THE REGULATORY REGIME OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE MECHANISMS IN ZIMBABWE'S CAPITAL MARKETS

DISSERTATION PROPOSAL SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE MASTER OF LAWS (LLM) IN INTERNATIONAL TRADE AND INVESTMENT LAW IN AFRICA

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DECLARATION

I, REGINA MABWE do hereby declare that this is an original work done by myself and has never been submitted for any degree or examination in any University or higher institution of learning for publication as a whole or in part.

All the sources used have been indicated and acknowledged as complete references.

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REGINA MABWE

AT PRETORIA THIS 17TH DAY OF MAY 2019

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CHAPTER 1

INTRODUCTION

> 'As pivotal players in capital markets, exchanges need to be cognisant of the potential long-term impact of unsustainable business practices on the operating environment and the health of the economy. Whether through performing a regulatory function or otherwise, exchanges certainly have a vested interest in ensuring the quality of the stocks they are taking on. The level of involvement of an exchange will depend on a range of factors, such as the existing legal framework, what is currently practised and the extent to which sustainability reporting is being taken up by corporates. Ultimately, the approach should be up to each individual exchange. The reality is, however, that exchanges have significant influencing potential and are well positioned to exert that influence in a variety of ways, including collaborating with other players across the investment value chain in strengthening the call for greater transparency and advancing engagement on sustainability between companies and their shareholders'.[1]

The old notion that investment frameworks need not contain social, governance or requirements relating to the environment for example on the stock market appears to have been influenced by the view that businesses have no need to regard such issues. After all as emphasised by Friedman back then,

> 'there is one and only one social responsibility of business-to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud'.[2]

[1] Association of Chartered Accountants, *Stock exchanges in sub-Saharan Africa: capturing intent towards ESG requirements* (2014) at 15

[2] Friedman M, *The Social Responsibility of business is to increase its profits*, 1970 from http://umich.edu/~thecore/doc/Friedman.pdf accessed 27 July 2019

However, the clamour for environmental, social or governance (ESG) regulation, reporting and disclosure is gaining clout. The importance of such in ensuring sustainable business models and sprucing up trade may be of benefit to shareholders and stakeholders alike.

ESG investing has been defined as 'investing incorporates environmental, social, and governance issues into the analysis, selection and management of investments'.[3] The environmental factors include but are not limited to climate change, carbon emissions, pollution, resource efficiency and biodiversity. Social factors include but are not limited to human rights, labour standards, health and safety, diversity policies, community relations, and human capital development (health & education). Governance factors include but are not limited to corporate governance, corruption, rule of law, institutional strength, accountability and transparency.

At the time of writing their article, Jere, Ndamba & Mupambireyi (2016) noted that there was no legislative framework governing mandatory corporate reporting in Zimbabwe.[4] They observed,

> 'Even though corporate reporting is increasingly becoming an instrument for effective communication with stakeholders and investors, the art of mature corporate reporting is still to find its footing in the corporate world and business culture in Zimbabwe as a contemporary instrument'.[5]

In 2019, legal developments led to enactment of the Zimbabwe Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019 (hereinafter referred to as the Listing Rules)), which law governs not only such reporting but also requires disclosure for companies listed on the Zimbabwe Stock exchange (ZSE). Such disclosure relates to ESG issues. This study thus critically examines the extent to which the current legislation adequately deals with ESG requirements and possible areas for reform.

The reforms under Zimbabwe Securities and Exchange Act (Chapter 24:25) (ZSEA) leading to the adoption of the Zimbabwe Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019 (hereinafter referred to as the Listing Rules)) follows the, 'Zimbabwe is open for business', mantra, a message replete in the foreign policy of the

[3] G Inderst & F Stewart *Incorporating Environmental, Social and Governance (ESG) factors into fixed income investment* (2018) at 2
[4]F Jere, R Ndamba & PF Mupambireyi, *Corporate reporting in Zimbabwe: An Investigation of the legitimacy of corporate disclosures by major public listed companies in 2014*, (2016) at 15
[5] F Jere, R Ndamba & PF Mupambireyi, fn 4 at 15

second republic.[6] The second republic came into being a few years after Zimbabwe adopted its Constitution of 2013. Following this there was a drive to align legislation with the constitution and with international best practices, which alignment was ongoing at the time of conducting this study. Some of the laws calibrated include the Companies Act (Chapter 24:03), the Insolvency Act (Chapter 6:04) and the Zimbabwe Securities and Exchange Act (Chapter 24:25).

The importance of the listing Rules is that they introduce ESG issues as part of the requirements for 'sustainability, information and disclosure'.[7] They make it mandatory for listed companies to disclose the organisation's sustainability strategy, to indicate the relevance of sustainability to the organisation as well as to report on its sustainability policy.

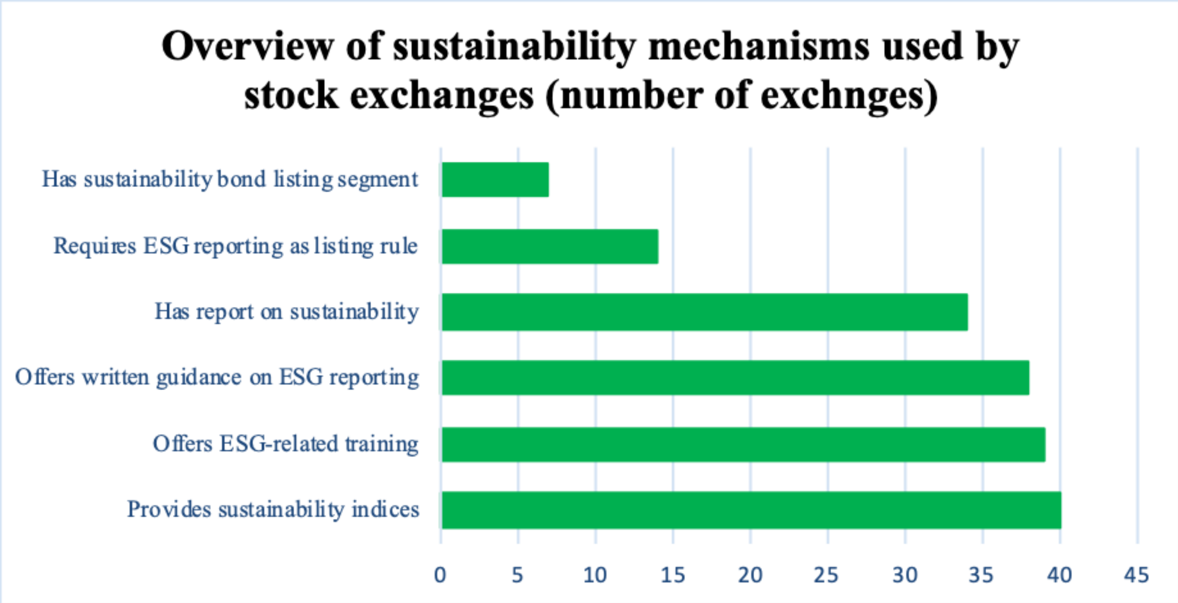
Traditionally companies used to adopt financial reporting as opposed to corporate reporting, yet, the growth of the latter is slowly gaining traction internationally.[8] Corporate reporting provides both financial and non-financial reporting and disclosure.[9] Non-financial reporting is vital for the purposes of showing the sustainability performance of the company including the negatives and positives.[10] Non-financial issues that require reporting may vary in nature but can be ESG issues.

Commercial reforms of this nature are in tandem with international mechanisms such as the United Nations Sustainable Stock Exchanges (UN SSE) efforts and similar mechanisms regionally, for example in South Africa. The impetus to introduce ESG mechanisms is

[6] This has been the mantra of the President of the second Republic, under the leadership of His excellency President Emmerson Dambudzo Mnangagwa. It is a mantra that seeks to show to the international community that notwithstanding close relations with the ousted Robert Gabriel Mugabe who ruled the country for 37 years and resigned in November 2017 Mnangangwa is different.

[7] See part XXI s399-404 of the Listing Rules
[8] F Jere, R Ndamba & PF Mupambireyi, fn 4 at 15
And also
ACCA. *Going Concern? A Sustainability Agenda for Action* (2007)
ACCA.*Reporting: Sustainability Briefing Paper* 1, London: (2008)
http://www.accaglobal.com/documents/rsb2.pdf accessed 24 July 2019
ACCA *Sustainability and the Accountant* (2009) http://uk.accaglobal.com/uk/members/publications/gbs/ accessed 24 July 2019
ACCA *Re-assessing the value of corporate reporting* (2012)
[9] ACCA *Understanding investors: directions for corporate reporting* (2013)
[10] F Jere, R Ndamba & PF Mupambireyi, fn 4 at 15

gaining traction worldwide and at the time of the study 54 exchanges around the world had at least a mechanism for ESG requirements.[11] Table 1 below shows the indices.



Data from World Investment report 2018 (UNCTAD SSE initiatives Database)[12]

The vitality of inclusion of ESG reforms in regulatory systems of capital markets is that it may be a strong avenue upon which foreign direct investment (FDI) may be attracted into the country. In the case of Zimbabwe, the need to attract FDI was spurred partly by efforts to rebuild the economy which has been ailing due to several factors such as poor governance, political issues, sanctions and disputes surrounding the land reform program. Policy reform and legislation that speaks to commercial developments is a fundamental tool marking economic improvement efforts of the current government of Zimbabwe. Such reforms as seen in securities regulation are critical as they ought to ensure and encourage sustainable business models and a culture of inclusion in line with Zimbabwe's socio-economic commitments under international law.

It is in this light that this thesis examines critically ESG issues in capital markets regulation in Zimbabwe. Such measures will be benchmarked against South Africa and international standards. South Africa is chosen because it has one of the biggest emerging markets in Africa and it falls within the same regional block with Zimbabwe.[13] It was amongst the first

[11] United Nations Conference on Trade and Development *World Investment Report Investment and New Industrial Policy* (2018) at 116
[12] UNCTAD fn 11 at 116
[13] ACCA fn 1 at 17

countries in Africa to further require ESG disclosures, thus it has a jurisprudence of such issues.[14] An analysis of the regulatory framework will show the potential areas for growth and determine whether Zimbabwe's openness to business is an elusive pie or a notion that may be turned to reality with the proper interventions.

1.1 Background of the study

There are four major players in the securities investment matrix. There is the investor, injecting capital (in this case in listed companies on the stock exchange), the host state receiving the benefit (Zimbabwe), the home state (country of origin of the investor) and stakeholders such as government, citizens and civil society organisations. Capital markets provide a basis for these players to interact.

Interaction of players in the securities market arises in a country such as Zimbabwe through an opportunity for drawing foreign direct investment (FDI) and raising capital.[15] Such capital may be for industry which sustains the economy. FDI may be defined as, 'a transfer of funds or materials from one country (called capital-exporting country) to another country (called host country) in return for a direct or indirect participation in the earnings of that enterprise'.[16] In his book, the *International Law on foreign Investment*, Sonorajah (2010) argues that portfolio investments do not form FDI. He further argues that portfolio investments cannot be part of FDI as they are, 'represented by a movement of money for the purpose of buying shares in a company formed or functioning in another country. It could also include other security instruments by which capital is raised such as venture capital'.[17] He suggests that because wealth management under portfolio investment is not done under the management and control of the investors but through shareholding, they cannot form FDI. However, it is submitted that the expansive definition provided in the *Encyclopaedia of International law* is to be preferred because portfolio investments are indeed a part of FDI. They feed into the capitalisation of companies, business and ventures and result in creation of business. Portfolio investments such as securities, bonds, debentures are thus a major component of FDI.

[14]ACCA fn 1 at 17

[15] Capital markets are a key component in modern economies. Since they regulate the sale of long-term debt, equity-backed securities, shares debentures and the like, they are also often terms securities. In this work, the terms 'capital markets' and securities' will thus be used interchangeably.

[16] *Encyclopaedia of Public International Law* at 246

[17] M Sornarajah *The international Law on foreign investment* (2010) at 8

Data shows that by 2016 portfolio investments had stagnated in Zimbabwe whilst a comparison with its neighbour South Africa shows some very significant increases.[18] This is to some extent a reflection of the country's difficult economic position. Until March 2019, portfolio investors could not take their profits or investment out of the country and could only do so after approval by the central bank, that is Reserve Bank of Zimbabwe (RBZ).[19] The amount of money locked in was estimated to be over US$120 million which capital indicates the potential of portfolio investment to contribute to a country's economy[20].

It cannot be gainsaid that capitalisation of security markets through portfolio investment is critical as it allows countries to tap into capital from private sources which is much needed to build a country's economy. As observed by Mwenda (2000), 'two major functions of the Stock Exchange are thus the provision of a market for the purchase and sale of securities and the provision of capital for the purposes of industry and Government, both central and local'.[21] The downside of the gold rush for capitalisation is that Zimbabwe joins other developing or least developed countries in the fight for the cake. A lot thus depends on macroeconomic conditions such as political stability and transparent and fair systems. Where these are in place competition is daunting still as developing countries such as Zimbabwe tussle against big markets such as the New York Stock Exchange, London stock Exchange and other renowned markets.

Other advantages moved in favour of FDI through capital markets is that it offers for the investor high returns, it allows for tapping into other markets especially portfolio markets and it dismantles trade barriers as it enables relaxation of foreign exchange control regulation.[22]

On the part of Zimbabwe, investment into its securities market could have a snowball effect. Such investment has the potential of reviving the country's economy and purging the country's image from being deemed 'investor hostile' to investor friendly. It allows citizens to participate in ownership of the resources either through buying of stock or participating in parastatals saved from collapse though capitalisation. In turn an economic turnaround may

[18]World Bank Data, *Portfolio Investments, bonds* https://www.indexmundi.com/facts/indicators/DT.NFL.BOND.CD/compare?country=zw#country=za:zw accessed 5 May 2019

[19] Fin24 *Foreign investors can finally take money out of Zim, but at a huge discount* https://www.fin24.com/Economy/foreign-investors-can-finally-take-money-out-of-zim-but-at-a-huge-discount-20190304 accessed 5 May 2019

[20] Fin24 fn 19

[21] KK Mwenda *Securities regulation and emerging markets: Legal and institutional issues for Southern and Eastern Africa* (2000) quoting R J Briston in *The stock exchange and investment analysis* (1973) at 34-35

[22]KK Mwenda fn 21

result in better standards of living as well as a redress of other social indicators such as race, culture and gender inequality.[23] The participation of citizens is key in tracking compliance of companies with ESG issues aside from government's efforts to regulate.

Notwithstanding the myriad of benefits stemming from investment in capital markets, such must be done sustainably. The concept of sustainability assumes that even in investment matters, there are grave matters which must not be overlooked. It means that the conduct of business must be done in such a way that future generations must benefit form exploitation of resources whilst current generations benefit too. Sustainable investments is a nascent topic which is slowly gaining recognition under international and domestic law. However, portfolio investments fall under the rubric of financial services. The World Trade Organisation (WTO) is therefore the international body that is competent to deal with trade in that type of service and or goods category.

Trade in financial services is recognised under the WTO General Agreement on Trade in Services (GATS).[24] The agreement establishes the principles and exceptions upon which member states trade including the most favoured nation principle and transparency mechanisms. Any measures taken by a country must in terms of GATS must lead to 'protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed' and must 'ensure the integrity and stability of the financial system'.[25]

Whilst GATS speak to trade in financial services, it does not speak to sustainable bases upon which trade in financials may be conducted. As a result of the need to balance the gap between trade in financial services as well as creating sustainable practices in investment the UN came up with the UN SSE initiative.

The importance of the SSE initiative is that it is a vehicle that enables capital markets regulators, institutional investors, and stock exchanges to contribute towards introducing and promoting policy change in trade in financials.[26] As such, an ESG regulatory framework may prove to be a basis upon which corporates and individuals start to recognise the vitality of sustainability issues such as climate change, social issues such as gender equality, labour dynamics and governance issues such as transparency and accountability. This may be done

[23] CB Barry & LT Lockwood *New directions in research on emerging capital markets* (1995) at 23
[24] World Trade Organisation General Agreement on Trade in Services GATS
[25] GATS ARTICLES II-ARTICLE V
[26] UNCTAD fn 11 at 116

in a context that recognises the link between issues under WTO and issues under other arms of the UN such as environment, social issues and governance measures.

In line with the SSE initiative and the growing concerns on sustainability, the Listing Rules in Zimbabwe were promulgated by the Minister. Their purpose is to emphasise on ESG requirements. This research explores how the legislative framework approaches those issues. It further narrows on environmental concerns and gender as a social concern and how the law deals with the two.

An explanation ought to be made on the distinction between the ZSEA and the Listing Rules. In terms of the Constitution of Zimbabwe, it is parliament which has the power to enact legislation through an Act of parliament. S131 of the Constitution provides thus,

(1) 'Parliament's legislative authority is exercised through the enactment of Acts of Parliament.
(2) An Act of Parliament is a Bill which has been-
    (a) presented in and passed by both Houses of Parliament; and
    (b) assented to and signed by the President; in accordance with this Constitution.
(3) The words of enactment in Acts of Parliament are 'Enacted by the Parliament and the President of Zimbabwe', or words to that effect'.

Where parliament elects not to make law for various reasons, it may allow for the power given under the constitution to be exercised by a person of authority through subsidiary legislation. The person or authority may be the Minister as provided under s134 of the Constitution of Zimbabwe. The law provides thus, 'Parliament may, in an Act of Parliament, delegate power to make statutory instruments within the scope of and for the purposes laid out in that Act, but-

(a) Parliament's primary law-making power must not be delegated;
(b) statutory instruments must not infringe or limit any of the rights and freedoms set out in the Declaration of Rights;
(c) statutory instruments must be consistent with the Act of Parliament under which they are made;
(d) the Act must specify the limits of the power, the nature and scope of the statutory instrument that may be made, and the principles and standards applicable to the statutory instrument;

(e) statutory instruments do not have the force of law unless they have been published in the Gazette; and
(f) statutory instruments must be laid before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny.'

The Listing Rules therefore fall in the ambit of subsidiary legislation under Zimbabwean law. Where the research refers to the Act, it refers to legislation enacted in terms of s131 of the Constitution (mainly the ZSEA), whilst referral to Rules is a recognition of the hierarchy of laws within which the Listing Rules fall under the Zimbabwean legal system.

1.2 Problem statement

Injection of FDI into a host state has attendant risks both on the investor and the members of the country in which the investment is being made. Risks attendant to FDI include hostility, nationalism, ethnicity, human rights abuses, environmental degradation, discrimination, changes in industry patterns and political instability. Investors yet need to be certain that their investment is safe and that it is protected. In some cases, they may require knowing the effect of their investment on global value chains, on the environment, on the social fabric of the economy and on the political outlook. The citizens in a country are equally concerned with equality, discrimination, access to opportunities, human rights abuses, governance, rule of law, sustainable use of national resources and accountability.

The following are the problems associated with the interplay between ESG mechanisms and trade: firstly, lack of a clear law on ESG issues and how they affect the different players in the investment matrix. To date there is little or no data on ESG mechanisms in capital markets in Zimbabwe except provisions on the currently promulgated Listing Rules and that provided by the UN SSE. As a result. this study analyses the ESG provisions under the recently promulgated Listing Rules. It combs through the Constitution of Zimbabwe and subsidiary legislation to ascertain whether there has been change indeed insofar as ESG mechanisms are concerned.

Secondly, inadequacy in the law in so far as precision and articulation of the ESG matters is concerned. For example environmental concerns have been an issue within the country. There is little or no data on prosecutions of environmental law breaches especially by corporates. This research seeks to explore on whether the listing Rules will bring better investment and

ESG protection for the diverse players in the investment matrix by ensuring prosecution of breaches around ESG matters.

Thirdly, the research investigates the dichotomy between financial reporting which did not require ESG articulation and the merger under the law with non-financial reporting. With the advent of the UN Sustainable Development Goals (SDGs), one of the areas that has been interrogated is the interplay between trade and gender, trade and the environment as well as other issues.[27]There is therefore growing acceptance as much as the trade and other issues may appear polarised, a country that wishes to lure investments should seriously consider how to tackle the relationship so that ESG issues do not suffer. The traditional notion that commerce and ESG issues should be compartmentalised is slipping fast. For example, as of 2018, out of the 403 directors in listed companies on the ZSE, only 72 were women which equates to a paltry 18%.[28] Regional comparisons are no different as they range from 20% in Botswana, 21% in Malawi and 24% in Zambia.[29] Given these projections and a set of new Rules that emphasise on responsible investments, the research considers how the law attempts and manages to address these variants in a manner that consolidates trade and ESG matters. This study will thus reveal that sustainable investments should be buttressed by a legal system that requires and takes into account ESG requirements such as gender equality and environmental concerns.

1.3 Importance of the study

The area under study is a fresh area under international law. Whilst the concept of environmental issues or gender as a social concern under capital markets has been researched on, there is little or no literature on the importance of ESG requirements within the Zimbabwean securities sector regulatory system. Not much research has delved into the trade associated benefits that may ensue from the level and the extent of regulation. This study shall examine the pitfalls and opportunities arising within the regulatory sphere.

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[27] B Rajagopal *Women and trade at the WTO: Pink herring, Trojan horse or historic advance?* (2018), D Elson & M Fontana *When it comes to gender analysis, modern trade agreements are lacking* (2018), O Fitzgerald *Reuniting trade and human rights* (2018), M Panezi *The Case for Developing a Model Chapter on Gender and Trade* (2018)

[28]TechZim *How many women lead Zimbabwe's leading companies?* (2019) https://www.techzim.co.zw/2018/06/how-many-women-lead-zimbabwes-leading-companies/ accessed on 28 April 2019

[29] TechZIm fn 28

Andreas and others (2015) make the point that responsible or sustainable investment is under researched.[30] They note that notwithstanding the importance of the responsible investment trend, nothing much appears on the academic plane to delve into areas of interest. This study therefore plugs that gap by providing ng a Zimbabwean and Afrocentric perspective of ESG mechanisms under the local capital markets.

For long, the debate on the relationship between gender and trade has raged. Little has been researched on the gender dynamics of securities regulation with Zimbabwe as a specific and its impact. There are various works that have spoken on women participation in financial services sector especially in developed countries. This would include banking, securities, competition law and quasi financial sectors like telecoms. Literature around area of women's participation in the securities market especially in Africa remains scant. It is not that the issues are not there as this paper will prove that they do exist and should be examined. Maybe no one had paid attention to them previously. This study contributes to that debate and shows the meaningful ways that gender diversity as a component of social requirements under ESG contributes to commerce in securities markets.

The study further adds a voice to call for governments to start considering seriously the ESG requirements, not only on paper but practically. Whilst there are divergent views that deem the interplay between the environment and trade, or the environmental and social issues or the environment and governance as moot, at a local level, the study alerts governments to the growing need to create sustainable business and trade regimes by having clearer and deeper ESG regulation.

1.4 Hypothesis of the study

This study is founded on the following assumptions

i) Sustainable trade in Zimbabwe is better created by having legislative frameworks around ESG issues.

ii) ESG provisions yield positive trade and consequential results if the language in the regulation is mandatory as opposed to permissive.

[30] GF Andreas & others *Is responsible investment proportionally under-researched*? In T Hebbs & others (eds) *The Routledge Handbook of Responsible Investment* (2015) at 34-35

iii) The Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019 are a step towards the creation of an ESG aware investment regime in Zimbabwe.

iv) A balanced securities administration should stipulate as a requirement ESG financial reporting and must follow on breaches with enforcement measures.

1.5 Aims of the study

The aims of the study are to; -

i) Highpoint the advantages of the current ESG provisions under the Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019.

ii) identify gaps in the ESG provisions under the Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019 against regional comparatives.

iii) analyse reasons for the permissive language provided under ESG requirements under the Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019.

iv) illustrate the positives that the Securities and Exchange Commission, Zimbabwe Stock Exchange, intermediaries and other players would benefit from stronger ESG reporting.

v) Address alternative options that may be available for strengthening current legislation.

1.6 Research questions

The following are questions sought to be answered in this study

i) Whether or not ESG provisions under the Securities and Exchange Act and subsidiary legislation are adequate?

ii) In what ways do the current legislative ESG provisions in the Zimbabwean securities regulation support sustainable reporting and disclosure and how can it be asternthened?

iii) What is the likely effect of the current ESG provisions in capital markets regulation in Zimbabwe on trade and investment?

1.7 Research methodology

Research was conducted mainly through desk and library sources. Primary sources formed the pillar of the study. The starting point was the Constitution of Zimbabwe as well the Securities Exchange Act of Zimbabwe. Subsidiary legislation cannot be ignored as it is critical in filling some of the gaps left in the parent Act. In this case, the Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019 formed the basis of the study. Court judgments from the Zimbabwean courts speaking to ESG issues were also explored as they provide an important basis for interpretation of statute.

Secondary sources consisting mainly of texts by international jurists, journals, articles (published and unpublished) and literature relevant to the study were used. As the area of study raised some exceptionally new concepts, internet resources were valuable.

The research could have been richer had it included disaggregated data (surveys or available statistical data) on ESG issues for example social issues such gender diversity in the capital markets in Zimbabwe. This was not available due to time and resources constraints.

1.8 Literature review

There is diverse and rich literature around the area of security regulation from which study was drawn. However, there were a limited number of texts on ESG provisions in securities regulations as the area is a budding place of study under international law and domestic law. The study thus heavily relied on articles both published and unpublished. It also relied on articles from institutions and individuals that deal with ESG mechanisms worldwide especially those from accounting firms as they in certain instances provided statistical data. Literature was used from areas of law and trade that interrogate the interplay between individual ESG issues for example, environment and trade or trade and gender.

The author relied on the writings of Hebb (2016),[31] Jere, Ndamba and Mupambireyi (2016),[32] and Wood (2007).[33] Reliance was also placed on reports by the World Trade Forum (2014),[34]International Finance Corporation (2019),[35] Grant Thornton (2017),[36] United Nations Conference on Trade and Development (2018)[37] and Wyman (2016).[38]

[31] GF Andreas & others fn 30
[32] F Jere, R Ndamba & PF Mupambireyi, fn 4
[33] PR Wood *Law and practice of international finance; Regulation of international finance* (2007)
[34] World Trade Forum *The Rule of Law in Monetary Affairs* (2014)

GF Andreas and others (2016) analyse responsible investment by considering indices that ought to be considered in non-financial reporting.[39] Their findings are to the effect that,

> "We find responsible investment to have experienced significantly lower aggregated research support quantity and aggregated research support strength in the period 1970 to 2008 than its peer research areas with similar research category parents, age and funding potential. We define quality-weighted research output as any publication regardless of medium. Furthermore, its annual research support quantity and strength appears substantially weaker than its peers' equivalent, especially in the twentieth but also in the twenty-first century, even though it has recently shown above-average growth rates not only against its peers but especially against mainstream investment."

The several authors in the handbook appreciate the gap lying within research around ESG issues. The possible explanation to the lack of significant research may be attributed to the lack of international mechanisms that keep a tab on ESG issues in capital markets. The UN SSE Initiative was established in 2009. From thence renewed efforts have been channelled towards research around ESG issues including regulation of the same at both international and domestic level. This study is a contributes to further ESG research thus filling a gap in non-financial reporting. It provides insights on ESG mechanisms within the Zimbabwean context of securities law.

Jere, Ndamba and Mupambireyi (2016), dealt with corporate reporting in Zimbabwe. [40] Their research analyses the utilisation of corporate reporting strategies in Zimbabwe. They label

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[35] International Finance Corporation *Moving towards gender balance in private equity and venture capital* (2019) accessed from https://www.ifc.org/wps/wcm/connect/79e641c9-824f-4bd8-9f1c-00579862fed3/Moving+Toward+Gender+Balance+Final.pdf?MOD=AJPERES on 03 May 2019

International Finance Corporation *The case for gender diversity among Sri Lanka's business leadership* (2019) accessed from https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/resources/guidelines_reviews+and+case+studies/the+case+for+gender+diversity+among+sri+lankas+business+leadership on 8 May 2019

International Finance Corporation *Women in business leadership boost ESG performance: Existing body of evidence makes compelling case* (2019) Accessed from https://www.ifc.org/wps/wcm/connect/0c46a0b8-cc3b-4da0-8dcf-bde5af9ac166/PSO42.pdf?MOD=AJPERES on 25 April 2019

[36]Grant Thornton *Women in business: New perspectives on risk and reward*." Grant Thornton, Chicago, IL. https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/publication/women-in-business-new-perspectives-on-risk-and-reward.pdf. Accessed 20 July 2019

[37] UNCTAD fn 11

[38] O Wyman *Women in the financial services: Time to address the mid-career conflict*. 2016 https://www.oliverwyman.com/content/dam/oliver-wyman/global/en/2016/june/WiFS/WomenInFinancialServices_2016.pdf accessed on 16 April 2019

[39] GF Andreas & others fn 30

[40]F Jere, R Ndamba & PF Mupambireyi, fn 4

ESG issues as non-financial issues which require the same attention as the financial issues. The importance of their study is that it provides a basis upon which ESG reporting is measured using empirical evidence. Reason is, they surveyed ten listed companies and noted the absence or little weight given to ESG matters. To this extent this research agrees with the authors. However, the challenges of their study are that, it was done at a time when the listing requirements were not yet in place. It raises issues whether the results of the research would be the same in the face of the Listing rules on ESG. The study further focuses more on the accounting bases more than the legal bases for ESG issues. This study will therefore focus on the legalities around ESG requirements in capital markets in Zimbabwe.

Wood (2007) deals with international finance regulation with a bias on African markets.[41] He provides figures and facts on diverse African countries, regulation of financial markets and the liquidity thereof. He argues that financial services legislation is heavy handed in dealing with breaches whether it is through criminal sanctions or administrative ones. In addiction he argues that civil sanctions may be imperative. He further argues that criminal reparations in most jurisdictions are even more stringent. His work is provided as a reference point to determine whether the ESG provisions under the Listing Rules in Zimbabwe will result in criminal or civil sanctions in the event of breaches.

Wood argues in favour of administrative remedies in the event of security breaches. He emphasises that such administrative measures are vital where they are, ‘effective, proportionate and dissuasive’.[42] This research will agree with him to greater extent that since ESG breaches may involve various players, it is necessary that administrative law be utilised as one of the remedy areas in the case of breaches. The research will however propose that some ESG issues such as human rights may be determined as constitutional breaches in order to increase the remedies that a party may secure.

The World Trade Forum (2014) makes the argument that monetary affairs in international law cannot be analysed on an island, apart from other matters such as the rule of law.[43] They argue that for a long-time international law did not regulate or place any standards on how nations deal with financial matters. However, the development of civilisations and the evolvement of technology has led researchers, lawyers, economists, sovereign states and various stakeholders to start analysing further into the nexus between monetary affairs and

[41] PR Wood fn 33
[42] PR Wood fn 33 at 285-620
[43] World Trade Forum fn 34 at 287

other aspects of the law, such as ESG issues. They assert that economic affairs must be considered from a perspective of equity and rather than adopt a narrow view of a clear bridge between trade and human rights. They acknowledge that economies would be bettered where interpretation and application of rules in the WTO is done in light of international law norms provided under the United Nations human rights covenants.

In emphasis, they capture the argument thus,

> 'Given that the trade regime is not integrated into the UN system, there is a risk that the WTO dispute settlement organs will view the rules of global finance from a rather narrow perspective on growth, development and equity, without consideration of the norms that have emerged from the UN institutions concerned with human rights and development'.[44]

The research agrees with their views. Since ESG rules revolve around environmental and social issues, it is necessary that imbalances may need to be addressed by interpreting monetary affairs laws from a perspective that considers diversity, inclusion and sustainability.

The IFC (2019) tackles the concept of addressing imbalances in venture capital and equity markets.[45] It determines that this will be one of the ways of minimising risk and sheltering investors from various disastrous security breaches. It also recognises that the address of imbalances is a measure that accords with gender equality as an ESG concern.

> 'There is significant research outlining the benefits of diversity in leadership. The expected benefits of increasing diverse perspectives within teams, of which gender diversity is one component, are well and academia. Diverse leadership teams are less likely to exercise group think and carry conscious and unconscious biases in decision-making processes. They tend to encourage team members to become more aware of their entrenched ways of thinking and question their assumptions, which in return helps them better process information and avoid making errors in decision-making processes (Rock and Grant 2016). Gender diversity—the equitable or fair representation of people of different genders documented and generally accepted in

[44] World Trade Forum fn 34 at 287
[45]International Finance Corporation fn 35

> business can introduce different perspectives, problem-solving approaches, and increase innovation and risk management effectiveness (Rock and Grant 2016)'.[46]

The IFC study is further critical as it identifies the role of women as allocators of capital and recipients of the same. It analyses the advantages of inclusion in partnerships, in fund investments, in companies and in knowledge sharing. This research agrees to a greater extent with the IFC report. It is against its backdrop that this study analyses the importance of ESG provisions within the Zimbabwean capital markets legislation.

The importance of the IFC 2019 report becomes fundamental when regard is had to researches done in Libya, Sri Lanka, Egypt, Lebanon and Ghana, whose results have shown that the increase of women on boards, as participants in the securities markets has positive results.[47] Such studies have also linked ESG compliance with gender equality measures.

Wyman (2017) travels a similar path to that of the IFC.[48] He interrogates the inclusion of women in diverse financial sectors. He tackles the reasons for exclusion and dismantles each of them wisely. He challenges the traditional notion that involving women in the financial services sector increases risk and exposes investors. He considers the increase in performance of institutions that have adopted gender diversity and points to the ESG compliance associated with such measures.

This research concurs to some extent with his line of reasoning. The only point of departure is that the research is conducted in a developed world context. Questions that arose in the study are whether his conclusions would hold water in the face of the cultural, economic and distinctions arising in developing countries. Issues such as capacity building and the history of colonialism in shaping institutions such as capital markets will be analysed so as to draw a distinction between the study and the Zimbabwean context.

The United Nations Conference on Trade and Development (2018) report [49] was mainly used for statistical data and analysing modern trends in ESG mechanisms as a sustainable investment tool.

The study therefore sought to point out the importance of a legislative framework that governs ESG issues as a means for aiding trade. It however recognised that the law is not an

[46] International Finance Corporation fn 35 at 21
[47] International Finance Corporation fn 35
[48] O Wyman fn 38
[49] UNCTAD fn 11

end if it is unclear and remains with loopholes that do not address adequately ESG issues. Since the concept of ESG issues is nascent and evolving, there is need for the law to be clarified to the best extent possible. Institutions that support the legal provision with training and research may be an aid to achieving an ESG compliant stakeholders and communities that challenge and point out the non-compliance where possible.

1.9 Delimitation of study

The study covers securities regulation from 2004 when the SEA came into effect to date. It reflects on the steps that the Zimbabwean government has taken into effecting legislation that speaks to inclusion as well as investor protection.

It specifically acknowledges that investor protection mechanisms considering enforcement were initiated especially upon reforming Securities regulation in 2004. It also accepts that inroads have been made in diverse spaces to encourage and ensure diversity both in the legal framework and institutions arising from the capital markets field.

Major limitations to the study were the availability of disaggregated data that specifically speaks to disparities in gender diversity. Secondly data as regards criminal matters and civil matters from the courts was scant. Added to that was the unavailability of research in the form of books, journals or articles which speaks specifically to African capital markets, enforcement mechanisms and diversity.

1.10 Chapter overview

CHAPTER 1: INTRODUCTION

This Chapter introduces the reader to the study. It tracks the background of the study, lays out the research questions and methodology and aims of the study. It explains the literature used in the study, its delimitations as well as the importance of the study.

CHAPTER 2: CONCEPTUAL FRAMEWORK OF ESG UNDER INTERNATIONAL LAW

This chapter will analyse ESG provisions under international law. It considers the concepts of sustainable investments and how trade fits within the MSDG debate. It considers the various efforts to incorporate ESG mechanisms in stock exchanges and the probable benefits and difficulties arising from such efforts.

CHAPTER 3: ESG PROVISIONS UNDER ZIMBABWEAN LAW: PROSPECTS AND CHALLENGES

This chapter considers the ESG provisions in the legislative framework of Zimbabwean securities sector. It analyses the legislative framework and mirrors it against regional counterparts such as the Joburg Stock Exchange framework. The basis of the comparison is to establish possible ways of reform.

CHAPTER 4: ESG PROVISIONS, SUSTAINABLE DEVELOPMENT AND TRADE

The chapter considers ESG provisions in the current Zimbabwean law relate with sustainable development mechanisms under international law and the trade effects of the same on the various players within the securities sector.

CHAPTER 5: SUGGESTIONS, RECOMENDATIONS AND CONCLUSION

This chapter addresses possible way of strengthening ESG mechanism under Zimbabwean law.

CHAPTER 2

CONCEPTUAL FRAMEWORK OF ENVIRONMENTAL SOCIAL AND GOVERNANCE ISSUES UNDER AND THEIR APPLICABILITY TO CAPITAL MARKETS

2.1 Introduction

According to the World Investment Report (2018), the importance of stock markets, institutional investors and security market regulators is that they are a vital tool for promoting new policies, tools and instruments in the investment area.[50] One of the policy reform areas is the introduction of ESG requirements as part of the capital markets regulatory regime. This chapter therefore considers the ESG requirements at an international scale at a regional level as well as in South Africa (a comparable jurisdiction). South Africa is used for several reasons. First, it is a country closer to Zimbabwe. Second, its legal system is like Zimbabwe in that it is Roman Dutch in nature. Third, South Africa's Stock Exchange was the first in Africa to introduce ESG requirements in its capital market and it would be prudent to unravel the benefits and challenges that accrued from adopting such a course.

This chapter will be structured as follows: the study shall commence with an analysis of ESG initiatives at the global level. It will thereafter examine regional initiatives in ESG requirements. Lastly it will consider ESG regulatory structure under South African legislation and conclude on the importance of ESG regulatory requirements in modern stock markets.

2.2 International law and ESG requirements

The major initiative under international law which introduces ESG requirements in capital markets is the United Nations Sustainable Stock Exchanges (UN SSE) which was launched in 2009 by the UN Secretary General.[51] It marks a partnership amongst the United Nations Commission on Trade and Development (UNCTAD), United Nations Global Compact (UNGP), United Nations Environmental Program Finance Initiative (UNEP FI) and the Principles on Responsible Investment (PRI) which were adopted in 2006.

Of note is the fact that the UN SSE is a soft law initiative. It brings together stock exchanges from around the globe by requesting them to sign a public commitment of their own volition.

[50] UNCTAD fn 11 at 116
[51] UNCTAD fn 11 at 116

Its focus areas are research, technical assistance and consensus building.[52] The work of SSE fuses the economic activities of Stock exchanges with Sustainable Development Goals (SDGs). It encourages economic conduct in capital markets that promotes four key SDGs which are SDG 5 on Gender Equality, SDG 8 on Decent work and economic growth, SDG 13 on Responsible consumption and production and SDG 13 on Climate action.[53]

Under the umbrella of the PRI, its mission is to: -

a. Encourage adoption of the Principles of Responsible investment,
b. Encourage collaboration on their implementation,
c. Encourage the fostering of good governance, integrity and accountability in capital markets;
d. Encourage the addressing of obstacles to a sustainable financial system that lie within market practices, structures and regulation[54]

Under the six principles of Responsible Investments, investors commit to: -

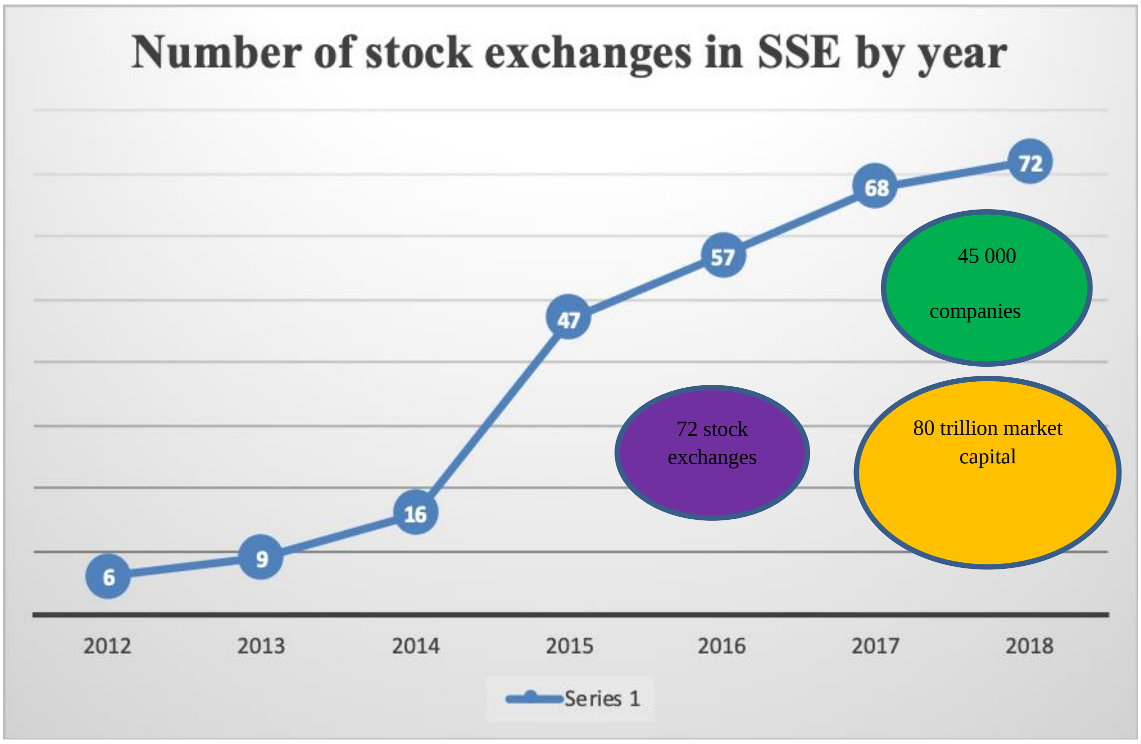
a. Incorporate ESG issues into investment analysis and decision-making processes,
b. Be active owners of and incorporate ESG issues into their ownership policies and practices,
c. Seek appropriate disclosure on ESG issues by the entities in which they invest,
d. Promote acceptance and implementation of the Principles within the investment industry,
e. Work together to enhance our effectiveness in implementing the Principles,
f. Report on activities and progress towards implementing the Principles.[55]

2.2.1 A case for the principles

The research indicates three major issues. First, that the aspect of ESG issues in stock markets is a recent phenomenon. Second that at international level, there is no legal instrument dealing with the adoption of ESG mechanisms in capital markets. Third that the efforts to include ESG issues in the regulation of capital markets is a voluntary initiative open to stock exchanges in partnership with organizations, regulators, companies, investors, and

[52] Sustainable Stock Exchanges initiative (SSE), *About SSE* (2019) https://sseinitiative.org/about/about-the-sse/ accessed 24 August 2019
[53] SSE fn 52
[54] Principles for Responsible Investment (PRI) *A blueprint for responsible investment: genesis, assumptions and process* (2017) at 3 https://www.unpri.org/download?ac=5330 accessed 22 August 2019
[55] PRI fn 54 at 3

governments. It is not an instrument that binds state parties. Table 2 below reflects the impact which the UN SSE initiative has so far.



Data from World Investment report 2018 at 116 (UNCTAD SSE initiatives Database)

The initiative has not been without results as it has seen various benefits since its adoption. The upward growth of stock exchanges involved in the initiative is reflected in the figure above which reflects that there has been an increase in stock markets initiatives around ESG issues worldwide since the UN SSE. Such a growth is to be lauded especially where the world is grappling with ensuring a fulfilment of the SDGs by 2030. It also reflects the positive uptake of the initiative by diverse stakeholders involved in the capital markets. It might further reflect that the attitude of engagement and collaboration amongst the diverse players within the economic and other fields has changed. The mentality of boxing commerce and social and environmental issues may be shifting, which is to be lauded given that the changing nature of the world's problems requires renaissance solutions as opposed to silo approaches. Thus, notwithstanding that the UN SSE is a soft law initiative, it has resulted in countries adopting ESG regulations and voluntary initiatives on a different scale across the world.

The importance of the UN SSE at an international level cannot be overemphasised. It bears the possibility of ensuring that there is certainty in the law, as it provides a minimum basis of for ESG requirements in capital markets. For example, under principle number 2, the PRI assists countries in creating ESG policies that have a uniform grain across the world. Through this process, several stock exchanges have adopted formal ESG disclosure mechanisms post the inception of the principles in countries such as Australia, France, India, Malaysia, South Africa, Sweden, Taiwan and Thailand.[56] On the continent countries that have adopted ESG legislation which has a mark of the UN SSE include Zimbabwe, South Africa and Egypt.

The second argument in favour of the initiative is that the PRI provides a basic minimum standard which exchanges and business must adhere to in fostering ESG compliance in capital markets. Parties are encouraged under the principles to adopt measures relating to safeguarding the environment, addressing inequality through social mechanisms as well as ensuring transparency in stock markets through vibrant governance measures. The PRI thus provides from the basic ESG compliance initiative to the complex set that may be adopted by an advanced market. Thus, whilst the principles are not conclusive, their adoption has led to countries taking conscious efforts to adopt ESG measures in their countries with a number of those appearing on the African continent. Some of the initiatives may be small steps towards growing a more effective and sounder ESG regulatory regime. From a regulatory perspective, the soft law initiative has therefore resulted in significant impact in setting a minimum bar of compliance and adoption.

A further benefit of the initiative is that, notwithstanding that it is no law, it has resulted in the allowance of countries to use their policy space to adopt the an ESG regulatory regime that is consonant with the demands of their capital markets. For example, the requirements to adopt the measures are not uniform under the PRI principles but allow countries to adopt policy measures in capital markets whose ESG issues reflect the PRI principles and SSE Initiative. This flexibility has in return saw the bulk of the world's professionally managed investments being now signatories to PRI.[57] The one size does not fit all approach may also assist countries in the developmental stage to harness their resources in establishing a sound ESG compliant system without the pressure to comply without capacitation.

Adoption of the initiative has resulted in an increase in ESG reporting across the globe. For example, from 2004 when ESG reporting was raised to date, ESG reporting has noted a steady rise. In 2017, ESG investments grew by 25 percent from 2015 to US$23 trillion,

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[56] JE Humphrey, DD Lee &Y Shen *The independent effects of environmental, social and governance initiatives on the performance of UK firms Australian Journal of Management*, (2011) 37 at p135–151

[57] PRI fn 54 at 3

therefore accounting for about one-quarter of all professionally managed investments globally[58]. Part of this increase was a result of investor pressure to comply with ESG requirements stipulated in local legislation.[59]

Signing up to the UN SSE is a show of goodwill and commitment to engaging in responsible investment. Whilst some may discredit this, the advantages of exchanges and regulatory regimes signing up to an investment framework that supports ESG mechanism is that it affirms two principles under international and contract law; *pacta sunt servanda* and caveat *subscripto*. Under the former, parties should honour agreements they enter into and under the latter, once one affirms to a contract by way of signature, they are bound to perform and may be liable to a suit for specific performance or payment of damages in the event of none performance. As a result, the affirmation by parties to join the SSE affords members to hold each other accountable and ensure compliance by each of the parties involved in a manner that accords with the promotion of sustainable investments.

A possible benefit to the rules of the SSE is that it allows parties to engage, collaborate and share information on best standards of practice internationally. For example, the PRI platform offers support and PRI resources that include reports and guides, the Collaboration Portal, the PRI Data Portal, a regional relationship manager and reporting and assessment tools to measure and communicate your progress in ESG matters. [60] From an emerging market perspective, the adoption of ESG rules in a country's legislation may require technical capacity. The initiative becomes a critical tool for building such capacity and smoothening the transition of the market to an ESG compliant one. This may further be essential for improving ESG training on the various stakeholders a country's capital markets.

Since capacity building is key, the PRI team has committed to assisting members with enforcement of the ESG commitments. Through its work, it assists signatories to comprehend the vitality of ESG regulations, reporting and training through initiatives such as assisting the stock market to understand the contribution of ESG factors to investment performance, the role that responsible investment plays in broader financial markets and the impact that those

[58] KPMG *The rise of responsible investments* (2019) https://home.kpmg/xx/en/home/insights/2019/03/the-rise-of-responsible-investment-fs.html accessed 22 August 2019
[59] KPMG fn 58
[60] PRI *Become a signatory* https://www.unpri.org/signatories/become-a-signatory/ accessed on 22 August 2019

investments have on the environment and society.[61] This in turn may be a basis upon which market regulators may create polices that are in tandem with their markets.

There is the further advantage of offering a concerted basis for tackling ESG issues in investments across the world. It is possible that individual investors may not assert a stronger influence on aspects of the markets and economies such issues as environmental risks, environmental harm or social issues. The initiative allows parties to band up and move with a solid voice to address the various issues that affect the world.[62] The solid nature of the efforts is further affirmed by the diversity of the parties who may collaborate which is government, organizations, regulators, companies and investors.

The initiative provides a basis for greater accountability as PRI takes to task members on unfulfilled obligations. A case in point is the system of ‘fact sheets’. This is a mini report which details the ESG mechanisms including legislative that a party is undertaking. These are made available to the public thus making the system transparent. It allows other stakeholders to trace the involvement of exchanges, investors, companies and governments in ESG matters. Further, the reporting system is mandatory. Failure to comply with the reporting system results in the Secretariat seeking an explanation from the exchange as it must answer to its actions. This is followed by an investigation and a review process of the Rules or principles breached. Failure to comply with the agreement made by the parties may result in the exchange being de-listed from the SSE for an initial period of six months. The measures cited herein thus reflect a formidable tool for ensuring the smooth running of the initiative and its success.

Lastly, whilst the system under the initiative is based on willingness and *bona fides,* the reputational tag of enterprises, companies, governments and investors has become the gold of our time. It matters that entities be seen as part of the leading ship of ESG issues in investment matters.[63] For instance institutional investors are aware of the negative reputational risks that arise from investments that are not viewed as socially responsible. A rigorous process therefore of compliance with human rights, labour rights, corruption and environmental laws, and their own benchmarks must be undertaken before a decision is made.[64] This process of ESG awareness, whether as stipulated by regulation or in the form of

[61] PRI fn 54 at 3
[62] PRI fn 54 at 19
[63] PRI fn 54 at 21
[64] PRI fn 54 at 21

soft principles becomes a method of inculcating a culture of sustainable investments, which matters in the era of instability and financial uncertainty.

2.2.2 Challenges of the international framework

As discussed previously, the UN SSE is no law in the strict sense, but a soft law initiative. The UN SSE itself is not an international regulatory body but an amalgamation of diverse interested groups who share the same vision of supporting sustainable investments and encouraging sustainable investment practices. The PRI a vital part of UN SSE are mere guidelines and consist of a voluntary set of principles which encourage incorporation of ESG issues into investment practices, such principles being 'voluntary and aspirational'.[65] The challenges with such is that it is easy for parties involved to hop into the partnership and hop out as and when they wish. There is not strong tie which may bind a party to remain committed to the initiative besides issues such as revenue losses or reputational tag. It also means that there is no legal weight to the initiative and a court through which breaches may be enforced and penalties imposed. This may pose problems in terms of the parties' commitment, the certainty of enforcement of penalties for breaches and even the existence of the program in the long run. Whilst the review process appears to be good, it remains to be seen in the future as to whether it will stand the test of dealing with breaches in a fair, decisive and impartial manner.

Except for the process of review, suspension and termination of membership, there appears to be no other effective remedies to ensure enforcement of penalties in the event of breaches. The remedy for failing to meet Once a party makes commitments currently is the suspension of a member for an initial six months by the Secretariat in the absence of a report to explain conduct. As the initiative is a voluntary undertaking, it is doubtful that suspension of membership will carry weight amongst trading parties as it does no more than perhaps affect a party's reputation an revenue. The reputational tag as a penalty may not yield as much results in developing countries markets as much as happens in developed nations.

There appears no single agreed definition of ESG. Whilst environmental issues may be more definite, the brackets of social and governance issues are much wider as they involve several matters such as gender, discrimination, harassment, corruption, transparency, accountability and the list increases depending on the context. It may be thus difficult to formulate a

[65] PRI *What are the Principles for Responsible Investment?* https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment accessed on 22 August 2019

legislative framework as the concept of ESG is malleable. The definition is according to the PRI dependant on an individual firm, clients and resources.[66] This uncertainty and lack of clarity at an international level raises doubts as to the import of the ESG mechanisms in regulatory structures of capital markets as what may be a breach in one market may not necessarily constitute one in another.

In its current state, the initiative appears to fail to adequately contemplate peculiarities of the small exchanges especially emerging markets. This may be illustrated by the numbers which prove that it has more representation of companies, governments and investors from the Global North than it has from the global South. Even the recent increase in numbers still makes it worrying that developing markets are underrepresented and may not have a voice in ESG initiatives on the same scale as developed nations.

As reflected in the introduction to the study, some of the major stakeholders in portfolio investments are communities, indigenous people and civil society organisation. The UN SSE is silent on the role of such important stakeholders affected by the investment such as women, minority groups and communities. The silence therefore affects any regulatory structure that may arise from the initiative as it may not adequately cater for the needs of those affected. There is an acceptance in the blueprint that more needs to be done in reaching out to companies, governments and stakeholders if the implementation of the ESG principles is to become more effective.[67]

Absence of civil society involvement is a concern as it is the watchdog of policy enactment and implementation. There is therefore a gap in the initiative in that it closes the door to a relevant mechanism that is critical in checking that once policy is enacted, it is implemented. Whilst the committees within the initiative and its various projects may provide checks and balances, it is submitted that the voice of civil society is an essential tool as it is may be more objective since it is separate from the institutions operating within the UN SSE. There is therefore a need for it to be accommodated within the system.

The other negative arising from the system is that the efforts are intertwined but clearly not singled out into an initiative that might encompasses the various entities involved in portfolio investments. The UN SSE runs its own programs which are complimented by the SSE

[66] Chartered Financial Analyst Institute *ESG Integration in Europe, the Middle East, and Africa: Markets, practices, and data* (2019) at p6 https://www.unpri.org/download?ac=6036 accessed 25 August 2019
[67] Chartered Financial Analyst Institute fn 66 at 9

Regulatory working group especially in the area of exchanges that require assistance in ESG regulation. The PRI is for investors mainly asset owners, investment managers and service providers. On the side lines the IOSCOC also runs programs such as sustainable investment. This fragmentation of efforts may be detrimental to achieving an international framework that aptly captures how ESG regulation ought to be formulated, implemented and enforced.

Given the above discussion, the research does show that whilst international efforts to create an ESG framework may not provide a law written in stone, initiatives such as the UN SSE and PRI provide a sound basis upon which research, capacity building and support for ESG regulation may be based.

2.3 Regional framework and ESG requirements

At the regional level, the African Development Bank runs an ESG framework as part of the Bank's initiatives. The bank has the green bonds program that supports climate change financing of sustainable projects. The social bond program aims to finance projects whose thrust is to address or mitigate a specific social issue and create positive social outcomes mostly, but not exclusively, for a target population(s).[68].

Beyond this framework, nothing exists in the form of a regulatory structure or policy framework for capital markets in Africa around ESG issues. Information around ESG issues, regulation, research and technical capacity appears to receive more emphasis on a global scale than id does in the region. One notable ESG initiative from the Africa Securities Exchanges Association (ASEA) is the Ring the Bell ceremony for gender equality which was run by the Kenya Stock Exchange.[69]

The absence of regional initiatives is worrying especially in the face of efforts such as the African Continental Free Trade Area (AfCTA) signed in 2018. Article 3 of the AFCTA notes that one of the main thrusts of the agreement is to assist with the efficient movement of capital and natural persons and facilitate investments by leveraging on initiatives and development in state parties as well as regional economic communities. In order to enhance the flow of capital within the region and for a full realisation of the free trade agreement, it is imperative that the role of ESG issues be part of the matters recognised in ensuring

[68] African development Bank *Social Bond Framework* (2017) https://www.afdb.org/fileadmin/uploads/afdb/Documents/GenericDocuments/AfDB_Social_Bond_Framework.pdf accessed on 25 August 2019

[69] African Stock Exchanges Association (ASEA) *Ring the bell for gender equality* (2017) https://african-exchanges.org/en/media/news/ring-bell-gender-equality-2017#contentCarousel/undefined accessed on 25 August 2019

sustainable investments. This is critical considering that there is suggestion that there may be significant economic growth within the region as business leverages on the continent's 1.2 billion population using the free trade agreement.

> "…The removal of tariffs and trade barriers to free up trade and deepen intra-African trade and regional integration is an important tenet of the AfCFTA. The AfCFTA is also likely to lead to shift in technology frontier as well as improvement in productivity spill overs within African countries that will result from trade creation. The AfCFTA ultimately aims to boost the economic performance of African countries in ways that enhance welfare as well".[70]

Previously, African trade accounted for less than 3% of world trade.[71] The above economic outlook is strengthened by statistics from the UN Economic Commission for Africa (UNECA) which indicates a rise in intra-African trade by 52% by 2022 (compared with trade levels in 2010) and double the share of intra-African trade (currently around 13% of Africa's exports) by the start of the next decade.[72] Such a positive economic outlook requires the injection of capital in order for business to thrive. It is thus imperative that in the negotiations on the investment protocol, inroads be made around ESG issues in the region's stock exchanges to balance economic growth with sustainable development.

Suggestions have been made to stimulate trade by also creating a regional stock exchange. The idea of a regional stock exchange is not new as it was advanced before by several authors. In the words of one author,

> 'African stock markets should integrate if they are to become efficient sources of investment capital. He said that with the exception of the Johannesburg Stock Exchange (JSE), bourses in Africa were too small and lacked liquidity. The JSE is Africa's largest and most vibrant stock market accounting for over 90 per cent of the total market capitalisation of sub-Saharan Africa and over 76 per cent for the entire continent. 'Integration will improve liquidity by providing a larger market from which to tap capital for investments. A workable option would be to combine forces at the

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[70] Africa Trade Report 2018 *Boosting Intra-African Trade: Implications of the African Continental Free Trade Area Agreement*, Afrexim 2018
[71] UNCTAD Statistics 2018
[72] World Economic Forum, *This African trade deal could improve lives across the whole continent* https://www.weforum.org/agenda/2016/05/this-african-trade-deal-could-improve-lives-across-the-whole-continent/ accessed 20 June 2019

regional level before the eventual creation of a single stock market for the continent with the JSE as the pivot'.[73]

Such an idea is not far from fusing into the dream of a United Africa under the AfCTA agreement. It is therefore important that a regional level mechanism be created for the interpretation of ESG mechanisms and how best policy should be framed and implemented within African markets so as to fuse the operationalisation of the continental agreement with ESG compliant practices. Such a mechanism could be used to create a framework that recognises the peculiarities of most of the continent's emerging markets and allow for an interpretation and policy tools on ESG that is consonant to the demands of African stock exchanges.

2.4 National mechanisms: the Johannesburg Stock Exchange (JSE) and ESG efforts

Regulation is one of the key mechanisms to either stimulate of stifle ESG investing. Several countries have created regulatory systems that prescribe ESG investing such as Australia, France, Germany, Sweden and the United Kingdom.[74] In other countries, ESG mechanisms are still voluntary. In most countries ESG issues are rarely mentioned in investment regulation although the trend is changing.[75] In countries such as United States of America and the United Kingdom, regulatory frameworks have not largely inhibited ESG integration, such as the Modern Slavery Act in the United Kingdom. Other legislation or voluntary codes allow institutional investors to consider ESG factors when investing.[76]

One of the most significant ESG frameworks both in terms of regulation, availability of data, capacity building for stakeholders and dissemination of information is the JSE. A recent report by the CFA (2019) indicates that regulation is the driver of ESG integration in South Africa than in other markets.[77] In a survey conducted with about seven other developed economies, the report notes that compared to other markets, government regulations and listing standards on ESG were more explicit in south Africa than other jurisdictions. The following table provides a summary of the operations of the JSE ESG measures.

Name	Johannesburg Stock Exchange (JSE)

[73] remarks by J Mbaru, Nairobi stock exchange chair- The Daily Nation Newspaper, Kenya Wednesday, November 3, 1999 quoted in KK Mwenda fn 21 at 3
[74] JE Humphrey, DD Lee &Y Shen fn 56 at 136
[75] G Inderst fn 3 at 5
[76] G Inderst fn 3 at 5
[77] Chartered Financial Analyst Institute fn 66 at 191-195

Conducts business in	South Africa
Number of listed companies (Dec./16)	376
Domestic market capitalization (in Millions USD, Dec./16)	958.907
Has signed the SSE Commitment Letter?	Yes
Has prepared SSE Communication to Stakeholders?	Yes
Requires ESG as listing rules?	Yes; • Requires (on an apply and explain basis) that listed companies annually report the extent to which they comply with the King Code. King IV includes sustainability reporting as well as integrated reporting. • JSE also has mandatory governance disclosure requirements beyond the principles of King.
Offers written guidance on ESG reporting?	Yes; • The JSE has collaborated with the Institute of Directors in Southern Africa (IoDSA) assisting the King Committee on Corporate Governance Guidance to issue guidance notes on reporting against the King Code. The JSE is a member of the standing King Committee. King III is available only as are the various practice notes issued. From an investment tool perspective, the FTSE/JSE Responsible Investment (RI) index series was introduced in October 2015 and replaced the SRI

	Index that had been running since 2004. The methodology measures eligible companies ESG strategies and performance, thus also influencing the way companies should operate. • JSE is a member and significant contributor to the development of guidance on integrated reporting as issued by the Integrated Reporting Committee of South Africa.
Offers ESG related training?	Yes; • Mandatory directors training is offered for smaller companies intending to list on the alternative board Alt-X, in collaboration with the Institute of Directors. While specialised ESG training is still nascent, the JSE continues to explore training needs of companies. Our standard course on the listings requirements covers the King Code and its reporting elements. During 2016, the JSE launched a programme on corporate ethics. An annual SRI Showcase / ESG Investor Briefing is run to enable investor engagement on ESG issues
Provides sustainability indices	Yes; • The JSE has adopted the FTSE ESG Ratings process to create the FTSE/JSE Responsible Investment

	Index Series, launched on 12 October 2015. This replaced the SRI Index that had been running from 2004. The RI Index Series currently comprises two indices: i. The FTSE/JSE Responsible Investment Index, a market-cap weighted index calculated on an end of day basis, comprising all eligible companies who achieve a FTSE ESG rating of 2.0 or above. ii. The FTSE/JSE Responsible Investment Top 30 Index, an equally weighted tradable index calculated on a real time basis, comprising the Top 30 companies ranked by FTSE ESG Rating. See www.jse.co.za/responsible-investment
Green bond listings	Yes • As of 07/16 three green bonds were listed Information available at https://www.jse.co.za/news/the-johannesburg-stock-exchange-lists-its-first-green-bond
Additional information	• Sustainability section available on its website • Integrated annual reports and links on its website • Supplemental online reports: i. Resilience and sustainability: how we look at our business ii. King narrative

	iii. Environmental report 2015 iv. Stakeholder report 2015 v. Social and ethics report 2015 vi. Remuneration report 2015
Organisational model of stock exchange	Listed company for profit; demutualized in 2005 and listed in 2006
Regulatory bodies	Registrar of Securities Services, Financial Services Board
Regulatory model	Because of the level of authority possessed by the exchange, it is considered a Strong Exchange Self-Regulatory Organisation (SRO) Model. The JSE is the frontline regulator for the exchange, setting and enforcing listing and membership requirements and trading rules. The Financial Services Board (FSB) supervises the JSE in the performance of its regulatory duties. The regulatory landscape is set to change significantly in the future, as South Africa looks to implement a twin peaks model of oversight. Under the new system, prudential supervision will be transferred to the South African Reserve Bank (SARB) and market conduct regulation will be led by a bolstered FSB
About the stock exchange	Location: Johannesburg, South Africa The Johannesburg Stock Exchange ("JSE") offers secure, efficient primary and secondary capital markets across a diverse range of securities, supported by our post-trade and regulatory services. We are the market of choice for local and international

	investors looking to gain exposure to the leading capital markets in South Africa and the broader African continent. The JSE is currently ranked the 17th largest stock exchange in the world by market capitalisation and the largest exchange in the African continent. The JSE was formed in 1887 during the first South African gold rush. Following the first legislation covering financial markets in 1947, the JSE joined the World Federation of Exchanges in 1963 and upgraded to an electronic trading system in the early 1990s. The bourse demutualised in 2005 and listed on its own exchange in 2006. In 2003, we launched an alternative exchange, AltX, for small and mid-sized listings, followed by the Yield X for interest rate and currency instruments. The JSE acquired the South African Futures Exchange (SAFEX) in 2001 and the Bond Exchange of South Africa (BESA) in 2009. Today we offer five financial markets namely Equities and Bonds as well as Financial, Commodity and Interest Rate Derivatives.

Information from SSE initiative website https://sseinitiative.org/fact-sheet/jse/[78]

2.4.1 The regulatory framework

ESG mechanisms were introduced under Regulation 28 in the Pension Fund Act of 1956. The preamble provides as follows:

> 'A fund has a fiduciary duty to act in the best interest of its members whose benefits depend on the responsible management of fund assets. This duty supports the

[78] Information from the SSE initiative website https://sseinitiative.org/fact-sheet/jse/ Accessed 25 August 2019

adoption of a responsible investment approach to deploying capital into markets that will earn adequate risk adjusted returns suitable for the fund's specific member profile, liquidity needs and liabilities. Prudent investing should give appropriate consideration to any factor which may materially affect the sustainable long-term performance of a fund's assets, including factors of an environmental, social and governance character. This concept applies across all assets and categories of assets and should promote the interests of a fund in a stable and transparent environment'.

The commitment is in line with the exchanges' commitment letter to the SSE initiative. It has pledged to 'promote long term sustainable investment and improved ESG governance and disclosure among companies listed on its exchange through dialogue with companies, investors and regulators.[79]Whilst the general notion under law is that a preamble cannot be used to interpret the statute concerned, the preamble to regulation 28 introduces certain fundamental issues. It addresses the concept of a fiduciary duty of a fund's performance to act in the best interests of beneficiaries. In other words, it balances the notion of a fiduciary's right to make profit with the notion of sustainable investments.

Regulation 28 further introduces factors which must be considered when investing responsibly. It does not leave them to the determination of individuals. It clearly provides that issues to be considered are of an environmental, social or governance nature. Regulation 28 (2) proceeds to make it mandatory for a fund to comply with the principles set out under it. The first is the requirement to have an investment policy.[80] This move is laudable as it affirms the need for companies to map at least in writing the strategy that may be adopted to ensure sustainable investments.

The second requirement is a stipulation of the principles upon which sustainable investments must be hinged. These are: -

i. Education of board members on governance, investment of the pension fund and other matters.[81] (governance)

ii. Check compliance with regulation 28 by its service providers and advisors.[82] (governance)

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[79] SSE website fn 78 at https://sseinitiative.org/wp-content/uploads/2013/03/Johannesburg-Commitment-Letter.pdf accessed 23 August 2019

[80] Regulation 28 (2) (b) of the Pension Fund Act of 1956

[81] Regulation 28 (2) fn 80 (c) (i)

[82] Regulation 28 (2) fn 80 (c) (ii)

iii. When contracting services to consider broad based black economic empowerment in the service providers[83] (social)

iv. Ensure that the fund's assets are apt for its liabilities[84] (governance)

v. Carry due diligence before investing in an asset or third-party managed asset on risk in general but specifically, operational, market, credit and liquidity risk.[85] (governance)

vi. In addition to (v) where a foreign asset is the source of investment, due diligence should spread to assessing currency and country risks.[86] (governance)

vii. In addition to (v) and (vi), a fund should take into credit rating, but it should not form the main basis upon which risk assessment is done.[87] (governance)

viii. Comprehend the evolving nature of risk profile of assets with time, considering the diverse risk brackets.[88](governance)

ix. Before investing in an asset or during investment monitor its long-term sustainable performance may be affected by any factors including ESG matters (ESG)

The comprehensive list of requirements touches on ESG issues in detail and leaves no room for the investing party to fail to comply with the law. The law requires that there be exact compliance as shown by the use of the word 'shall'. In the case of **Woodward v Sarsons (1875) LR 10 CP**, the import of mandatory wording in a statute was explained thus, 'An absolute (peremptory) enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially'.[89]

To note also, is the detailed nature of the investment policy of any fund. According to legislation, such a policy should be all-encompassing in terms of ESG matters. It must account for environmental, social and governance issues. Further, the list allows parties to even go beyond and add relevant matters that may not fit tightly within any bracket of the ESG issues.

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[83] Regulation 28 (2) fn 80 (c) (iii)
[84] Regulation 28 (2) fn 80 (c) (iv)
[85] Regulation 28 (2) fn 80 (c) (v)
[86] Regulation 28 (2) fn 80 (c) (vi)
[87] Regulation 28 (2) fn 80 (c) (vii)
[88]Regulation 28 (2) fn 80 (c) (viii)
[89] See also *Maharaj & Ors v Rampersad* 1964 (4) SA 638 at 643H

The law requires investment funds to have both a national and international outlook. This is revealed in s28 (2) (c) (vi) which places the obligations of a board on due diligence to extend to foreign investment transactions. Not only does this offer an opportunity for diversifying portfolios to investors so that they spread their risk across diverse sectors whilst investing in a sustainable enterprises, it is also key in the age of calls for socially responsible investments.[90] As such, companies, investors and stakeholders have the opportunity to tap into new markets and start fresh investments elsewhere but with a view to ensure compliance with the law.

Regulation 28 (2) (d) introduces the liability clause. This provision provides that notwithstanding the use of a third party in the performance of its functions under s28 (2) (c), the fund retains the legal liability for non-performance. In other words, the provision introduces the vicarious liability principle under delict as well as the contractual law of agency. This expression is an embodiment of the maxim *qui facit per alium facit per se* (he who does his work through the hand of another does it himself). A fund cannot claim exemption from compliance with the requirements of the law by using an agent as a defence or excuse. It must account for its actions and will remain liable for failure to comply with ESG issues.

Whilst the provision relating to institutional investors allows them to consider ESG investing, in some cases lack of ESG clarity may hinder such institutions from determining the space of ESG with other south African laws and other obligations.[91] In such cases, it is submitted that there may be need to move from a strict fiduciary investment portfolio to one that takes into account ESG issues.

Under the paragraph 3.84 of the JSE Listing Rules, it is mandatory to follow the King Code on Corporate Governance in South Africa. This is notwithstanding that the principles in the King Code are generally voluntary. The King Code is a set of rules and principles which seeks to support corporate governance. Incorporated in the listing rules from the King Code is for example the requirement that there must be a policy evidencing the power balance amongst the board of directors so that no one director prevails in corporate decision making over the others. Similarly, a chairman and chief executive office must be separate and if possible appointed from different pools to avoid the same person being in conflict of interest when running their duties.

[90] Sewkurun A *Sustainable investment in South Africa* (2019), Ethical Boardroom website https://ethicalboardroom.com/sustainable-investment-in-south-africa/ accessed 26 August 2019

[91] G Inderst fn 3 at 5

It is a strict requirement under the corporate governance requirements in terms of paragraph 3.84 for companies when submitting their annual reports to indicate the level of compliance with the listing rules. One therefore notes that the regulatory corporate governance provisions are quite strong and seeks to instil a culture of commendable corporate functions.

Under the Listing Rules of the JSE, an issuer must adopt the ‘apply or explain’ rule. The phrase denotes that principles in the Code must be applied by all entities and consideration of the recommendations in the Code must be had. In order to allow stakeholders to challenge the board on its governance quality, all entities must disclose in a statement how they applied or failed to apply the King Code principles. Application of the principles is mandatory and where there is a failure, an adequate explanation should follow. An entity is further bound to apply all principles and cannot rely on substantial compliance to evade liability. One therefore notes that there is a strict requirement to follow the listing Rules under the JSE especially in explaining how the governance of a listed company is operated.

An analysis of the legal framework reflects that in the listing rules as well as regulation, governance issues get a fair portion of emphasis. Whilst notice is given to social and environmental issues, the bulk of the listing rules refer for example to the King Code, which Code considers governance matters. That this is the case is echoed by the CFA report (2019) in which they note that when incorporating ESG issues into the investment process, governance issues are the main risk that investors focus on.[92] They however indicate that by 2022 the impact of social issues on investments will have grown than it currently is.[93]The possible explanation could be that, in emerging markets such as the JSE, concern is more about governance by the stakeholders. This explains why governance issues are confirmed more in corporate bonds, shares and sovereign debt unlike environmental issues and social issues which are a bit silent compared to Europe. The study noted that social and environmental issues became a phenomenon usually after a major event such as a court case or disaster.[94]

Notwithstanding what may appear as a very sound legal system that lays out ESG issues, a recent report by the CFA (2019) indicates that regulation acts as a barrier to integration of ESG issues. In equity investments it was second, with 33% whilst in fixed income, it was

[92] Chartered Financial Analyst Institute fn 66 at p187, 189
[93] Chartered Financial Analyst Institute fn 66 at p186
[94] Chartered Financial Analyst Institute fn 66 at 189

second again at 42%.[95] Part of the reasons for the barriers advanced in the equity market are limited understanding of ESG issues and integration, lack of comparable historical ESG data, absence of a company culture on ESG matters support, concern about negative reports and very extensive non material information.[96] In the fixed income markets the same issues reigned with the exception of non-material information. This was substituted with limited amount of ESG research.[97]

What the above information reveals is that a sound regulatory system on ESG issues does not necessarily equate to integration of the same in analysis, reporting or investment processes. In emerging markets, there is still room to work strongly on capacity building so as to enhance ESG understanding and how best it may be integrated into markets. Such research must also incorporate increased trainings which may be a way of enhancing awareness.

2.5 Conclusion

The above expose sought to reflect on the international regional and national legal frameworks on ESG issues. The study revealed that ESG regulation is still not uniform across the world as there is no international framework but initiatives that encourage adoption of ESG laws at national levels. The study also revealed that whilst legislation is a critical tool for example in countries such as South Africa, other initiatives such as research, data collection and capacity building should be woven into it so that it works.

[95] Chartered Financial Analyst Institute fn 66 at 192
[96] Chartered Financial Analyst Institute fn 66 at 192
[97] Chartered Financial Analyst Institute fn 66 at 192

CHAPTER 3

ESG PROVISIONS UNDER ZIMBABWEAN LAW: PROSPECTS AND CHALLENGES

3.1 Introduction

Zimbabwe is a partner in the United Nations Sustainable Stock Exchanges program. This chapter shall analyse the regulatory framework of capital markets in Zimbabwe and the extent to which ESG issues are covered in the law. The chapter will commence by outlining the law on ESG mechanisms. The study will thereafter analyse the law vis-à-vis international standards and South African law and rules. In the process, the research will single out the prospects and challenges of the legal system. It will analyse the extent to which legislation on ESG mechanisms can or is a driver or an inhibitor to responsible investments.

A summary of the state of the stock exchange and ESG initiatives in Zimbabwe appears below.

Name	Zimbabwe Stock Exchange
Country	Zimbabwe
Number of listed companies (Dec/16)	63
Domestic market capitalization (in million USD, Dec./16, WFE)	3.77
Has signed the SSE Commitment Letter?	Yes
Has prepared SSE Communication to stakeholders?	No
Requires ESG reporting as a listing rule?	No Requires a statement of how the King Report or Cadbury Report on Corporate Governance are applied
Offers written guidance on ESG reporting?	No
Offers ESG related training	No
Provides sustainability-related indices?	No
Has green bond listing	No

Organizational model of stock exchange	Public Listed Company
Regulatory bodies	• Securities and Exchange Commission of Zimbabwe • Reserve Bank of Zimbabwe • Zimbabwe investment Authority • Zimbabwe revenue Authority
Regulatory model	The Zimbabwe Stock Exchange (ZSE) Act reached the statute book in January 1974. The members of the Exchange continued to trade as before. However, for legal reasons, it became necessary to bring into being a new Exchange coincidental with the passing of the legislation. The present Exchange therefore dates back from the passing of the Act. In 2004, the Securities Act was promulgated to repeal the ZSE Act and became operational in September 2008. The Securities Commission of Zimbabwe is the capital market regulator and it became operational in October 2008 and is governed by commissioners appointed by the Minister of Finance with a tenure of four years. • The Zimbabwe Stock Exchange serves three critical functions: 1. Providing a link between companies that need funds to set up new businesses or to expand current operations and investors that have excess funds to invest in such companies 2. Provide a regulated marketplace for buying and selling of shares at prices determined by supply and demand,

	notwithstanding other macroeconomic fundamentals 3. Provide a properly constituted and regulated environment that ensures market integrity and fairness among stock market participants.
About the stock exchange	The first stock exchange in Zimbabwe opened in Bulawayo in 1896. It was however only operative for about six (6) years. Other stock exchanges were also established in Gweru and Mutare. The latter, also founded in 1896, thrived on the success of local mining industry, but with the realization that deposits in the area were not extensive, activity declined and closed in 1924. After World War II a new exchange was founded in Bulawayo and dealing started in 1946. A second floor was opened in Salisbury (Harare) in December 1951 and trading between the two (2) centres was by telephone. They continued operating until it was decided that legislation should be enacted to govern the rights and obligations of both members of the Exchange and the general investing public. Zimbabwe has a developed capital market with an active institutional base. Zimbabwe has a pension fund industry, an insurance industry, and a local asset management industry supported by nineteen (19) registered stockbroking firm.

Information from UN SSE website https://sseinitiative.org/fact-sheet/zimbabwe-stock-exchange/[98]

3.2 The legal framework

ESG issues are introduced under the Zimbabwe Stock Exchange Listings Requirements) Rules, 2019 (listing Rules). The enactment of the Rules comes as a positive sign which signals an important step towards aligning local legislation with international standards of best practice.

For emphasis, the provisions covering ESG requirements are as follows:

399. ‘The issuer shall be required to disclose in the chairman’s statement the relevance of sustainability to the organisation and the organisation’s strategy for addressing sustainability issues.

Sustainability reporting

400. (1) The issuer must disclose its sustainability policy, including mitigation of risks, sustainability performance data and other material information which deepens stakeholders’ understanding of corporate performance.

(2) The issuer should provide a balanced and objective view of their performance by including both positive and negative impacts on environment and society, how it relates to its stakeholders and contribute to sustainable development.

(3) The issuer is encouraged to apply internationally accepted reporting frameworks (refer to section

(4) Where other frameworks are adopted, consideration should be taken that the framework provides-

(a) benchmarks and performance measurement systems that allow comparison over time;

(b) guidance on key performance indicators and data which should be measured.

Reporting Standards and Guidelines

[98] Adopted from UN SSE website https://sseinitiative.org/fact-sheet/zimbabwe-stock-exchange/ accessed on 17 August 2019 and modified

401. (1) The ZSE encourages the adoption of internationally accepted reporting frameworks, such as the Global Reporting Initiatives (GRI) Sustainability Reporting Guidelines or Standards, in disclosing the company's sustainability performance. The GRI Sustainability Reporting Guidelines or Standards are globally applicable and sets out general principles and indicators that listed companies can use to measure and report their economic, environment and social performance.

(2) The Company shall apply the latest versions of GRI Guidelines or Standards to the level applicable to its context and nature of operation. (3) Where other standards or guidelines acceptable to the Exchange have been used, section 400 shall be used to evaluate the framework before adoption

Industry or sector specific requirements for reporting

402. Some issuers operate in industries that are extremely sensitive to environmental and social issues such as oil and gas, mining and metals sector which high environmental and social exposure and impacts warrant specialized reporting frameworks for meaningful assessments of organisational risk and performance. Such companies are required to- (a) adopt industry-specific reporting framework; or (b) the GRI Sector Supplements for selected industries; or (c) such internationally and nationally recognized reporting frameworks.

Disclosure of Sustainability Information

403. (1) The Company shall provide sustainability information either:

(a) in an annual report, showing a holistic presentation combining or integrating financial and non-financial disclosures (environmental and social issues) reflective of the company's corporate practices;

(b) where an integration framework has been used, both frameworks and standards for integration and sustainability reporting should be acknowledged. In the event that a company adopt the Integrated Reporting Framework, all sustainability information should be referenced to a standalone comprehensive sustainability report prepared separately and available to stakeholders; or

(c) a standalone sustainability report giving a comprehensive disclosure of environmental and social issues and the report should be referenced in any reporting of annual financial statements by providing a summary of sustainability information linked to the standalone report.

Independent assurance

404. Independent assurance is not a mandatory step in the process of sustainability reporting. Where an independent assurance report is provided, the following should be provided-

(a) an independent assurance statement published along the sustainability report, with the following information provided-

(i) sustainability assurance standards used;

(ii)qualification and expertise of the practitioner, reporting standards used, signature and name of assurance practitioner, employing organisation and reporting date'.

The listing rules can be summarised thus; they provide duties for issuers and for companies. Issuers have a duty to disclose sustainability in the chairman's statement and its relevance to the organisation, to disclose in the same statement the role of the organisation in addressing sustainability issues. On reporting, the issuer must disclose its sustainability policy. When reporting, the issuer must give a balanced view of their performance and how it affects the environment, society and aids sustainable development. In reporting, issuers are encouraged to adopt internationally recognised standards. Issuers operating in environmentally sensitive industries must adopt reporting that accords with those industries which is of a special nature. Thus, ends the role of issuers and ESG issues relating to their work. It is covered specifically in about four provisions which are sections 399 to 404 of the listing Rules.

Companies' duties to provide sustainability information appear in s402 of the listing Rules. Under that section, a company has the duty to provide sustainability information in its annual report which includes financial and non-financial information. A standalone report on sustainability information must give comprehensive disclosure of environmental and social issues.

Under independent assurance, the law recognises that it is permissive. Where an independent assurance report is provided, the listing rules require that it be published alongside a sustainability report, with information that includes expertise and qualifications of the practitioner involved, standards used and reporting date. As far as sustainability issues are concerned, this is as far as the law goes.

3.3 Criticism of the framework

Zimbabwe's commitment to adopting sustainability initiatives is reflected in its commitment letter. The voluntary commitment to the SSE initiative under the exchange shows a willingness to,

> 'commit, through dialogue with investors, companies and regulators, to promoting long term sustainable investments and improved environmental, social and corporate governance disclosure and performance among companies listed on our exchange'. [99]

The commitment carries the same message as the JSE commitment. Whilst it may be argued that a letter of commitment may not be the best indicator of a party's willingness to be bound to integrate ESG regulation within their territory, it is a starting point. A good one too as it reinforces the idea and notion of a willingness to commit to a set of principles and be bound by them. The endeavour captures three areas of interest the what, how, who in the ESG initiatives under the Zimbabwean scenario. Under the how, the letter indicates that dialogue will be the main medium of ensuring ESG disclosure and performance in Zimbabwe. Under the who, the parties critical in such a drive are singled out. These are companies, investors and regulators. In terms of what, the commitment specifies that the thrust is to promote long term sustainable investments and improved environmental, social and corporate governance. The promotion focuses on disclosure as well as performance. Bearing this in mind, one may proceed to analyse whether the listing Rules manage to capture the spirit of the commitment. That can be juxtaposed through initiatives by the ZSE to strengthen the legislative efforts.

The promotion of sustainable investments appears to receive import under s399 of the listing Rules. That section emphasises that the chairman's report ought to specify the sustainability strategy of the organisation and the measures that it is undertaking to address the such issues. This theme of sustainable business practices including disclosure and performance is woven throughout the provisions of s400 of the listing Rules which requires issuers to sustainability

[99] https://sseinitiative.org/wp-content/uploads/2015/12/Zimbabwe-Zimbabwe-Stock-Exchange.pdf accessed 30 August 2019

policy. Such a policy in terms of the law must have sustainability performance data, mitigation risks and all such other information that may be relevant in advising stakeholders so that they appreciate a corporate's performance.

In terms of s401, the law encourages companies reporting on sustainability performance to use the Global Reporting Initiatives (GRI) Sustainability Reporting Guidelines or Standards. The provision further gives flexibility to companies when reporting in that it allows them to utilise the GRI Sustainability Reporting Guidelines or standards considering their context and the nature of their operations. This may be important for the purposes of ensuring that companies are not choked by an extremely stringent ESG but have the elbow space to tailor make them to suit the Zimbabwean peculiarities.

S403 requires a company to disclose sustainability information in an annual report that combines both the financial matters as well as the non-financial (ESG) matters. This is critical to show the company's corporate practices. The law requires a company that adopts the integrated reporting framework to articulate the frameworks and the standards used for reporting. Further to that, the sustainability report in the integrated framework should be in a standalone report which is availed to all stakeholders. The importance of s403 is that it is the first of its kind in Zimbabwe to introduce a legislative requirement that makes it mandatory to have a report structure that captures both financial and non-financial matters. It follows the global trends which advocate for an integrated system of reporting as this may be favourable to stakeholders. It further creates a simplified yet unified reporting system by requesting the articulation of sustainable report as a separate document which must be circulated to all members. Not only does this enhance transparency, it brings about some measure of accountability as it allows stakeholders to follow on a firm's transparency strategy and judge the level of compliance.

A summary of sustainability information must accompany the standalone comprehensive sustainability report in terms of s403. This has the effect of simplifying the way in which stakeholders can trace the sustainability strategy and plans of the company. S403 thus crystallises the commitment to promote sustainability disclosure and performance by companies on the exchange. It does so by emphasising on the need for an annual report that captures sustainability information and by also mandating that the same should be simplified and availed to all stakeholders. S404 of the listing Rules recognises that there are companies that may be interested in independent assurance. It does not make it mandatory but insists that where it is used, such a report should be backed by a sustainability report. The assurance report must as a matter of law also stipulate the sustainability assurance standards.

For a country that committed to focus its efforts on dialogue in terms of its commitment letter, the legislative efforts go beyond the pledge and reveal a willingness to do much more than what was voluntarily assumed by the Zimbabwe Stock Exchange. The inroads made under the Listing Rules in terms of promoting sustainable investments do show a move from the traditional notion that businesses have no part to play in the sustainability discourse.

Whilst the efforts of the legislative provisions are laudable, there are several setbacks that may be noted. The first mention of 'sustainability' appears in s399 of the listing Rules. The word appears several times in Part XXI of the listing Rules without an explanation of what it means or entails. This may create problems for the regulator. For example, in the event of a breach, questions arise such as the measurement tool that may be considered in deeming an investor or company or even issuer to fall outside the purview of enforcing the 'sustainability' issues. In the same vein, the Act refers to the GRI Sustainability Reporting Guidelines or Standards as one of the methods of measuring sustainability performance. What the Act fails to do is to explain such. One has to search online for the same and attempt to get standards relevant for their investment.

It would have been useful to offer guidance on sustainability reporting. The same could be done through workshops, conferences or training courses. Such could also be done through pamphlets thus strengthening the dialogue commitment. Similarly, it would be useful to offer sustainability training. This is in order to assist investors on what to look for in a company and companies on how to disclose and perform in a sustainable manner.

The Act does not further indicate the consequences of failing to comply with the provisions relating to sustainability. Maybe it does not do so because the commitment letter indicates that the initiative is voluntary. However, on the part of investors and companies the Act is silent on whether a criminal or civil sanction would arise in the event of breach. It would be submitted that a minimum sanction would have been at least a good way of ensuring compliance as opposed to no sanction at all.

Further the multiplicity of regulators makes it difficult to track compliance and determine the ambit of the regulatory regime. For example, S399 and S400 of the Listing Rules refer to issuers and their duties in ensuring compliance. The Securities Commission of Zimbabwe does not regulate them as of now but awaits an amendment in the law. Issuers are supervised instead by the Reserve Bank of Zimbabwe. Questions then arise on the entity that should regulate them and how the same will track compliance of ESG law. This imprecision in regulatory clarity and the arm necessary for tracking compliance is a threat to ESG compliance.

Issues arising out of the sustainability discourse appear to be revealed in the ESG mechanisms. The ZSE's commitment letter refers to improved ESG disclosure and performance. The Act does not specifically mention ESG issues except in about three provisions. It also appears that sustainability measures are taken to mean ESG measures and the same used interchangeably without expressly stating so. However, there is a difference between ESG investments and ethical investments (which in some cases are sustainable investments)[100]. For example, in the US, under the ambit of the Department of Labour, ESG issues may be considered by fiduciaries if the effect on financial analysis does not materially affect the decision making whose standards are recognised through use of data and methodologies in financial analysis. There is also a demarcation in the United States of America of "Economically Targeted Investments" (which are purely financial purpose investments).In the UK, the newly Defined Contribution Code and trustee guides of July 2016 under the Pensions Regulator do not place any legal bar to the taking into account of ESG issues by trustees. A consideration of how investments are sustainable in the long-term future is further encouraged. As already established in Chapter 2, In South Africa, the 2011 Amendment to the Pension Funds Act provides as follows 'Prudent investing should give appropriate consideration to any factor which may materially affect the sustainable long-term performance of a fund's assets, including factors of an environmental, social and governance character'.[101]

S400 of the listing Rules appears to hint at ESG issues by requiring issuers to provide a balanced report of their performance including its effects on the environment and the society. By expressly stating society, the drafters seem to indicate that social issues may find place under that provision. Whilst this may be so, it may be equally difficult to prove non-compliance as an issuer may hide behind the vague description of society to indicate that there is no reason why they must be bound by the law.

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[100] OECD *Investment governance and the integration of environmental, social and governance factors* (2017) 12 https://www.oecd.org/finance/Investment-Governance-Integration-ESG-Factors.pdf accessed on 17 August 2019

[101] OECD fn 100 at 12

S401 of the listing Rules provides for the GRI Sustainability Reporting Guidelines or Standards. It simply refers to ESG in explaining the meaning of GRI Reporting Guidelines or Standards. This is defined as 'globally applicable (standards) and set out general principles and indicators that listed companies can use to measure and report their economic, environment and social performance'. The Global reporting Initiative has a set of standards that cuts across ESG matters.[102] It introduces several themes in the ESG domains. Whilst this has the advantage of allowing investors or companies to select those standards that fit their context, it is not without challenges. One of the major challenges appears to be divergent perspectives by the investors on the ESG factors as explained by the Global Reporting Initiative.

The other major setback is that the landscape of the ESG matters is complicated and introduces various sub themes and issues which may not be of major concern in some countries. This may affect the perception of an investment in another country in which a similar ESG issue may be of a serious concern. This is exacerbated for example by the lack of training by the regulators within the Zimbabwean securities market on ESG issues. There is also a lack of the provision of guidelines on how ESG reporting may be done, thus leaving stakeholders in the dark.

Conceptualisation of the factors and data collection varies amongst stakeholders thus making it difficult to discern. This is especially so for the S in the ESG factors. As noted by Ruggie (2019),

> 'This is especially true of the S in ESG, which is the weakest pillar of the three. Elements of the E tend to be more self-evident and easier to measure. Governance criteria can be more readily discerned from general corporate governance principles and long experience. But for the S, a scatter plot of scores generated by different data providers resembles nothing so much as pigeon droppings in Venice's St. Mark's Square. The indicators are too diverse and fragmented because the way in which the S is conceived by different data providers lacks a common principled basis'.[103]

Ruggie (2019) argues that the diverse aspects under social factors such as health and safety, employee relations, diversity and non-discrimination, human capital development,

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[102] https://www.globalreporting.org/standards/gri-standards-download-center/ accessed 17 August 2019

[103] JG Ruggie *ESG Investing: coming into its own-and not a moment too soon* (2019) 7 https://www.business-humanrights.org/sites/default/files/documents/Montreal%20RIA_John%20Ruggie%20speech.pdf accessed 23 August 2019

community relations responsible marketing, indigenous peoples are issues that relate to people[104]. These may be people as workers, customers or those in the affected communities. As a result, he argues that the starting point for human rights is the Universal Declaration of Human Rights (UDHR) whilst that for businesses is the UN Guiding principles on Business and Human Rights.[105]

Whilst his argument is sound, it raises certain fundamental issues especially in the context of Zimbabwe. The Constitution of Zimbabwe, 2013 provides a Bill of Rights under Chapter 4. The bill of rights covers an extensive list of rights including those articulated under the UDHR. S45 of the Constitution is imperative as it extends the application of the rights to natural and artificial persons. S45 provides thus,

> ‘(1) This Chapter binds the State and all executive, legislative and judicial institutions and agencies of government at every level.
>
> (2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it.
>
> (3) Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them’.

This raises the questions of the department or entity that is supposed to have oversight over the enforcement and the realisation of the rights. On one hand is the Human Rights Commission and the gender Commission established in terms of Chapter 13 parts 3 and 4 of the Constitution. On the other are the four entities under the ZSE that man the activities of investors on the stock exchange. The overlaps of issues and the complexity of the non-economic issues may prevent a full understanding of their nature and how compliance may be tracked.

It further raises issues as to what law should apply in the case of an ESG breach that hinges on human rights breach. The question would be whether it would be the subservient law in the form of the ZSEA and the Listing Rules or the Constitution. This may be easy to resolve as the answer lies in s2 of the constitution which provides as follows,

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[104] JG Ruggie fn103 at8

[105] JG Ruggie fn 103 at 9

> ‘(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
>
> (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them’.

What this entails is that in the event of an ESG breach whose effect amounts to a human rights breach under the Constitution, the Constitution of Zimbabwe would take precedence. It is recognised as the supreme law of the land and the rules being subsidiary legislation cannot take away a constitutionally vested right.

Even in the event of an ordinary breach, the question arises as to the entity that is responsible for enduring compliance with the listing Rules. For example, s399 and 400 relate to issuers, yet the Securities Commission does not regulate issuers. It cannot therefore impose sanctions in the event of a breach. The situation is different if compared to the JSE which is a self-regulatory organisation in terms of the Financial Markets Act, 19 of 2012. It has the powers over issuers, directors, sponsors, company secretaries, designated advisers and depositories. In the event of breach of the listing Rules, it therefore has the powers to investigate, prosecute and impose a penalty on a party. There is therefore need for legislative reform to give power to the Securities Commission as an arm of the exchange to investigate and impose penalties on ESG law offenders lest the law become a decorative tool.

S402 of the listing rules gives an option to industries operating within certain areas with specific ESG issues to adopt an elective reporting framework from three options of industry specific reporting, GRI Sector supplements for specific industries or such internationally or nationally recognised reporting frameworks. The provision does not take the ESG discourse further except that it notes that it exists under Part XXI of the Listing Rules. It leaves the ESG mechanisms unexplained. It appears to create confusion to the issuer by further allowing for the adoption of a nationally recognised reporting framework on ESG issues without indicating the national frameworks available for example in Zimbabwe that affords the ESG reporting recognised by statute. This position is contrary to say the UK’s Companies Act (2006) and the Modern Slavery Act which mandate that the director’s report of a quoted company should include information on a pool of ESG issues ‘*to the extent necessary for an understanding of the development, performance or position of the company’s business*’.

S403 of the listing Rules is the last to mention ESG issues. Where a company is filing its report the non-financial information in the report must include environmental and social issues. Nothing appears on governance matters. It is important that the Act emphasises the need for companies to include social and environmental disclosures on ESG mechanisms by companies in their annual reports.

However, the commitment of the exchange was to canvass ESG matters which include governance of companies. That element is lacking in s403 and appears to be glossed over in the few ESG provisions under the listing Rules. This is a lamentable position as it reflects a lack of total commitment to ESG regulations.

One will further note that an ESG report is not part of the listing Rules. The Rules require only that a company shows how the King Code or Cadbury Rules were applied.[106] The absence of this requirement takes away a strong element that could have been used towards ensuring ESG compliance as well as information sharing by investors. It is a far cry from the JSE's 'apply or explain principle'.[107] The principle mandates that companies comply with all of the listing requirements or provide in the absence of such an adequate explanation for noncompliance. Whilst s399 and s400 of the listing Rules impose an obligation on issuers to consider sustainability strategies, it ends there. The provisions seem to be couched in obligatory language but lack the touch of emphasis as appears under the JSE. The failure to impose strict sanctions on noncompliance with ESG reporting reveals the disparity between the import or sanctions levied on noncompliance with financial reporting.[108]

The framework under JSE is combined with the King Code III principles thus laying out clearly the measures that an issuer must adopt in order to comply with the law. Currently, the measures under the current listing Rules appear to have no principles or Rules upon which they ZSE has attempted to ensure that issuers comply. The possible explanation might be that having been instituted this year, the Rules are still in their infancy and inroads are still being made on how best the law may be applied. Be that as it may, there is need to buttress the provisions under s399 and s400 of the Listing Rules in clarifying the ambit of ESG compliance.

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[106] S217 of the Listing Rules

[107] Johannesburg Stock Exchange Practice Notes 2013
https://www.jse.co.za/content/JSEGuidanceLettersItems/King%20III%20Reporting%20in%20terms%20of%20the%20JSE%20Listings%20Requirements.pdf
Accessed 23 August 2019

[108] I Ioannou & G Serafeim *The consequences of mandatory corporate sustainability reporting: Evidence from four countries* (2016)

Whilst the ESG provisions have certain gaps in the law can create a basis for pro-active basis upon which companies can adopt an ESG conscious strategy as opposed to a re-active step to ESG reporting.[109] The former system stimulates companies to adopt an ESG reporting system even where there are no laws or where the law is not mandatory. The latter stimulates companies to adopt ESG reporting in answer to public pressure.

However, one will note that some companies listed on the exchange had already started to do ESG reporting before the inception of the listing Rules. For example, in 2015, before the inception of the Listing Rules, there were two companies involved in ESG reporting in Zimbabwe.[110] Notwithstanding therefore that the rules are couched in permissive language, they catalyse companies who were already part of the program to continue ESG reporting.

3.4 Conclusion

The discussion in this chapter established that there is legislation on sustainability and ESG issues in Zimbabwe under the Listing Rules, 2019. The study analysed the provisions and established the following legislation on sustainability disclosure and performance in the form of the Listing Rules, 2019 is a starting point towards ESG and sustainability compliance. Legislation in place does not cover ESG issues as a listing requirement. Legislation in the few paragraphs that it addresses ESG issues uses sustainability and ESG interchangeably without explaining whether the two mean one and the same thing. Whilst inferences may be drawn in certain circumstances, the absence of clarity may pose a law in the implementation of the law and in tracking noncompliance. Provisions in the Listing Rules speak of sustainability reporting but fail to address how progress may be tracked and the effect of non-compliance. The law mentions social and environmental issues but hardly speaks of governance issues as part of the company’s annual report on ESG issues. Whilst s217 of the Rules refer to such, the Companies Act and the Rules seem not to place weight governance disclosure. The exchange offers no guidance on ESG reporting guidelines. The exchange offers no assistance on ESG training.

[109] G Norris & B O'Dwyer *Motivating socially responsible decision making: The operation of management controls in a socially responsive organisation* (2004) 173–196
[110] Association of Chartered Certified Accountants fn 1 at 24

CHAPTER 4

ESG PROVISIONS, SUSTAINABLE DEVELOPMENT AND TRADE? WHY ESG?

4.1 Introduction

This chapter analyses the importance of ESG regulation in capital markets. It does so by considering the impact of ESG regulation at international level. It proceeds to investigate the same at regional level. Lastly the study reflects on the possible trade and investment benefits of ESG regulation in Zimbabwe's capital markets.

4.2 ESG regulation and effects at a global level

In order to realise the SDGs by 2030, it has been noted that there is need for investments of between US$5 to US$7 trillion annually, with the figure being more significant in developing countries.[111] The figure of deficit of funds in developing countries is expected to be about US2.5 trillion. As a result of the need for capital to invest in the realisation of SDGs, investors including institutional investors, asset owners (including public and private pension funds) have pledged to assist in the realisation of the goals by injecting capital in sustainable projects.

Reports indicate that by the end of April 2017, asset managers and pension funds in excess of 1 700, with nearly US$70 trillion in assets under management had appended their signatures to the PRI and the climate bonds initiative had garnered interest of top twenty underwriters mainly from top financial firms.[112] In a survey by Morgan Stanley Institute for Sustainable Investing done in 2017 with retail investors in excess of 1000, the results indicated that

> '[...] three-quarters reported an interest in sustainable investing. Millennial investors continue to lead the change. They are twice as likely as the overall pool to invest in companies or funds that target social or environmental outcomes.'[113]

[111] International Organization of Securities Commissions (IOSCO) Consultation Report *Sustainable finance in emerging markets and the role of securities regulators* (2019) 10
[112] IOSCO fn 111 at 10.
[113] IOSCO fn 111 at 10

These figures reveal that there is a shift at the global level from investments that fail to recognise ESG issues. The move has been to move into sustainable investments with the hope that business thrives in an environment that supports responsible investments.

There has therefore been a move worldwide by diverse countries and exchanges to adopt ESG requirements either on a regulatory or voluntary basis. The domino effect created by the UN SSE and PRI has been revealed in the diverse regional and local initiatives that speak to sustainability mechanisms. The same could be said of the World Federation of Exchanges (WFE) program whose Exchange Guidance and Metrics in its 2018 Sustainability Principles has indicated how and motivated companies to disclose certain metrics as their baseline indicators.

ESG issues improves sustainability of companies and firms, their management and their risk or return profiles.[114] Considering that there is a sharp rise in the number of investments and trade needed to fulfil the SDGs in 2030. The expansion of companies into new markets as they seek to tap into business that result in fulfilment of the SDGs creates a basis upon which firms may manage their risk profiles. Such profiles are key in an era where the move is towards responsible investments. Firms therefore benefit at a broader level by engaging at an international scale in matters that concern ESG regulation.

Post the 2007-2008 financial crisis, the move towards responsible investments gained traction as there was a realisation that it takes more than business to create sustainable systems from a financial, social and even environmental perspective. In the US, there was a sharp increase in ESG investments. First in 2008 after the 2008 financial crisis and secondly after the 2016 Trump election.[115] The former was probably informed by the realisation of the volatility of mainstream investments and how responsible investing may curb future financial crises.

Thus, the thrust at the international level has been to encourage grassroots and local level investments. The idea being that the bottom up approach of ensuring the realisation of goals from the level of the individuals and communities affected may pose a basis upon which rights may be realised. There is a further recognition that good decisions need data. ESG data in the individual countries has been scant and some countries have not taken initiatives either on a voluntary or regulatory basis. The concerted efforts through the UN SSE, PRI, WEF, IOSCO coalesce into results whose effect may be a realisation of the SDGs. It becomes

[114] PRI fn 54
[115] JG Ruggie fn103 at 28

critical that through the varying initiatives data be available to assess the need, the rate and the extent to which regulation and policy may be used to address ESG issues.

A major output of the ESG mechanisms at the global level is the opportunity to champion high priority ESG issues such as climate change and inequality.[116] As climate change becomes a concern and an issue to be addressed under the SDGs, ESG incorporation presents an opportunity for companies, investors and the host state to consider and map inroads into addressing environmental law issues. Currently the multilateral system is under threat as countries appear to adopt an individualistic approach. A good example of the near collapse of the multilateral system is the World Trade Organisation dispute settlement system. With the threat of non- renewal of the tenure of the appellate body members looming, it may be that by December, the system may have collapsed. The ESG discourse offers a basis for renewed efforts to address the threats to the multilateral system and find ways to collaborating and deciding on issues that affect the world.

One of the major challenges of adopting corporate Social responsibility mechanisms is that they are voluntary, fluid and in most cases have no legal basis upon which they may be based. Although the definition of ESG remains under review and subject to improvement, a major benefit is that ESG regulation provides clearer indices on responsible investing.[117] Such indices backed by policy and a baseline of some general agreed norms becomes a basis upon which trade and investment issues may be woven into social and other issues. In this vein, the IOSCO through its IOSCO's Growth and Emerging Markets Committee (GEMC) has been encouraging emerging markets to tap into

4.3 ESG regulation and effects at a regional level

The African Stock Exchanges Association (ASEA) has noted that there are trade and investment benefits that its members may accrue from adopting exchanges that encourage ESG regulation and integration in their markets. It is in that spirit that the Sustainability Working Group (SWG) was formed. Covering about 23 exchanges, its role is to unify and align ASEA member exchanges' efforts and practices around sustainability, create durable wealth for its stakeholders, by delivering value and support economic growth in the region.[118]

[116] JG Ruggie Fn 103 at 29
[117] KY Lo & CK Kwan *The Effect of Environmental, Social, Governance and Sustainability initiatives on stock value – Examining market response to initiatives undertaken by listed companies* Corporate Social Responsibility and Environmental Management (2017) 24 at 615
[118] African Stock Exchanges Association *Sustainability Roadmap Report* (2018) at 4

Whilst research into the effects and the impact of ESG regulation is still under consideration at regional level, one of the notable effects of ESG regulation could be strengthening regional trade thrusts. This is critical especially under the African continental Free Trade Area where efforts are being made to strengthen the trade ties of the African block.[119]

This economic agreement has been projected to hold diverse economic gains for African countries by the start of the next decade.[120] There is a positive presumption that Africa's trade with the world may increase from the 3% for which it accounted for before the signing of the agreement.[121] One notable feature under the AfCTA is the agreement by member states to adopt a bottom-up approach in regional integration; that is use the diverse regional blocks within Africa as a means of creating, '*The Africa we want*'. A united and integrated Africa.

Integrated efforts under ESG regulation may well pave way for the integration of the African stock markets thus fulfilling the idea of a united Africa, increasing the liquidity of our markets and creating new markets for companies. As noted previously in Chapter 2, one of the challenges of individual markets in emerging economies is lack of depth and liquidity. Recent studies have confirmed the same.[122] The consolidated efforts under the ESG mechanisms drive may well pave well for establishment of a single formidable African Stock exchanges giant with significant liquidity and capital depth.

Should the mark be missed, the project would remain essential as it creates a policy formulation and implementation hub especially on ESG issues. Some of the matters that the ASEA has been working on include research into policies and actions that promote sustainability mechanisms. Such include sharing information of ESG best practices, creation of a learning hub, attempts to create harmonised and standardised ESG reporting across the region and create networks around ESG discussions.

Further, African exchanges have come together under the Marrakech Pledge for Fostering Green Capital Markets in Africa (Marrakech Pledge) to develop and assist stock exchanges align their commitments with environmental pledges. The thematic areas under the

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[119] The African Continental Free Trade area entered into force on 30th May 2019- https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area accessed 5 July 2019
[120] World Economic Forum (2019) fn 72
[121] Africa Trade Report 2018 *Boosting Intra-African Trade: Implications of the African Continental Free Trade Area Agreement* (2018)
[122] ABSA Financial Markets Report 2018

Marrakech Pledge are ‘extending risk-based governance to socio-environmental risks and developing sustainable financial instruments and products’.[123]

The efforts therefore in the African region that recognises the link between business and or investments and the SDGs continue to grow with inroads being made to expand the regulatory framework, policy and ESG understanding. Whilst some of these efforts such as the Marrakech pledge are still in their infancy, there is a possibility that they will yield much fruit in future.

At a regional level ESG mechanisms have therefore been seriously considered and remain under research with the hope that under ASEA and collaborative efforts with other organisations, ESG mechanisms will be integrated in capital markets across the African continent.

4.4 ESG regulation and effects at a local level

At local level the benefits of a succinct and solid ESG regulatory framework are multiple. It gives locals the power to direct the wind in which the investment will flow. The financial viability of adopting such a course is immense. Increasingly, institutional and individual equity investors have made the link between ESG information, a company’s purpose, values and strategy and its performance. Studies confirm that having appropriate ESG policies in place is not just about doing the right thing and being compliant with laws and regulations, it’s financially beneficial. Companies with sustainable practices outperform companies that have not integrated ESG considerations into operations. [124]

Sound ESG regulation, implementation and tracking may provide a basis for managing risk and creating opportunity for future investments. The traditional notion has been that fiduciaries owe no duty to the community except to investors. However, report by the United Nations Environment Programme Finance Initiative confronts this view and states that,

> ‘Fiduciaries have a duty to consider more actively the adoption of responsible investment strategies...[and] must recognise that integrating ESG issues into

[123] IOSCO fn 111 at 14
[124] KPMG fn 58

investment and ownership processes is part of responsible investment and is necessary to managing risk and evaluating opportunities for long-term investment.[125]

The traditional notion that incorporating ESG reporting conflicts with the fiduciary duty to maximise profits is melting. Under shareholder primacy, the view was that profits had to be maximised at whatever cost. This has contributed to a generation of workers' income stagnation, political polarization, environmental degradation and an existential threat to the climate system, human rights violations in global supply chains, growing market concentration across the economy, greater frequency of financial crises, massive tax avoidance hollowing out public capacity, and even declining life expectancy in the world's wealthiest country.[126]

There are indications that ESG regulation is critical in helping companies realise their competitive advantage through improved performance.[127] For example a Harvard Business School Report (2013) suggests that companies which produce sustainability reports outperform those which do not.[128] At a local level, there are benefits that enterprises may gain from engaging in ESG reporting which include improvement in outputs.

Of importance is also the aspect of increased transparency through meeting the information needs of investors and stakeholders. as the various platers in the investment scenario interact, there is constant need to know the products for investment available, the attendant risks, the profits expected and how the business may be kept as a going concern, ESG regulation and reporting enables information on the investment and surrounding climate to be available in a transparent manner thus qualifying stakeholders and investors to make the necessary decisions.

ESG reporting fulfils the social contract, enhances legitimacy and increases financial valuations of firms at national level.[129] From a legitimacy perspective, the import of ESG reporting is that it "both lessens the regulatory burden that would otherwise constrain the execution of corporate strategy, and keeps from the market the potential stigma associated

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[125] United Nations Environmental Program (UNEP) *Fiduciary responsibility ; Legal and practical aspects of integrating environmental, social and governance issues into institutional investment* (2009) 11 http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf accessed 17 August 2019

[126] JG Ruggie fn 103 at 3

[127] ACCA fn 1 at 15

[128] ACCA fn 1 at 15

[129] MR Matthews *Twenty-five years of social and environmental accounting research: Is there a silver jubilee to celebrate?* (1997) 481–531

with a reputation for environmental recklessness".[130] For a country such as Zimbabwe therefore, the regulatory load that would otherwise weigh on execution of corporate functions may be averted through conforming to the regulatory requirements on ESG reporting as provided under the Listing Rules.

It further averts backlash from other stakeholders on the stigma associated with negligence associated with the varying ESG issues including but not limited to the environment, gender, labour, governance, discrimination and inequality. Recently there was noise as some stakeholders lamented the very low numbers of women representation on companies listed on the ZSE. Although there was a school of thought that believed that gender dynamics did not matter

Another possible benefit could be an increase in transparency and enhancement of brand value. The upshot of such is to improve employees' output and support the firm's control processes.[131]Some institutional investors have viewed regulation as a hindrance to ESG considerations in investment decision making.[132] Nevertheless the discussion before shows that regulation may actually act as a catalyst for ESG integration, understanding, research and incorporation in decision making than a hindrance. Whilst it may not be the end, it forms a basis upon which ESG matters may be incorporated in any jurisdiction.

At a local level, regulation of institutional investors may be focused on governance issues as revealed by the JSE model. There are certain critical areas that are worth consideration. These are

i) Investing prudently
ii) Acting in the best/sole interests of beneficiaries
iii) Taking a long-term view
iv) Avoiding conflicts of interest
v) Diversifying the portfolio[133]

Thus, any kind of investing that considers the above five matters have the propensity of creating a model that incorporates the G in the ESG factors. As revealed in Chapter 3, regulation 28 in South Africa has sought to ensure that institutional investors incorporate

[130] S Brammer & S Pavelin *Voluntary environmental disclosures by large UK companies* (2006) at 1169
[131] R Hahn & M Kühnen, M *Determinants of sustainability reporting: A review of results, trends, theory, and opportunities in an expanding field of research* (2013) at 5
[132] OECD fn 100 at 9
[133] OECD fn 100 at 10

ESG matters when considering investments. The considerations are an attempt to ensure investments are done responsibly and sustainably in a manner that fits into the SDG's.

Even at a local level, sustainability legislation and reporting may have its disadvantages. For example, lack of technical expertise on the content and framework of the ESG drafting. This would entail how best to formulate the need to identify ESG reportable issues and ensure that all stakeholders derive benefits from the policy framework. From a company perspective, it means expending resources into ensuring that you measure, collect and collate data which in some circumstances may be too dear for some companies. In such cases it may be that a company will then only engage in such reporting if the benefits outweigh the costs. This creates a scenario where compliance becomes voluntary as opposed to obligatory. In some cases where there are no resources, companies may use it as a basis for shunning from ESG compliance and claim impossibility as a defence.

In some cases, the reluctance to disclose may stem from fear of giving potential litigants ammunition with which they can proceed to sue the companies involved for non-compliance with the law. in such circumstances, some entities may leam towards doctoring information to purge themselves. This may be averted by the creation of information sharing platforms for exchanges. for instance, a company listed on several exchanges that may fail to disclose an essential noncompliance ESG indices may be incepted on a platform in another country and the information shared on am integrated platform.

There is varying plausible data linking ESG reporting and FDI flows or increase in investments. Whilst the idea has been sold that sustainable investments are the way to go, there is no concrete empirical evidence to suggest a nexus between it and investment benefits. There is therefore need from an economic basis to assess the effects of ESG reporting on investments especially for emerging markets such as the ZSE.

Some authors have argued that there are three possibilities between Corporate Social Responsibility (CSR) and financial performance.[134]There is a possibility of a positive link, negative or no link at all. A positive link, it has been posited would arise where the firm engaging in CSR improves its recruitment and holds onto talented workers.[135] In some cases it would occur where the reputational backlash to a company is salvaged through its CSR

[134] SA Waddock & SB Graves *The corporate social performance – financial performance link* (1997) 303–319.
[135]D Greening & D Turban *Corporate social performance as a competitive advantage in attracting a quality workforce* (2000) 254–280.

initiatives.[136] A negative link would occur where the costs of CSR initiatives outweigh the benefits that stem from such efforts.[137] No link at all exists where the negative and positive effects offset each other such that one cannot really ascertain the winner in the two.[138]

The above assessment relates to CSR, which is not exactly the same as ESG mechanisms, whilst ESG reporting have elements of CSR, it goes beyond that as it entails in some cases mandatory legislative requirements for such. There is therefore a need to establish whether there is a positive, negative or no link at all between ESG legislation and its implementation and investment of FDI inflows.

The further challenge that may arise is enforcement of ESG mechanisms breaches. The study so far has revealed that in the case of Zimbabwe there are several regulators of the diverse ESG indices. There is further diverse legislation on ESG related issues especially under the Bill of Rights in the Constitution of Zimbabwe, 2013. Implementation of legislation in the other related legislation may not necessarily yield the results expected under an ESG framework. In such cases, it is submitted that an ESG framework that benefits the diverse stakeholders may better be served by a collaboration of the diverse regulators so as to adopt a holistic as opposed to a piecemeal enforcement process.

It has been argued that in some cases, whilst ESG reporting may stimulate sustainable investments, it may be used as a tool by some companies as a greenwash spectre.[139] In this case, companies improve ESG performance for display without addressing the real issues surrounding sustainable investments and improved trade. It would be a case of doing right for the wrong reasons.[140]

This may have negative effects in circumstances where companies may for example use the positive ESG compliances on some issues as a means of circumventing or even disregarding others.[141] However, as revealed in a watertight regulatory system such as the JSE model, the law may indicate that compliance of the provisions cannot be severed and that companies may not escape from liability by arguing substantial compliance. In such a case, the

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[136] J Peloza, J *Using corporate social responsibility as insurance for financial performance* (2006) 52–72.
[137] Editorial *The effects of environmental, social and governance disclosure and performance on firm value: A review of the literature in accounting and finance* (2018) 4
[138] Editorial n14 at 4
[139] S Schaltegger & RL Burritt *Sustainability accounting for companies: Catchphrase or decision support for business leaders?* (2010) 378
[140] S Schaltegger & RL Burritt fn 139 at 378
[141] D Owen, T Swift & K Hunt *Questioning the role of stakeholder engagement in social and ethical accounting, auditing and reporting* (2001) 25 (3) Accounting Forum

investment benefits stand to be reaped from a legal provision that plugs the hole for future noncompliance cases. The same may be said of the submission that there are companies who in the hope of ESG compliance will only furnish information that paints them in a positive light and withhold from the stakeholder's information which they deem detrimental to their interests.[142]

In some cases, there may conflicting signals and rules on the E, S, and G factors in different companies and investors within the same country and across the world. The addition of what the community as stakeholders defines as its values may add to the problems. The reason being that the society defines how the host state may create policy and what policy will be implemented. The fluidity thus of the varying concepts and their applications creates a problem in how best such factors may be fused into the trade and investment regime. It may be that there is also lack of transparency in some of the ESG issues. These may include issues of inequality, discrimination and environmental issues especially in areas such as the oil and gas industry. These black boxes make it difficult for a sustainable system of investments to be created.[143]

There is a possibility that information may be doctored in order to suit the narrative. The Russell survey (2017) established that, 'there often is a wide gap in what the survey respondents claim they do regarding ESG integration and what is actually happening".[144] It may therefore entail that for emerging markets such as Zimbabwe, there may be need for more research and data on ESG issues before total implementation of the same to avoid manipulation of information so as to appear to conform to the common story.

For institutional investors, it may be that there are jurisdictions that require them to invest a large portion of their investments locally. What it therefore entails is that for such investments even though they may not be ESG compliant, the investors will be stuck as they cannot in terms of legislation migrate to invest in markets abroad whose ESG ratings may be more favourable. In such cases, legislation becomes an inhibiting tool to a complete ESG incorporation, whereas it could have been utilised to move towards a realisation of responsible investments. In the same report it was also observed that, "Overall, that ESG factor consideration appears to be not as a dominant driver in investment decision but rather

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[142] L Hodder-Webb & others *The supply of corporate social responsibility disclosures among US firms* (2009) 497–527..
[143] G Inderst & F Stewart fn 3 at 42
[144] Russell (2017), *Fixed Income ESG Survey Results. Russell Investments* in G Inderst & F Stewart (2018)

as a supplemental piece of information at best as a part of credit analysis”. [145] whilst it is imperative to swim with the tide and adopt ESG regulations, in the absence of credible data, it may appear that especially for emerging markets such as Zimbabwe ESG issues are not the driver of investment but rather supplement ESG investing.

4.5 Conclusion

This chapter explores the possible trade and investment benefits that generally arise from ESG regulation. It further considers the benefits that Zimbabwe could benefit from stronger and clearer ESG regulation. It remains for further research to be conducted to assess the impact of the current legislation and how best it can be utilised to benefit the country.

[145] Russell (2017) fn 144 at 42

CHAPTER 5

SUGGESTIONS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This chapter sythensises the findings of the study. It considers the objectives set out at the beginning of the research and makes suggestions and recommendations on how best the current legal terrain may be strengthened to afford Zimbabwe more trade and investment benefits.

5.2 Recommendations and suggestions

The Growth and Emerging Markets Committee (GEMC) of the International Organization of Securities Commissions (IOSCO) has proposed 11 suggestions for regulators in emerging markets such as Zimbabwe that will ensure that ESG compliance is prioritised which proposals apply in the Zimbabwean case with equal force but moderate changes.[146] The following could expand the current ESG mechanisms regulatory framework and create a stronger basis for ESG integration.

5.2.1 Need for integration of ESG specific issues in the overall risk appetite and governance features of companies

As established, issuers are not regulated by the Securities Commission of Zimbabwe thus making it difficult for them to be supervised under the current listing Rules. There is need for issuers and the rest of the regulated entities to be incorporated in a framework that requires mandatory ESG integration in overall risk and governance of their firms.

5.2.2 The law should emphasise on ESG specific disclosure and reporting for issuers

Currently, it was established that the law uses ‘sustainability’ and does not expressly clarify on ESG issues specifically as components that should be both disclosed and reported on. The law should therefore clearly articulate the ESG issues that issuers should both report on and disclose.

[146] IOSCO fn 108 at 12

5.2.3 Availability and quality of data

The requirement for specific ESG reporting and disclosure means that the law should make it a requirement that quality data be available to ensure ESG specific reporting through for example updating the listing Rules, the use of external reviewers and through other external service providers such as credit rating agencies.

Creation of hubs that collate ESG data across firms and within the government's departments. There is further need to marry the expertise within this company with use of new technologies such as big data and satellites to ascertain the impact and requirements for a comprehensive ESG system that is relevant to the needs and demands of our securities markets. There is need for creation of data labs that are home grown which speak to the various ESG issues. Most of the ESG data and information currently used stems from expertise from abroad and even outside the continent. There is need for local resources to tap into the local ESG issues and provide a platform for data availability.

In the same vein, government information on basis issues such as environmental and social issues is still scarce. The departments dealing with the issues and the ministries are varied and information sharing is little. There is need to collaborate and build concerted efforts on tackling the ESG issues and creating policies that are commensurate with them.

5.2.4 ESG instruments

There must be clarity on ESG instruments in the law and how the different categories and eligible projects and funds raised through their issuance may be used for. This is in order to reap the benefits of the regulatory framework and avoid use of sustainable investments in the very projects that fail to take into account ESG matters.

5.2.5 ESG eligible projects and activities should be spelt out.

There is need to create a five to ten-year plan with a short-term strategies on the ESG mechanisms that need to be covered under the version, the key performance areas against which progress will be measured and the indicators in the specified areas for measuring progress by issuers. Monitor reports and assist stakeholders through training on ESG issues, performance and reporting. Monitor developments of a technological nature and others such as changes in global regulation and market issues and how they affect stakeholders.

In such a plan, ESG eligible projects must be defined. The roadmap must ensure that the ESG issues fit within the context of the economic, social and environmental setting of Zimbabwe and does not conflict with other ESG matters. Possible areas to consider would be: -

i) environmental: combating or mitigating climate change, carbon emissions, pollution and waste, resource efficiency, biodiversity
ii) Social: human rights, labour standards, health & safety, diversity policies, community relations, and human capital development (health & education).
iii) Governance: corporate governance and corporate behaviour, corruption, rule of law, institutional strength, accountability and transparency.

5.2.6 Offering document requirements must be stipulated in the law

Requirements of public offerings must be established by the regulators including the use and management of the funds raised through the issuance of such instruments. The processes used by issuers for project evaluation and selection should be clarified and spelt out in order to allow investors and stakeholders to know the risk and opportunities available in any investment.

5.2.7 Ongoing disclosure requirements should be constantly reviewed and enforced

The ongoing disclosure requirements especially under the listing Rules should be established with the regulators assessing the extent of the utilised funds. One way of doing so would be to create inroads within regulation of ensuring compliance through imposition of penalties for ESG law breaches such fines, delisting a non-complying company, removing an issuer from the list of qualified personnel. For example, in 2015, Article 173 of France’s law on Energy Transition for Green Growth created a compulsory climate change reporting for financial institutions. It was hailed as noble and likely to have far reaching impact. As Zimbabwe’s energy sector continues to grow and there is a likelihood that it will continue growing in the future, enacting a mandatory law on energy transition may be in line with the country’s ESG commitments.

A constant review mechanism as well as enforcement procedure requires that the government ensures that there is technical capacitation of officers working within the legislative drafting, training, offering of guidance, compliance and enforcement departments to make the legal processes efficient.

5.2.8 The law should provide for proper use of funds

The law should provide for measures that prevent, detect, investigate, prosecute and sanction misuse of funds raised through ESG instruments.

Prevention may well be addressed through advocacy on ESG mechanisms and the regulatory framework which as established under Chapter 3 is not being done. Thus, the regulator must initiate a program of training on disclosure, reporting and perhaps the sustainable use of ESG raised capital.

Detection, investigation and sanctioning requires technical capacitation of the regulator and an active assumption of the supervisory and enforcement role. It also entails that in its role, the regulator and supervisor should allow due process so as to combat injustice in the determination ESG law breaches.

Determinations must be followed up with an efficient and timely appeal or review process to allow finality in litigation and expedient determination of matters.

5.2.9 Use of external reviews

The law should provide for the use of external reviewers constantly to allow for tracking of compliance on ESG issues and updating them to suit international standards. Issuers should consider the use of external reviews to guarantee consistency with the ESG issues raised and their alteration with time. External reviewers may be in the form of local judges who understand the context of Zimbabwe and how ESG issues affect the diverse players in the investment matrix. These could be fused with experts from international bodies such as the UN SSE and private companies to allow for objectivity and thorough assessment of the issues.

5.2.10 Require institutional investors to consider ESG investments

Legislation should make it mandatory for institutional investment to make ESG investments critical in their investment process, analysis, decision making, strategies and overall governance. Institutional investors make a significant portion of the investment proportion and the current gap in the law which does not regulate their ESG performance need to be filled.

5.2.11 Capacity building

Current gaps in the ESG regulation and enforcement should be noted and addressed. Such should cut across the regulator and its departments, the companies and investors (ESG training and reporting guidelines) and stakeholders so that they know how and when to demand accountability.

The regulator should have appropriate monitoring mechanisms to allow them to constantly monitor and encourage compliance.

5.2.12 Creation of a single or fused regulator

An election needs to be made on the choice of the regulatory system that is to be adopted in the securities sector to allow stronger ESG law enforcement. The current state where four government arms regulate seems to be ineffective as there is lack of collaboration and information availability on how ESG activities are monitored, it is imperative that the ZSE be either made self-regulatory or that the SEC assumes that role. If the government elects on maintaining the current status quo, there is need for collaborative efforts within the diverse departments to be strengthened.

5.2.13 Provide supplementary tools to ESG compliance

There is need to supplement legislation with principles upon which ESG mechanisms may be reported on and performance measured. For example, preparation of ESG reporting guidelines. Regulation is a starting point, yet compliance must be followed up and evaluated. Encourage ‘open’ days with civil society as it is the watchdog of regulatory compliance and human rights breaches and get feedback on ESG issues of concern for example gender issues.

5.2.14 Increased research

More research into the impact of ESG on firms within Zimbabwe needs to be invested in as there appears little to date.

5.2.15 Lessons from South Africa

The South African experience reveals that the following may be imperative, in addition to the foregoing recommendations

a. The ought to be a law that provides for a regulator, to avoid duplication of roles in ESG legislation and its implementation, preferably the Zimbabwe Stock Exchange.
b. The role of the regulator should include enforcement powers to allow a proper tracking of compliance and imposition of the necessary penalties in the event of breach.
c. There is further need to refine the law and adequately define ESG terms within the Zimbabwean context to enable compliance to be measured.

5.3 Findings and conclusion

This study sought to analyse ESG mechanisms in Zimbabwe's capital markets regulatory regime. The study noted that notwithstanding the sift law nature of ESH regulation under international and regional, there is a growing concern for the interaction of ESG matters and trade in order to create sustainable investments. The study noted that Zimbabwe recently promulgated the Listing Rules, which Rules form the basis of ESG regulation in the country. It was noted that there a various trade and investments benefits that the country may glean through a clearer law which has more measures for tracking implementation and compliance. The study further noted that whilst the law is sound, there are gaps in the law such the proper regulator, clarity on the meaning of certain terms and capacity building this is the first recorded study on ESG measures and Zimbabwe. There is therefore need for further research into the benefits of ESG investing on trade and investment with a thrust to bettering the current ESG legal framework.

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