act is the establishment of an independently funded institution known as the Investment Securities Tribunal ("IST"). Section 274 of the ISA 2007 governs the establishment of the IST and sets out the ambit of its powers, which are the exercise of jurisdiction, powers and authority as conferred upon it by the ISA 2007.

The IST, to the exclusion of any other national court or body, exercise sole jurisdiction in the hearing and determination of questions of law or disputes arising from (a) decisions or determination of the SEC with regard to the operation and application of the ISA 2007 in respect of disputes between: capital market operators; market operators and their clients; an investor and a securities exchange or capital trade point or clearing and settlement agency; and between capital market operators and self regulatory organizations; (b) the SEC and self regulatory organizations; (c) a capital market operator and the SEC; (d) an investor and the SEC; (e) an issuer of securities and the SEC; and disputes arising from the administration, management and operation of collective investment schemes.[223] All persons aggrieved by a decision of the SEC can institute action in the IST.[224] Appeals against decisions of the SEC can also be instituted in the IST.[225]

The IST is comprised of ten individuals who are appointed by the MOF.[226] The individual appointed as the chairperson is required to have a minimum of fifteen years of experience as a legal practitioner with "cognate experience" in issues relating to the capital market.[227] The tribunal will consist of four full time members, three of whom are legal practitioners with no less than ten years experience and one person who is considered a capital market specialist. These four individuals are required to solely devote themselves to issues arising from and related to the adjudicative process and will not participate in administrative functions.[228] The remaining five members of the IST will be part time members who shall

[223] s284(1)
[224] s289
[225] s289
[226] s275(1)
[227] s275(1)(a)
[228] s275(1)(b)

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have proven abilities and expertise in corporate and capital market matters.[229] A tribunal award is ranked at par with that of a judgment of a Federal High Court and an award can only be appealed in the Court of Appeal.[230] The ISA provides a time cap for the IST in the performance of its adjudicatory functions within three months of the date of the commencement of the hearing of the substantive action.[231] Accordingly, the tribunal is mandated to conduct its proceedings in such a manner as to avoid undue delays and to dispose of matters in a rapid and efficient manner.[232]

The creation of a specialized financial and capital markets tribunal is illustrative of the recognition that capital markets disputes are specialized in their very nature. The fact that SEC decisions are reviewed by a specialized body of experts enhances the enforcement powers of the SEC as well as creates a platform for enhanced accountability of the SEC's material decisions.

The SIL and the proposed SIA do not make provision for the appeal of SEC decisions to a specialized capital markets. Appeals and reviews of AHC are addressed to civil high courts. At present there is a commercial court which has been created in Ghana but it is not clear whether appeals and reviews of the AHC can be directed there. Furthermore it is not apparent that the commercial court has a time capped mandate as is evident in the IST. Accordingly to enhance the enforcement powers of the SEC it would be necessary to provide a mechanism whereby appeals of decisions by the SEC are remitted to a tribunal with the requisite expertise.

4.5.1.3. Lessons from Nigeria in respect of principles for cooperation

Notwithstanding Nigeria receiving scores reflecting full implementation of the principles relating to cooperation., the IMF levelled some criticism against the SEC in the manner in which these principles have been carried out. Owing to the fact that Ghana is yet to implement provisions to meet the standards set out in the principles for cooperation it would be pertinent for the Ghanaian SEC to take note of some of the IMF's criticisms and

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[229] s275(1)(c)
[230] s290(3)
[231] s289(5)
[232] s289(2)

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take steps in the implementation phase to ensure that the same criticisms are not levelled against them.

The following are steps the Ghanaian SEC should take to avoid the criticisms levelled against the Nigerian SEC in respect of its implementation of principles 14 and 15. The SEC should ensure that it keeps an accurate audit trail of enforcement cases it deals with as well as the cases it hands over to criminal authorities. A system must be implemented to ensure the efficient handling and coordination of requests received from foreign regulators.[233] The SEC will need to ensure that the system keeps track of the requests received from foreign regulators and records the nature of the assistance it renders to its foreign counterparts.[234] The SEC should ensure that there is a readily accessible database maintaining records of the number and nature of the information and assistance requests it has received.[235] Personnel should be designated to perform the aforesaid function and the IMF has proposed the personnel be from the department dealing with enforcement and should have a specific mandate to handle matters relating to enforcement cooperation.[236] The SEC should publish the bilateral memorandums of understanding it concludes as well as to report on its cooperative endeavours on its website.[237] The publication of the aforesaid will enhance the transparency of the SEC, Ghana and the financial sector.[238]

No criticism was levelled in respect of the implementation of principle 13 however the following can be adopted by the Ghanaian SEC as it prepares to implement the provisions contained therein. Provision must be made for the SEC to be able to share information relating to the beneficial ownership of bank and brokership accounts.[239] The remedy of the application of a judicial order to freeze the assets as well as bank accounts of persons who have contravened the securities industry laws of Ghana or any other foreign jurisdiction with assets in Ghana should be available to the SEC.[240] Provision should be made to ensure

[233] IMF (note 217) at 59
[234] Ibid.
[235] Ibid at 60
[236] Ibid.
[237] Ibid.
[238] Ibid.
[239] Ibid at 56
[240] Ibid at 57

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that the SEC is able to cooperate and offer assistance to foreign counterparts on issues which are not considered a breach of domestic laws but are considered a breach in the relevant foreign jurisdictions.[241] Finally, the SEC should ensure that there are no limitations placed on the type of information it can share with domestic regulators as well as with its foreign counterparts, naturally with the relevant adherence to the maintaining and ensuring the confidentiality of the information shared.[242]

4.5.2. Lessons from South Africa

The efficiency of the South African capital market can be attributed to the existence of the strong capital markets legal infrastructure.[243] South Africa has a well-established judiciary which is perceived to be competent and independent. South Africa has over time implemented sound commercial laws and debtor-creditor laws which have undoubtedly played a pivotal role in the creation of a sound legal capital markets framework.[244] South Africa was also one of the first countries to adopt the International Financial Reporting Standards which have ensured the high level of reporting and enhanced the transparency of market participants.[245]

The IMF performed an assessment of the South African securities market against the IOSCO principles of securities regulation in October 2010. Of the thirty principles assessed by the IMF, South African received an aggregate grade of sixteen fully implemented, eleven broadly implemented and two partially implemented.[246] The principle relating to systems for clearing and settlement of securities transaction was not assessed and accordingly South African received no grade in that regard.[247]

In response to the IMF assessment South Africa took further steps to enhance its regulatory framework with the resultant promulgation of the Financial Markets Act in February 2014.

[241] Ibid at 56.
[242] Ibid.
[243] International Monetary Fund *South Africa: Detailed Assessment of Implementation on IOSCO Principles - Securities Markets* (2010) IMF Country Report No 10/335 at 10
[244] Ibid.
[245] Ibid.
[246] Ibid at 15
[247] Ibid at 15

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Accordingly the lessons which can be gleaned by the Ghanaian SEC from the South African model are innumerable. Notwithstanding the aforesaid the potential best practices which will be highlighted will be focused on the principles relating to the regulator, enforcement and cooperation.

4.5.2.1. Lessons from South Africa in respect of principles for the regulator

The Financial Services Board ("FSB") is the regulatory agency established and governed by the Financial Service Board Act which performs the function of the SEC in South Africa.[248] The FSB has been able to maintain its financial independence by imposing levies on market participants on an annual basis following consultations with the market participants.[249] In addition to collecting levies, when the FSB conducts inspections or investigations into violations of market regulations and the violations are proven, the FSB can request that the adjudicatory authority make an order for the offending party to cover the costs incurred in performing the investigation.[250]

The MOF has no authority to issue directives or to require the FSB to adopt regulatory standards or comply with directives issued by the MOF.[251] This has the effect of ensuring the operational independence of the FSB

4.5.2.2. Lessons from South Africa in respect of principles for enforcement

The FSB is authorized to conduct unannounced on-site visits. The on-site visits supplement the annual review by the FSB of market participant's audited financial statements.[252] The FSB has developed a self-assessment report which market participants are required to complete and these reports are submitted alongside the report published by the FSB following an on-site visit. There is a risk based system which has also been developed to assist in prioritizing the on-site visits of the market participants whose conduct carries the most risk for investors. The risk based system is able to generate which market participants have the discretion or control over the assets of investors and it prioritizes the investigation

[248] Act 97 of 1990
[249] Ibid (note 244) at 20
[250] Ibid.
[251] Ibid at 21
[252] Ibid at 25

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and monitoring of those participants.[253]

The FSB has full powers of investigation even to the extent that it is authorized to issue warrants for the production of documentation and is not required to approach a court for the issuing of a warrant.[254]

There is an established Enforcement Committee ("EC") which is chaired by a retired judge and has other personnel who have expertise in adjudication of capital market issues.[255] The FSB is able to bring actions before the EC when it has identified market participants who are in violation of the market rules.[256] The EC has proven to be so effective and expeditious that it has naturally become the preferred route for the bringing of actions.[257] The establishment of the EC and its effectivity has enhanced the enforcement powers of the FSB. The written decisions of the EC are published on the FSB website. The decisions include a full explanation of the allegations as well as the reasons the EC had for reaching its conclusion.[258] Defendants can appeal decisions of the EC in any national high court.[259]

4.5.2.3. Lessons from South Africa in respect of principles for cooperation

The FSB is empowered to share information with its domestic and foreign counterparts. The FSB is also authorized to conduct inspections of any person pursuant to a request from a domestic or foreign counterpart and to share the information it obtains.[260] The FSB has reported its use of its powers to subpoena witnesses and compel the disclosure of documentation and information even in instances where the request for information is as a result of no breach of South African law but rather that of foreign international laws.[261] The FSB has developed a system which has enabled it to keep track of the information requests it receives as well as the information it disseminates.[262]

[253] Ibid at 26
[254] Ibid.
[255] Ibid at 27
[256] Ibid.
[257] Ibid.
[258] Ibid.
[259] Ibid.
[260] Ibid at 32
[261] Ibid.
[262] Ibid.

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4.6. Conclusion

This chapter investigated and analysed the proposed draft SIA to determine whether it plugged the loopholes identified in the SIL and questioned whether its effect would be that of bringing the securities industry laws in line with the IOSCO principles. The result of the analysis was that on a regulatory level, the proposed SIA has closed the identified irregularities in the SIL. The argument was advanced that with the legislation meeting the principled objectives relating to the regulator, enforcement and cooperation; it would have the effect of providing an environment for greater efficiencies, transparency and eventually, liquidity on the GSE, which can only positively impact potential investors. Consideration was given to the Nigerian and South African securities laws and unique features of the laws and their implementations were identified as lessons which could be learned and adopted by the SEC. Furthermore the IMF had criticised various aspects of the Nigerian securities industry laws and the criticisms were highlighted as red lights which the Ghanaian SEC should take note of and guard against.

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Chapter 5

5. CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions

The IMF conducted an assessment of the state of Ghana's financial systems in 2011 and reported that its securities industry laws were outdated and were not in compliance with the IOSCO standards for securities regulation. The SEC in response to the report initiated a process of reviewing the current securities industry laws with the aim of modernizing and aligning them with the IOSCO standards. The result was a draft SIA which is yet to be accepted by parliament and promulgated by the president. The aforesaid necessitated an investigation and analysis of the current legal framework of the Ghanaian securities industry.

The analysis was conducted within the prism of the academic theory of the need for effective securities regulation to enhance efficiency, transparency and eventually liquidity on African stock exchanges. The central thesis of this research is that Ghana's current securities laws are inadequate, and, in order to enhance the efficiency of the Ghanaian securities market, the legislation will need to be amended in line with the IOSCO principles and comparable best practices in Africa.

Chapter 2 approached the discussion by contextualizing the framework within which the IOSCO securities standards operate. The need for securities regulation was illustrated to be a prerequisite to ensuring the presence of a stable and efficient financial system which can dynamically impact a country's economic development It was further noted that the threat of systemic risk is what necessitates the need for prudential regulation of the securities industry. A descriptive consideration of the IOSCO standards, principles and objectives was conducted and the conclusion was reached that the IOSCO principles are an effective measurement tool to determine the effectiveness and efficiency of a securities industry.

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Chapter 3 was an analysis of Ghana's securities industry laws using the IOSCO methodology for the assessing of compliance to the IOSCO principles of securities regulation. The analysis was focused on the IOSCO principles relating to the regulator, enforcement and cooperation. The analysis clearly shows how the SIL falls foul of the three identified categories of IOSCO principles. Accordingly, the analysis indicated that there were certain provisions in the SIL which need to be amended and done away with in order for the securities industry laws to be aligned with the IOSCO principles. Furthermore the analysis indicated that the SIL did not make provision for cooperation between the SEC and its foreign counterparts and accordingly such a provision would need to be included in the securities industry laws.

Chapter 4 investigated and analysed the proposed draft SIA to determine whether it plugged the loopholes identified in the SIL and questioned whether its effect would be that of bringing the securities industry laws in line with the IOSCO principles. The result of the analysis was that on a regulatory level, the proposed SIA has closed the identified irregularities in the SIL. The argument was advanced that with the legislation meeting the principled objectives relating to the regulator, enforcement and cooperation it would have the effect of providing an environment for greater efficiencies, transparency and eventually, liquidity on the GSE, which can only positively impact potential investors. Consideration was given to the Nigerian and South African securities laws and unique features of the laws and its implementation were identified as lessons which could be learned and adopted by the SEC. Furthermore the IMF had criticised various aspects of the Nigerian securities industry laws and the criticisms were highlighted as red lights which the Ghanaian SEC should take note of and guard against.

5.2. Recommendations

The proposed SIA should be adopted by parliament and promulgated into law. The rationale being, and as shown, that the SIA will have the effect of bringing the securities legal frame work in line with the IOSCO standards and principles of securities regulation. As has also been illustrated the proposed SIA cures the majority of the defects identified in the SIL.

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Section 10 of the proposed SIA empowers the MOF to give directions of a general nature to the SEC on matters of policy relating to the capital market and the SEC is required to give effect to the directives. This provision has the effect of affecting the operational independence of the SEC and accordingly this provision should be removed.

The proposed SIA proposes mechanisms to enhance the financial independence of the SEC. However, the SEC can take a leaf out of Nigeria's operating methodology by making use of the provision of investing the funds it receives by way of fees and levies from market participants. The Ghanaian SEC should take steps to ensure that the fees and levies it imposes on market participants are sufficient to cover its operational costs. By so doing, the SEC will limit its reliance on government funding. Furthermore, it must be ensured that there are no requirements in other pieces of national legislation which will require the SEC to pay over excess funding to the national treasury.

Consideration should be had for the creation of a specialized tribunal or court whose mandate will be the adjudication on matters relating to securities industry laws. The tribunal or court should act as a court of appeal and review of the AHC decisions. The Nigerian model could offer some insights in that regard.

To enhance the enforcement, surveillance and investigatory capacity of the SEC, the SEC should be sufficiently resourced with individuals with the capacity to carry out these functions. There needs to be a proliferation of continuous investigation and not only limited to instances when foul play is suspected. There is also a need to make ad-hoc on site visits of market participants.

The SEC could make provision for the request of an order requiring parties, who after an investigation are found to have fallen foul of the securities industry laws to pay for the costs incurred in undertaking the investigation. By so doing, the SEC will be able to enhance its enforcement powers as it will be able to attract employees. Furthermore, the possibility of paying for the cost of an investigation could also act as a deterrence for market participants.

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At present access to information in respect of the manner in which the enforcement division carries out its mandate is not readily available on-line. Accordingly, the SEC should also take steps to increase its levels of transparency by keeping a more up to date website and making available in electronic format information illustrating that enforcement mechanisms are being utilised by the SEC.

The SEC should adopt a risk-based system which generates information prioritizing where market participants require the most oversight and investigation, to ensure the prevention of systemic risk.

In the preparation of the regulations, that will regulate cooperation as well as the drafting of bilateral Memorandum of Understanding ("MOU") with various countries, the SEC must ensure that it is in a position to share information relating to the beneficial ownership of bank and brokership accounts of its market participants. The remedy of the application for a judicial order to freeze the assets as well as bank accounts of persons who have contravened the securities industry laws of Ghana or any other foreign jurisdiction with assets in Ghana should be available to the SEC. Provision should be made to ensure that the SEC is able to cooperate and offer assistance to foreign counterparts on issues which are not considered a breach of domestic laws but are considered a breach in the relevant laws of foreign jurisdictions. Finally, the SEC should ensure that there are no limitations placed on the type of information it can share with domestic regulators as well as with its foreign counterparts, naturally with the relevant adherence to maintaining and ensuring the confidentiality of the information shared. Steps must be taken to ensure proper records are kept in respect to the various MOUs which are concluded as well as the nature of information which is shared and requested.

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