SCHOOL OF POST GRADUATE STUDIES

LEGAL, REGULATORY AND INSTITUTIONAL ASPECTS OF CROSS-BORDER TRADE IN SECURITIES: THE CASE OF EASTERN AND SOUTHERN AFRICA.

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Submitted to the School of Post Graduate Studies in fulfilment of the Requirements for the Award of the Degree of Doctor of Philosophy in International Trade and Investment Law.

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DECLARATION

This thesis is purely my own work and has not been submitted to this University or any other university for similar purposes. The information borrowed from other sources has been clearly acknowledged and cited in the portion of the thesis in which it appears.

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SUPERVISOR'S RECOMMENDATION

I, Kenneth K. Mwenda has read and checked the thesis written by Samamba Lennox Trivedi and do hereby confirm that it meets the University of Lusaka set minimum standards. I, therefore, recommend that the document be submitted for verification and examination for the purpose of the Award of the Degree of Doctor of Philosophy in International Trade and Investment Law.

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I, ……And on behalf of the University of Lusaka do hereby confirm that I have read and examined the thesis written by Samamba Lennox Trivedi and supervised by Professor Kenneth K. Mwenda. I, therefore, approve this research work.

NAME: …….

SIGNATURE: ……

DATE: ……

DEDICATION

This thesis represents the endurance, perseverance, love and care of my beautiful mother Alubina C. Samamba Trivedas who struggled to raise as up and hold us together as a family after the untimely passing of our beloved and greatly missed father Samamba W. Lennox Trivedas Snr.

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I am also immensely indebted to the law faculty of Sydney University in New South Wales in Australia where I read for my Master of Business Law (MBL). On my MBL Programme, the lectures delivered by Professor Ashley Black made me develop keen interest in Securities Law and Capital Markets Regulation. My initial plan was to undertake PhD studies in this area of law. However, I was also privileged to be taught by other leading scholars such as Professor Gillian Trigs—the then Dean of Sydney Law School—who delivered lectures in World Trade Law, Professors Vivienne Bath and Robin Burnett who jointly delivered lectures in International Business Law, Professor Chester Brown who delivered lectures in International Investment Law, and Professor Sheelagh MacCracken who delivered introductory lectures in International Finance Law. The global perspective which lit up the course of their lecturing made me realize that the future of the law is in the global community. That realization made me undertake my PhD studies in Securities & Markets Regulation in the regional and international context. Also, the research skills which I picked on my MBL Programme have helped me a great deal in undertaking meaningful research for my PhD thesis. I am therefore in the debt of the entire Law Faculty of the University of Sydney.

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INSIGHT FROM THE HOLY BIBLE

The LORD giveth wisdom, out of His mouth flows knowledge and understanding: Proverbs 2 verse 6. Fear of the LORD is the beginning of wisdom and knowledge of the Holy One is understanding: Proverbs 9 verse 10. Wisdom is the principal thing. Therefore get wisdom and with all thy getting, get understanding: Proverbs 4 verse 7. A wise man will hear, and will increase learning; and a man of insight shall attain unto wise counsels: Proverbs 1 verse 5. Then shall a wise and insightful man know wisdom and instruction, and understand words of wisdom and receive instruction in wise dealing in righteousness, justice and equity: Proverbs 1 verses 2-3.

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LIST OF ACRONYMS, ABBREVIATIONS AND KEY WORDS AND PHRASES

A. ACRONYMS AND ABBREVIATIONS USED IN THE THESIS

1. **CMT**…….Capital Markets Tribunal.
2. **COMESA**……Common Market for Eastern and Southern Africa.
3. **COMESA CH**……COMESA Clearing House.
4. **CSA**……Clearing and Settlement Agency.
5. **CSD**…….Central Securities Depository.
6. **DCF**……Domestic Compensation Fund.
7. **DSEC**…….Domestic Securities & Exchange Commission.
8. **DSM**……Domestic Securities Market or Domestic Stock Market.
9. **EAC**……East African Community.
10. **ESMA**…….European Securities and Markets Authority.
11. **GSC 2009**……Geneva Securities Convention 2009
12. **HSC 2006**…….Hague Securities Convention 2006
13. **HSC PRIMA Rule**…….Hague Securities Convention Place of the Relevant Intermediary Approach rule.
14. **HCPIL**……..Hague Conference on Private International Law.
15. **IMF……**International Monetary Fund.
16. **IPD**…….International Portfolio Diversification.
17. **ISM**…….International Securities Market
18. **JSE**…….Johannesburg Stock Exchange.
19. **LuSE**……..Lusaka Stock Exchange.
20. **MPSIA 2016**……..Movable Property (Security Interest) Act 2016.
21. **OECD**……..Organization for Economic Cooperation and Development.
22. **RCF**……..Regional Compensation Fund.
23. **RSE**……Regional Securities/Stock Exchange.
24. **RSEC**……Regional Securities & Exchange Commission.
25. **SADC……..**Southern African Development Community.
26. **SADC Fin & Invest Protocol 2006**……Southern African Development Community Protocol on Finance and Investment 2006.
27. **WB**……..World Bank.

B. KEY WORDS AND PHRASES

1. **Compensation system**……refers to "compensatory cooperation between domestic compensation funds and the regional compensation fund".
2. **Compensatory Assistance**……..refers to the payment of compensation by the regional compensation fund in cases where a domestic compensation fund fails or neglects to compensate an injured market participant.

3. **Cross-border trade in securities**……..refers to "cross-border trade and investment in securities".
4. **Distributable Securities**……refers to securities which may be distributed under prospectus domestically or across international borders.
5. **Effective legal, regulatory and institutional framework**……..refers to "a legal, regulatory and institutional framework that facilitates high supply and demand for securities across international borders at minimum cost**".**
6. **Exclusive property law**……refers to "the substantive property which exclusively governs the proprietary aspects of a cross-border securities disposition given the applicability of two or more domestic property laws".
7. **Extra-territorial criminalization of securities market misconduct**……refers to "criminalization of securities market misconduct committed wholly in one COMESA jurisdiction but having harmful effects in other COMESA jurisdictions".
8. **Framework**…….refers to the legal, regulatory and institutional framework for public distribution of securities across international borders.
9. **Fund of Last Resort**……Refers to a compensation fund which sits at the helm of the compensation hierarchy, and whose role is the compensation of pecuniary loss which domestic compensation funds have failed or neglected to compensate, and the loss having been suffered by a securities market participant on account of default of a licensed person, or their employee or agent.
10. **Harmonization**……refers to the reduction of underlying differences in domestic legal and regulatory rules by making those rules more coherent or adopting an identical text.
11. **International Passport**……..refers to "an international passport to multi-jurisdiction disclosure or securities advertisement". It is a regulatory device under which compliance with the securities disclosure or advertisement requirements of one COMESA jurisdiction exempts an issuer or licensee from further compliance with the requirements of other COMESA jurisdictions for multiple cross-listing or advertisement purposes. Whether reference is to disclosure or advertisement, depends on the context.
12. **Legal Diversity**……refers to plurality of legal norms.
13. **Legal, regulatory and institutional framework**…….refers to "the legal, regulatory and institutional framework for public distribution of securities across international borders".
14. **Legal Transplantation…..** Legal transplantation refers to the process of borrowing legal rules, concepts, models and norms from other jurisdictions and applying those rules, concepts, models and norms to domestic challenges. And **legal transplant** must be construed accordingly.
15. **Listable Securities**……refers to "securities which are admissible to official listing on stock exchanges".
16. **Listable Issuers**……refers to styles of issuer which are admissible to official listing on stock exchanges.

17. **Recognized Securities**…….refers to “securities which are generally recognized as securities under Securities Acts but excluded from listing on stock exchanges by claw-backs in Securities Acts”.
18. **Securities Markets**……refers to “domestic securities/stock markets, and International Securities Markets”.
19. **Securities Exchanges**…….refers to “domestic securities/stock exchanges, and the Regional Stock Exchange”.
20. **Substantive Property Law**……refers to “substantive property law governing the proprietary aspects of a cross-border securities disposition”.
21. **Power-in-Support**…….refers to power of a domestic regulatory authority to act in support of other domestic regulators and the regional securities, and exchange commission.
22. **Quantitative restrictions**……refers to “quantitative restrictions on cross-border investment of pension assets in listed securities”.

ABSTRACT

Legal, Regulatory and Institutional Aspects of Cross-Border Trade in Securities: The Case of Eastern and Southern Africa

The thesis examined the legal, regulatory and institutional aspects of developing and promoting a vibrant regional securities market in the Eastern and Southern African Region (COMESA Region) through cross-border trade in securities. The study argues that cross-border trade in securities in the COMESA Region promotes demand and supply of different securities.

Using the qualitative approach the thesis evaluated efficacy of the legal, regulatory and institutional aspects of Eastern and Southern African cross border trade in securities.

The study revealed that determining the substantive property law, and mutual recognition of listing documents and securities advertisements increase cross-border trade securities in the Common Market of Eastern and Southern Africa. It provides an original contribution to the existing scholarship on cross-border trade in securities. The study further demonstrates that share transfer agents and branch registers of company issuers are likely to increase legal uncertainty and transaction costs for cross-border securities deals. The regional integration of domestic payment systems speed up the settlement of cross-border securities trades, reduces transaction costs and ease the liquidity challenges that are faced by securities markets in the region.

The developed model provides an effective legal, regulatory and institutional framework which reflects the peculiar needs of COMESA markets, increases supply and demand for securities, facilitates cross-border disposition of securities at minimum cost, and safeguards the interests of issuers and investors, and is likely to facilitate the development of competitive securities markets in the region.

Key words: Cross-border trade, securities, domestic transactions and domestic market.

PART I

CHAPTER 1

1.0. INTRODUCTION.

Chapter 1 of this thesis sets out the introductory and methodological aspects of the study. The chapter not only provides a roadmap for various chapters of the thesis but also outlines the scope of the study. This thesis, for example, does not examine the intricacies of economic theory on cross-border trade in securities.[1] Rather, it examines mainly, the legal, regulatory and institutional aspects of developing and promoting a vibrant regional securities market in the eastern and southern African region (COMESA Region) through cross-border trade in securities. The thesis takes a departure from Mwenda's 2001 work that examines the development of the Zambian securities market from independence through to the late 1990s.[2] A number of legislative, regulatory and institutional developments have taken place since the late 1990s, and this study endeavours to address those developments. Such developments include the enactment of the Zambian Securities Act 2016, and Companies Act 2017, the SADC Protocol on Finance and Investment 2006, the Hague Securities Convention 2006 and the UNIDROIT Securities Convention 2009. There is also the introduction of Self-Regulatory Organization (SROs) and a Central Securities Depository (Agency) and securities transfer agents at domestic level, and the SADC Tribunal at regional level.

[1] Cross-border trade in securities is used in the context of secondary trading by subscriber or transferee investors as opposed to subscription for securities by investors. In the former context, cross-border trade in securities imports cross-border investment in securities as a condition precedent. Thus, wherever in this thesis cross-border trade in securities appears, cross-border investment in securities is imported, and vice versa.

[2] See, Kenneth K. Mwenda, 'Legal Aspects of Corporate Finance: A Case for Emerging Stock Markets' (PhD Thesis, Warwick University 2001) at 7 (hereinafter 'Mwenda, PhD Thesis (2001)') http://wrap.warwick.ac.uk/2472/ accessed 22 October 2019.

1.1.AN OUTLINE OF CHAPTER 1.

Chapter one of this thesis consists of thirteen sections. The first section gives the general introduction of the study.[3] The second section outlines the chapter.[4] The third section sets out the objectives and aims of the study.[5] The fourth section outlines the background to the regulation of cross-border trade in securities in the COMESA Region.[6] The fifth section defines the scope of the study and states the sources of the law.[7] The sixth section reviews literature relating to the problem under investigation.[8] The seventh section makes the statement of the problem and sets out the underlying thesis of the study.[9] The eighth section states the reasons underpinning the thesis of the study.[10] The ninth section justifies the study by highlighting its potential to enhance the current knowledge on the problem.[11] The tenth section gives the main research questions of the study.[12] The eleventh section sets out the main research questions of the study.[13] The twelfth section outlines the methods used in collecting and analysing data.[14] The thirteenth section gives the research design and methodology.[15] The fourteenth section sets out the five parts of the thesis and outlines the chapters comprised in each part of the thesis.[16]

[3] Section 1.0 of Chapter 1 of the thesis.
[4] Section 1.1 of Chapter 1 of the thesis.
[5] See, Section 1.2 of Chapter 1 of the thesis.
[6] See, Section 1.3 of Chapter 1 of the thesis.
[7] See, Sub-section 1.4 of Chapter 1 of the thesis
[8] See, Section 1.5 of Chapter 1 of the thesis.
[9] See, Section 1.6 of Chapter 1 of the thesis.
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[12] See, Section 1.9 of Chapter 1 of the thesis.
[13] See, Section 1.10 of Chapter 1 of the thesis.
[14] See, Section 1.11 of Chapter 1 of the thesis.
[15] See, section 1.12 of Chapter 1 of the thesis.
[16] See, Section 1.13 of Chapter 1 of the thesis.

1.1. SETTING THE LAW IN CONTEXT.

This thesis deals with the question whether or not the legal, regulatory and institutional framework adopted by Zambia, has facilitated the growth of cross-border trade in securities in the COMESA Region. In so doing, the thesis gives an international and comparative perspective of the study by examining parallel legislation in some jurisdictions within the COMESA Region.[17] Also, developments in some developed countries such as the United Kingdom, the United States of America, and Australia are examined.

A central argument of this thesis is that the said framework provides limited incentives for the growth of cross-border trade in securities in the COMESA Region. A notable reason that shades light on this shortcoming is that the political economy that drove the formation of securities exchanges and pension schemes in many countries in the region, has continued to shape the inward-focus of many such institutions. For example, in Zambia and many other COMESA states,[18] the establishment of the securities exchange was part of the World Bank/International Monetary Fund Structural Adjustment Program which emphasized among other conditions, privatization of State-Owned-Enterprises, as a pre-requisite to economic recovery loans.[19] And the legal, regulatory and institutional frameworks have evolved following the same pattern. In many countries in the region, at the time of establishing securities exchanges, the concept of cross-border trade in securities was not given

[17] The following key jurisdictions will be considered, namely (i) Kenya (ii) Mauritius (iii) Zimbabwe (iv) South Africa (v) Seychelles (vi) Botswana. Although South Africa is not a member of COMESA but rather the Southern Africa Development Community (SADC), she is one of the most viable emerging markets. She will therefore serve as a good model for regional and international comparative purposes.

[18] COMESA states such as Namibia, Botswana, Lesotho, Malawi and Mozambique.

[19] Kenneth K. Mwenda, *Zambia's Stock Exchange and the Privatization Programme: Corporate Finance in Emerging Markets* (Edwin Mellen 2001); Common Market for Eastern and Southern Africa, The Political Economy of Regional Integration in Africa: COMESA' (2016); The World Bank, *Political Economy of Regional Integration in Sub-Saharan Africa* (The World Bank 2012); Samamba Lennox Trivedi, 'The Political Economy of Cross-border Trade in Securities in Eastern and Southern Africa: From the Lagos Plan of Action to COMESA' (2020), SSRN Electronic Journal, http://ssrn.com/abstract=3497932 , accessed 19 February, 2020 (hereinafter 'Samamba Lennox Trivedi XXXI').

thoughtful consideration.[20] This view is supported by the lack of legal and regulatory provisions and institutions for the regulation of public distribution of securities across international borders in the COMESA Region.[21]

The following subsection gives the objectives and aims of the study.

1.2. OBJECTIVES AND AIM OF THE STUDY.

The objective of this study is to identify and understand legal, regulatory, institutional, and policy constraints on cross-border trade in securities in the COMESA Region. Osode observes that "today's financial markets are characterized by globalization, financial innovation, rapid advancement of information technology and explosion in cross-border financial transactions".[22] Thus, the need for a legal, regulatory and institutional framework that identifies with today's financial markets, cannot be overemphasized. As a possible way of improving the soundness of the current legal, regulatory and institutional framework in the COMESA Region, this study makes proposals for remedial legislative, regulatory, institutional and policy reform. Thus, the aim of the thesis is to enhance the body of knowledge on cross-border trade in securities in the region.

The following subsection gives the background to the regulation of cross-border trade in securities in the COMESA region.

[20] *ibid*
[21] *ibid*

[22] Patrick C. Osode, 'The New South African Insider Trading Act: Sound Law Reform or Legislative Overskill? (2000) 44(2) Journal of African Law 239-263, at 239 (hereinafter 'Osode (2000)').

1.3. BACKGROUND TO THE REGULATION OF CROSS-BORDER TRADE AND INVESTMENT IN SECURITIES IN THE COMESA REGION.

The background to the regulation of cross-border trade and investment in securities in the COMESA region can be divided into two eras. These are, the pre-COMESA era and the post-COMESA era. The following subsection examines the pre-COMESA era.

1.3.1. THE PRE-COMESA ERA.

The pre-COMESA era refers to the period before the formation of COMESA on the fifth day of November One Thousand Nine Hundred and Ninety-Three (1993)—being the date of signing the treaty establishing COMESA. It is a period that is synonymous with domestic trade and investment as opposed to cross-border trade and investment in the region.

During the pre-COMESA period, the regulation of trade and investment in securities was driven by the need, by COMESA Countries, to shield their industries from foreign competition.[23] In this respect, COMESA observes that non-tariff barriers such as exchange controls were necessitated by the need to mobilize capital for the ailing domestic economies.[24] COMESA Countries attained this goal by imposing heavy restrictions on foreign currency transactions so as reduce capital flight.[25] And, as empirical evidence indicates, this protectionist attitude had to a greater extent influenced the content of domestic legislation and the focus of key institutions that had a bearing on the regulation of trade and investment in securities. With the aim of promoting cross-border investment and trade in the region, one of the main objectives of COMESA is the creation of an

[23] Common Market for Eastern and Southern Africa, 'Historical Development of COMESA,' <http://www.comesa/int; http://training.itcilo.it/actrav_cdrom1/english/global> accessed 9 January 2016.

[24] *ibid*
[25] *ibid*

enabling environment for domestic and cross-border trade and investment in securities by removing pre-COMESA protectionist barriers to trade.[26]

In Kenya, the said protectionist attitude is expressed in the Exchange Control Regulations of 1950 which require Ministerial permission before securities could be issued outside the country to non-residents.[27] Similarly, monetary consideration for purchased securities issued outside the country is effected with Ministerial permission.[28]

In Zimbabwe, securities registered domestically cannot be issued to foreign residents except with prior permission of the Exchange Control Authority (the ECA).[29] Also, within Zimbabwe, domestically-registered securities can only be transferred to non-Zimbabweans with the permission of the ECA.[30] Similarly, monetary consideration for cross-border transfers of securities is made with prior permission of the ECA.[31]

In South Africa, the Currency and Exchange Control Regulations of 1961 prohibit cross-border disposition of securities without the permission of the treasury.[32] Likewise, treasury's permission is needed to transfer foreign currency or send bank notes outside the country.[33]

The following subsection examines the regulation of cross-border trade and investment in the region during the post-COMESA era.

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[26] COMESA Treaty 1993, Arts 3(c), 81(a)(b)(c); Common Market for Eastern and Southern Africa, *Key Issues in Regional Integration* (Vol. 5, The Common Market for Eastern and Southern Africa 2017).
[27] Kenyan Exchange Control Regulations 1950, regs 10(1)(a), 8(1)
[28] *ibid*
[29] Which may be the Minister of Finance or the Reserve Bank of Zimbabwe: Zimbabwean Exchange Control Act 1962, s 2 (definition of 'exchange control authority').
[30] See, Zimbabwean Exchange Control Regulations of 1996, regs 10, 12, 13.
[31] *ibid*
[32] regs 14(1) (b) (c), 3(1) (a) (b).
[33] reg 3(1) (a)(b).

1.3.2. THE POST-COMESA ERA.

The post-COMESA era refers to the era running from the formation of COMESA in 1993 to the present day. The post-COMESA era regulation of cross-border trade and investment in securities may be divided into two segments, namely the domestic legislation segment, and the regional legislation segment. The following subsection addresses these post-COMESA legislative developments in the order given above.

1.3.2.1. DOMESTIC SECURITIES INVESTMENT LEGISLATION AFTER FORMATION OF COMESA.

For lack of space, only legislation from Zambia and Kenya will be covered in this sub-section. The Zambian Securities Act 1993 has been repealed and replaced with the Securities Act No. 41 of 2016. However, the succeeding Act is generally inward-focused and skewed in favour of the domestic securities industry.[34] In particular, the Zambian Securities Act 2016 does not address legal, regulatory and institutional aspects of cross-border trade in securities. Despite the said shortcomings in the Zambian Securities Act 2016, Zambian Pension Schemes Regulation Act of 1996 allows pension funds to invest their assets in equities listed or quoted on foreign stock exchanges. This has been achieved by an amendment to section 25 of the Zambian Pension Scheme Regulation Act 2016,[35] and the passage of the Pension Schemes (Investment Guidelines) Regulations of 2011. However, only a paltry 30 per cent of the total value of the pension fund may be invested.[36] Similarly in Kenya, the Retirement Benefits Act of 1997 has introduced the

[34] See, Chapters 2, 3 and 4.
[35] See, Amendment Act No. 27 of 2005.
[36] Pension Scheme Regulation Act No. 28 1996, s 25; Pension Scheme (Investment Guidelines) Regulations 2011, regs 7(1)(2), 11.

investment of pension fund assets in securities outside the country.[37] However, investment outside Kenya can only be made in Uganda and Tanzania.[38]

A post-COMESA era regional instrument that touches upon the problem under investigation is the SADC Protocol on Finance and Investment 2006.[39] One of the major objectives of the SADC Fin & Invest Protocol 2006 is 'the promotion and protection of both FDI and FPI' in the SADC region.[40] However, the SADC Fin & Invest Protocol does not contain express rules that should govern cross-border dispositions of securities, and the ranking of competing collateral interests in the same securities.

The next subsection defines the scope of the study and gives the sources of the law for the study.

1.4. SCOPE OF THE STUDY AND SOURCES OF THE LAW.

Foreign investment takes the form of FDI or FPI.[41] FDI are foreign funds injected into domestic production such as the building of a new plant, installing new production lines, forming joint-ventures, et cetera.[42] To the contrary, FPI is short-term foreign investment in foreign securities.[43] This type of investment (FPI) comes in the form of private securities or listed securities. This thesis examines legal, regulatory and institutional aspects of cross-border trade in listed securities in the COMESA Region. In line with the scope of the study, the main source of law for the thesis is the

[37] Kenyan Retirement Benefits (Occupational Benefits Scheme) Regulations 2000, reg 38(1).
[38] *ibid*
[39] Hereinafter 'the SADC Fin & Invest Protocol 2006'.
[40] See the sixth perambulatory paragraph to Annex 1 of the Protocol on Finance and Investment. The object of Annex 1 is to foster investment cooperation among SADC Member States.
[41] Humanicki M., Kelm R. and Olszewski K., 'Foreign Direct Investment and Foreign Portfolio Investment in the Contemporary Globalized World: Should they be treated separately?' (2013) SSRN Electronic Journal, DOI: 10.2139/ssrn.2369231.
[42] Sornarajah M., *The International Law of Foreign Investment* (3rd edn, CUP 2010), at 8-10; Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (2nd edn, OUP 2012).
[43] Dokuz Eylul, 'The Relationship between Foreign Investment and Macroeconomic Indicators: Evidence from Turkey' (2015) 11(31) European Scientific Journal 389.

Zambian Securities Act 2016. The Zambian Securities Act is supplemented by the Zambian Companies Act 2017 and the Banking and Financial Services Act 2017.[44] Other sources of the law for this study are, the National Pension Schemes Act of 1996, the Zambian Pension Schemes Regulation Act of 1996.[45]

In Kenya, the Capital Markets Act of 2000 and the Retirement Benefits Act of 1997 are the main sources of law for this study. In Zimbabwe, the sources of the law for this study are the Securities Act of 2004, the Pensions and Provident Fund Act of 1976 and the Exchange Control Act of 1962. In South Africa, the Financial Markets Act of 2012 and the Pension Fund Regulations of 1962 will form the main sources of law for this study.

At regional level, the SADC Treaty 1980 and the COMESA Treaty 1993, and relevant protocols made under these international instruments will be considered. Finally, common law and equity, and the rules of private and public international law will also form part of the sources of law for this study.

Although it has been indicated in the introductory section that this thesis does not examine the intricacies of economic theory on cross-border trade in securities, in explaining the efficacy of Zambia's and other selected COMES states' legal, regulatory and institutional frameworks, this study refers occasionally to the economic theory and public policy underpinning the said frameworks. As Holmes explains:

> Every lawyer ought to seek an understanding of economics. There we are called on to consider the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage

[44] See, Zambian Securities Act 2016, s 5.
[45] Subsidiary legislation made under these Acts will also be consulted.

> we gain against the other advantage we lose and to know what we are doing when we elect.[46]

Thus, in economics, we find the economic theory and public policy underlying the legal and regulatory rules and institutions. There, we also find the objective of the framework and the cost of achieving it. This allows regulators and policy makers to pursue only those regulations and policies whose implementation yields more benefits than the cost of implementation. This sort of approach is likely to yield market efficiency through efficient legal rules.[47]

The following subsection reviews some literature relating to the problem under investigation.

1.5. LITERATURE REVIEW.

This section reviews some of the literature relating to regulation of cross-border trade and investment in listed securities in the COMESA region.

The African Development Bank Group (ADB Group)[48] examines constraints on the growth of cross-border investment in securities in the SADC region. The ADB Group observes that financial activities and financial instruments in SADC stock markets remain limited. The ADB Group also observes that low capitalization and inadequate liquidity in financial markets are a major constraint on the growth of cross-border investment in the region. The ADB Group argues that limited issue of financial instruments makes it extremely difficult to for investors to hedge against financial market risk. The ADB Group makes the following proposals as a possible way of promoting financial market development in the SADC region:

i) Consolidate SADC financial markets;

[46] O.W. Holmes, 'The Path of the Law' (1897) 10 Harv L. R. 474
[47] Polinsky A.M., *An Introduction to Law and Economics* (5th edn, Wolter Kluwer 2019)
[48] African Development Bank, 'Intra-SADC Cross-border Investments' (2013) 2 *Regional Integration Brief* 4

ii) Facilitate free flow and access to financial information;

iii) Harmonize the legal and regulatory frameworks for securities markets and the listing of securities; and

iv) Speed up the implementation and monitoring of the SADC Finance and Investment Protocol 2006.[49]

However, the ADB study does not examine the effect of the narrow range of financial assets on the IPD capacity of COMESA FSMs. Thus, this study examines the effect of limited financial assets on the efficacy of the rosier performance of these markets in attracting foreign investors for IPD. Also, the ADB study does not examine the role of institutions in the development of financial markets. This study, based on the North New Institutional Economics Theory, examines the role of effective and efficient institutions in developing competitive securities markets. And, as far as low capitalization and inadequate liquidity of COMESA securities markets are concerned, this study argues that financial activity in COMESA stock markets could be increased by aggressive international publicity of their rosier growth, and IPD opportunities.[50] Financial activity in these markets could also be enhanced by increasing participation of institutional investors such as pension schemes.[51] This study demonstrates further, that market activity could also be enhanced by demutualizing securities exchanges, promoting the participation of small investors such as collective investment schemes, and the development of functional alternative investment markets in the region.

[49] The SADC Protocol on Finance and Investment was signed on the 18th day of August 2006 and entered into force on the 16th day of April, 2010.
[50] See, Chapter 2 of the thesis
[51] See, Chapter 2 of the thesis.

The International Monetary Fund (IMF) observes that East African Community (EAC) Capital Markets face common challenges of low capitalization and liquidity albeit to different degrees.[52] The IMF also observes that capital market integration could improve the state of EAC capital markets.[53] The IMF proposes the following measures as a possible way of improving the state of East African markets, namely:[54]

i) Harmonization of market structures;

ii) Strengthening regional surveillance;

iii) Encouraging domestic bond issues by multi-lateral financial institutions; and

iv) Build the capacity of regional institutions.

Against this background—the IMF study above—an empirical study by Makau, Onyuma and Okumu indicates that regional integration of EAC securities markets through cross-listings is likely to enhance liquidity and capitalization.[55] The study by the trio also observes that there is poor cross-listing among EAC capital markets.[56] This thesis complements both the aforesaid studies by proposing the introduction of a RSE, an international passport to multi-jurisdiction cross-listing, redefinition of the term 'prospectus', and the adoption of the same definition of 'securities' in the COMESA region. Further, in this very respect, this thesis suggests ways of increasing demand and supply of securities to securities exchange in the region. This thesis also complements the IMF proposals by demonstrating that the efficacy of the harmonization model could be enhanced by introducing the mutual recognition model. This thesis beefs up the IMF

[52] Yabara M., 'Capital Market Integration: Progress Ahead of East African Community Monetary Union' (2012), International Monetary Fund Working Paper, WP/12/18.
[53] *ibid*
[54] *ibid*
[55] Makau S.M., Onyuma O.S. and Okumu A.N., 'Impact of Cross-listing on Stock Liquidity: Evidence from East African Community' (2015) 3(1) Journal of Finance and Accounting 10-18.
[56] *ibid*

proposals further by proposing the introduction of key regional institutions—a RCF and a RSEC—and the promotion of regulatory enforcement cooperation among domestic regulatory authorities, and between those authorities and the proposed regional authorities.

Mwenda examines the efficacy of the legal, regulatory and institutional framework adopted by Zambia in 1993 for the public distribution of securities, in promoting development of a competitive stock exchange. Mwenda observes that the Zambian legal, regulatory and institutional framework has not facilitated the development of competitive capital markets in the country. He argues that inadequate liquidity and poorly-drafted statutory provisions only serve to support the view that the LuSE and the regulatory framework were hurried up to facilitate the privatization programme.[57] Mwenda submits that in order to stimulate growth in liquidity on stock markets in the region, there is need to encourage multiple listings, increase cross-border trade in securities and expedite the formation of a regional stock exchange.[58] Although Mwenda's work also discusses the idea of setting up a regional stock exchange (RSE), it does so in corporate finance context. Thus, Mwenda's work looks at a RSE as an additional venue for the raising of corporate finance by issuers listed on DSEs. To the contrary, this study, discusses the idea of setting up a RSE as a platform for cross-border trade in securities. Further, this work examines the possibility of enhancing investor protection in ISMs by introducing a RSEC and a RCF. Also, whereas Mwenda's work focuses on regulatory issues that fall on the fringe of a securities deal, this work examines regulatory issues relating to the salient components of a cross-border securities deal.

[57] Mwenda, PhD Thesis (2001) 2-3, *op cit*

[58] *ibid.* See also, Kenneth K. Mwenda and Gerry N. Muuka, 'Integration of Capital Markets in Eastern and Southern Africa', in Henry Kyambalesa and Mathurin C. Houngnikpo (eds), *Economic Integration and Development in Africa* (1st edn, Routledge 2016); Kenneth K. Mwenda, *the Dynamics of Market Integration: African Stock Exchanges in the New Millennium* (Universal Publisher 2000).

The International Monetary Fund (IMF) examines the effect of cross-listings on the performance of stock markets in Sub-Saharan Africa.[59] Empirical evidence provided by the IMF study shows that stock markets that are integrated through cross-listings are more successful than those that are not. This study complements the IMF study by demonstrating that cross-border cross-listings in the region could be promoted by introducing a RSE, a RCF, a RSEC, and an international passport to multi-jurisdiction disclosure and securities advertisement. This study argues that, with an effective legal, regulatory and institutional framework in force, securities exchanges in the region are likely to attract cross-listings.

Marone examines constraints on the development of Africa's stock markets.[60] Marone observes that there exists only a few pension funds in Zambia and other SADC countries that generate long-term savings and channel them into stock exchanges.[61] This thesis highlights the potential of pension funds to mobilize long-term savings for investment in securities on securities exchanges.[62] This thesis demonstrates that with qualitative regulation through the prudent-person rule, pension funds are likely to contribute to the growth of cross-border investment and trade in securities in the COMESA region.

The Kenyan Retirement Benefits Authority (hereinafter 'the RBA') examines the rationale for quantitative portfolio ceilings on the investment of pension assets. The RBA argues that such

[59] OJ Adelegan, 'Can Regional Cross-Listings Accelerate Stock Market Development? Empirical Evidence from Sub-Saharan Africa' (2008) International Monetary Fund Working Paper, IMF/WP/08/281/2008, 12 (hereinafter 'Adelegan (2008)') <www.researchgate.net/publication/23691345_Can_Regional_Cross-listings_Accelerate_Stock_Market_Development_Empirical_Evidence_from_Sub-Saharan_Africa > accessed 18 May 2017.
[60] H. Marone, 'Small African Stock Markets—The Case of the Lusaka Stock Exchange' (2006) International Monetary Fund, IMF/WP/03/6, 23 (hereinafter 'Marone (2006)') <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=879081 > accessed 25 May 2015. For similar observations, see, Mwenda (PhD Thesis 2001) 104, fn 59, *op cit* .
[61] *ibid*
[62] See, Chapter 2 of the thesis.

portfolio ceilings are a necessary mechanism for limiting foreign currency risks and loss.[63] They argue that such quantitative restrictions serve to retain capital for struggling domestic stock exchanges. However, this study establishes that quantitative restrictions are illegal except when the survival of the domestic or regional economy is threatened. This study demonstrates that, qualitative restrictions are likely to improve the performance of COMESA pension schemes and promote cross-border investment and trade in securities in the region.

Chimpango examines constraints on the development of African capital markets, especially those in southern Africa.[64] Chimpango observes that capital markets in most African countries were established and continue to operate on inappropriate legal and institutional frameworks.[65] His work identifies foreign theories and influences such as law and economics, and law and development, and the Washington Consensus as some of the constraints on the development of effective legal and institutional frameworks for African capital markets.[66] Chimpango argues that in order to develop vibrant and competitive capital markets in Africa, the legal and institutional frameworks should be tailored to the prevailing culture, practices, customs and beliefs in each jurisdiction.[67] As possible way of ensuring an effective legal and institutional framework for African capital markets, Chimpango proposes a new approach—North's New Institutional Economics Approach—to legal and institutional development.[68] This study adopts the North approach and

[63] Kenyan Retirement Benefits Authority, 'The Rationale for Quantitative Portfolio Ceilings on Investment of Retirement Benefits Funds: The Case of Kenya' (2007) 14 <www.rba.go.ke/index.../26-research-reports-2006-2007? > accessed 26 May 2018

[64] Boniface K. Chimpango, 'The Development of African Stock Markets: A Legal and Institutional Approach (Nottingham Trent University, PhD Thesis 2014) https://core.ac.uk/download/pdf/30624139.pdf accessed 30 January 2020

[65] *ibid*

[66] *ibid*

[67] *ibid*

[68] As opposed to neo-classical economics, which has been used to analyse previous economic theories, on assumption of human rationality, the North framework is part of the New Institutional Economics which contends that formal rules (statutes, regulations and policy statements) will only be effective if they are compatible with existing informal rules (local practices, protocols, cultures, preferences and beliefs) as determined by the societal belief system: Douglas

suggests the complementary role of other theories of legal change such as the social change theory, utilitarian theory and the intentionalist theory. This study argues that success of COMESA securities markets could be facilitated by key regional institutions which are based on the needs, culture, practices and preferences of these markets.

There is also literature that examines the problem in other regions of the world. In this respect, Guynn and Marchand[69], examine the suitability of *lex situs* for indirect securities holding systems in the United States and Europe. Their study establishes that *lex situs* is not best suited to indirect securities holding systems.[70] This thesis contributes to the body of knowledge on constraints on cross-border trade in securities by establishing that, when applied to modern intermediated securities systems, *lex situs* causes legal uncertainty. This thesis also shows that although legal certainty in the contractual component of a cross-border securities deal may be attained through a choice of law clause, there is no party autonomy in the proprietary component.

Context within which the thesis has been developed.

Stock markets in the COMESA Region are faced with challenges such as small size, low capitalization and inadequate liquidity.[71] Regional integration of stock markets through a RSE and cross-listings, and promotion of cross-border trade in securities through an effective legal, regulatory and institutional framework, have been identified as possible means of improving the state of these markets.

North, *Understanding the Process of Economic Change* (Princeton University Press 2005). This theory has been built over North's earlier works such as, Douglas North, *Structure and Change in Economic History* (Norton 1981), and Douglas North, *Institutions, Institutional Change and Economic Performance* (CUP 1990).

[69] RD Guynn and NJ Marchand, 'Transfer and Pledges of Securities held through Depositories' in Hans Van Houte (ed.), *The Law of Cross-Border Transactions* (Sweet and Maxwell 1999) 55

[70] *ibid*

[71] Adelegan (2008), *op.cit*; Marone (2006), *op.cit;* Samamba Lennox Trivedi IV, *op.cit*

1.6. STATEMENT OF THE PROBLEM AND UNDERLYING THESIS OF THE STUDY.

The background to the regulation of cross-border trade in securities in the COMESA Region, the subsection on the sources of the law, and the scope and significance of the study together form the basis of the problem under investigation.

Since the seventeenth century when the first stock market in the world was established through to the 19th century, securities were held directly by investors.[72] Ownership of securities was evidenced by paper certificates.[73] Transfer of securities was effected by delivery of certificates.[74] Today, in the COMESA Region, indirect securities holding systems with multiple tiers of intermediaries have been introduced along with uncertificated securities.[75] In intermediated cross-border systems, securities are transferred by electronic debiting and crediting of accounts of securities holders.[76] Despite these developments, relevant securities and property laws still reflect the pre-20th century methods of holding, transferring and pledging securities. And although FPI flows to Sub-Sharan Africa have been on the rise in the past decade, COMESA stock market only get a tiny fraction of the same.[77] As a consequence of the foregoing, COMESA securities markets remain small with low capitalization and liquidity. This is notwithstanding the fact that stock markets could serve as viable alternative platforms—alternative to banks—for the mobilization of capital that could be channelled to productive investments and stimulate domestic and regional economic growth.[78] Cross-border cross-listings and trade in securities have been identified by

[72] See, Petram L., *The World's First Stock Exchange* (Columbia University Press 2014).
[73] Hans van Houte, *Law of Cross-border Securities* Transactions (Sweet & Maxwell 1998).
[74] *ibid*
[75] For example, see, Zambian Securities Act 2016, ss 97, 107; GSC 2009, Art 11(1)(2).
[76] *ibid;* See also, Thevenoz L., Intermediated Securities: The Impact of the Geneva Securities Convention and the Future of European Legislation (Cambridge University Press 2013).
[77] See. Chapter 3.
[78] See, Southern Africa Development Community, 'Regional Indicative Strategic Development Plan 2015-2020' (2016), (SADC RISDP 2015-2020).

studies on the COMESA region and other regions as a possible way of improving capitalization and liquidity of stock markets.[79] Against this backdrop, the statement of the problem under investigation may be presented as follows:

> **Has the legal, regulatory and institutional framework for public distribution of securities across international borders in the COMESA Region provided adequate incentives for growth of cross-border trade and investment in securities in the region?**

In order to thoroughly tackle the problem under investigation, a contextual approach to the application of legal and regulatory rules is necessary. Thus, empirical evidence is given in support of various propositions that have been advanced in this study.[80] Should the answer to the statement of the problem be that the legal, regulatory and institutional framework has made limited contribution to the growth of cross-border trade in securities, then the underlying thesis of the study may be formulated as follows:

> **Driven by various factors in its formulation and hindered by various constraints in its application, the legal, regulatory and institutional framework for public distribution of securities across international borders in the COMESA Region has had limited influence in facilitating growth of cross-border trade and investment in securities in the region.**

The small size, low capitalization and inadequate liquidity of stock markets in the COMESA region are here connected to constraints on the efficacy of the legal, regulatory and institutional framework in promoting cross-border trade in securities in the region.

[79] See, Mwenda, PhD Thesis (2001), *op.cit*; Jenah S.W., 'Commentary on a Blueprint for Cross-border Access to U.S. Investors: A New International Framework' (2007) 48 Harv. Int'l L. J. 69; See also authorities cited in Chapter 3.

[80] See, Chapter 7 of the thesis for empirical evidence to this effect.

1.7. REASONS UNDERPINNING THE THESIS OF THE STUDY.

There are a number of reasons underpinning the thesis above. Firstly, the regional political economy has had considerable influence on the development of the legal, regulatory and institutional framework. Secondly, the international political economy has also had a bearing on the focus of the said framework. Thirdly, lack of effective regional institutions such as a RSE, a RSEC and a RCF hinders growth of cross-border trade in securities in the region.[81]

1.8. SIGNIFICANCE OF THE STUDY AND LIMITATIONS UPON THE STUDY.

Since the seventeenth century when the first stock market in the world was established through to the 19th century, securities were held directly by investors.[82] Ownership of securities was evidenced by paper certificates.[83] Transfer of securities was effected by delivery of certificates.[84] Today, in the COMESA Region, indirect securities holding systems with multiple tiers of intermediaries have been introduced along with uncertificated securities.[85] In intermediated cross-border systems, securities are transferred by electronic debiting and crediting of accounts of securities holders.[86] Despite these developments, relevant securities and property laws still reflect the pre-20th century methods of holding, transferring and pledging securities. And although FPI flows to Sub-Sharan Africa have been on the rise in the past decade, COMESA stock market only

[81] Akamiokhlor observes that the establishment and effective management of capital market regulatory institutions is likely to raise confidence and promote investor participation in African capital markets: George A. Akamiokhor, 'Building Capital Markets Regulatory Institutions in Developing Countries—The Nigerian Experience' (1996) 45(2)/(3) Social and Economic Studies 249-278.
[82] See, Petram L., *The World's First Stock Exchange* (Columbia University Press 2014).
[83] Hans van Houte, *Law of Cross-border Securities* Transactions (Sweet & Maxwell 1998).
[84] *ibid*
[85] For example, see, Zambian Securities Act 2016, ss 97, 107; GSC 2009, Art 11(1)(2).
[86] *ibid;* See also, Thevenoz L., Intermediated Securities: The Impact of the Geneva Securities Convention and the Future of European Legislation (Cambridge University Press 2013).

get a tiny fraction of the same.[87] As a consequence of the foregoing, COMESA securities markets remain small with low capitalization and liquidity. This is notwithstanding the fact that stock markets could serve as viable alternative platforms—alternative to banks—for the mobilization of capital that could be channelled to productive investments and stimulate domestic and regional economic growth.[88] Cross-border cross-listings and trade in securities has been identified by studies on the COMESA region and other regions as a possible way of improving capitalization and liquidity of stock markets.[89] Against this backdrop. This study is significant in a number of ways. Firstly, this study highlights major legal, regulatory, institutional and public policy constraints on the growth of cross-border cross-listings and trade in securities in the COMESA Region. Secondly, the study also identifies constraints which affect the efficacy of the legal, regulatory and institutional framework in promoting growth of cross-border cross-listings and trade in securities. Thirdly, this study makes recommendations for remedial legal, regulatory, institutional and policy reform. Once implemented, the proposals made in this study are likely to enhance the efficacy of the legal, regulatory and institutional framework in promoting cross-border cross-listings and trade in securities, and contribute to economic growth in the region.

Limitations on the Study.

A number of limitations on the study have been identified. Firstly, there was not enough time for data collection and analysis. Secondly, limited financial resources were quite a constraint on meaningful telecommunication and visit to the sites of participants. Admittedly, both these

[87] See. Chapter 3.
[88] See, Southern Africa Development Community, Regional Indicative Strategic Development Plan 2015-2020, (SADC RISDP 2015-2020).
[89] See, Mwenda, PhD Thesis (2001), *op.cit*; Jenah S.W., 'Commentary on a Blueprint for Cross-border Access to U.S. Investors: A New International Framework' (2007) 48 Harv. Int'l L. J. 69; See also authorities cited in Chapter 3.

constraints may have a negative bearing on the quality of the study. Thirdly, financial and related matters are sensitive matters. Disclosure of some financial information may reveal financial irregularities such as violation of regulatory rules or tax non-compliance (both of which may attract regulatory sanctions). Also, evidence of low capitalization and poor performance of the respondent firm might negatively reflect on the quality of management of the firm and its attractiveness to investment. Therefore, participants may have withheld all or part of information which negatively reflects on management and performance of their firm. Fourthly, due to long distances between the researcher and participants, the researcher was made to distribute questionnaires by way of email in some cases. Responses were communicated by the same mode. In other cases, interviews were conducted by tele-conferencing. These modes of communication have inherent defects and risk of failure. Most calls and questionnaires went unanswered; some answered questionnaires could not come through. Thus, the researcher could not gather as much information as would have been necessary for a meaningful assessment of the problem. Fifthly and finally, since the problem under investigation is primarily regulated by legislation, case law and international conventions and instruments, a sociological or highly technical approach to data collection and analysis could not be adopted.

1.9. MAIN RESEARCH QUESTIONS.

a) Are there various factors driving the formulation of the legal, regulatory and institutional framework for cross-border trade in listed securities in the COMESA Region?
b) Are there various legal, regulatory, institutional and policy constraints on the growth of cross-border securities trade in listed securities in the COMESA Region?

c) Has the legal, regulatory and institutional framework had significant influence in facilitating growth of cross-border trade in listed securities in the region?

1.10. DATA COLLECTION AND ANALYSIS.

This section sets out the main sources of empirical data for this study and outlines the methods used to collect and analyse the data. In collecting empirical data, interviews and questionnaires were employed as research tools. In conducting interviews, both structured and unstructured questions were used. The results of the interviews and the findings from questionnaires were analyzed using excel. The random sampling method was used in order to avoid subjectivity in the selection of interviewees. However, a small number of interviewees from key institutions was selected without random sampling, namely:

i) The Chief Executive Officer of the Lusaka Stock Exchange;
ii) The Chief Executive Officer of the Zambian Securities and Exchange Commission;
iii) The Chief Executive Officer of the Pensions and Insurance Authority; and
iv) The Chief Executive Officer of the Common Market for Eastern and Southern Africa (COMESA).

1.11. RESEARCH DESIGN AND METHODOLOGY.

As alluded to in the review of literature, this research is mainly based on North's New Institutional Economics Approach to establishing an effective legal, regulatory and institutional framework. This study is also underpinned by theories of legal change such as the social change theory, the utilitarian theory and the intentionalist theory. The study falls into the qualitative research category and as such, focuses on answering specific questions relating to the problem under investigation

using both primary and secondary data. Thus, the research adopts a doctrinal approach to evaluating the legal, regulatory and institutional framework for the public distribution of securities across international borders in the COMESA region. This method was used in analyzing both primary and secondary data. Primary sources of data such as relevant legislation and case law were used. Secondary sources such as journals and other written commentaries on primary sources were also used. With respect to documentary sources of data, a checklist of such sources was used. The study employed the non-probability sampling method—purposive sampling—in the selection of documentary sources. Both primary and secondary sources of data were used in drawing conclusions and making comparisons. Doctrinal legal scholarship is founded in comparative law tradition.[90] Consequently, this approach was used to explain substantive and systemic aspects of different legal systems in the region using a functional analysis of legal processes.[91] In particular in this thesis, functional analysis focused on the regulation of securities markets in six COMESA jurisdictions and three developed jurisdictions. This exercise involved an examination of the legal, regulatory and institutional frameworks that are in force in those jurisdictions. Since most legal systems seek to protect similar interests, little or lack of convergence between/among legal system does not compromise the effectiveness of the doctrinal approach in the comparative legal tradition.[92] Consequently, in this research, for comparative purposes, only rules which perform the same function were analysed. As a possible way of overcoming the epistemological challenges that are often associated with desk research such as this one, this work relied on empirical works which use different doctrinal and philosophical approaches but confirm the central thesis of this study. And, as a possible way of avoiding the subjectivity that is inherent in desk research, a

[90] Zweigert, K., and Kötz, H., *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) at 34.
[91] *ibid*
[92] *ibid*

checklist of documentary sources was used. In selecting documentary sources, non-probability sampling method—purposive sampling—was used. This method was used as a way of overcoming the temptation of selecting only documentary evidence that supports the central thesis of this study and rejecting that which seems obstructive to the same. This study adopts a multi-disciplinary approach by drawing upon law, economics and other social sciences. The main scholarship traditions that inform this research are law and society, law and finance, law and economics and, the new institutional economics theory as advocated by North.

Against this backdrop, we now turn to outline the organization of parts and chapters in this thesis.

1.12.0. THE FIVE PARTS OF THE THESIS.

This thesis consists of five parts and nine chapters. Part I sets out the introductory and methodological aspects of the study. Part I also establishes the context within which the thesis has been developed. This part further provides an overview of important theories on public distribution of securities across international borders. Important theories on the effect of market size, and the legal, regulatory and institutional framework on liquidity of stock markets are also provided. In explaining these theories and principles, we intend to show some of the constraints which affect the efficacy of the legal, regulatory and institutional framework in promoting cross-border trade in securities in the COMESA Region.

Part II of the thesis provides empirical evidence on the small size, low capitalization and inadequate liquidity of securities markets in the COMESA Region. Also, in this part, the growth potential of these markets is highlighted. Further, this Part examines constraints on regional integration of stock markets in the region. Part II makes a case for regional integration of stock markets through cross-listings. Finally, Part II examines constraints on stock market development

in the region. The part identifies legal transplantation as one of the notable constraints on stock market development in the region. A central argument of this part is that a legal, regulatory and institutional framework that is founded on the needs, culture, practices and preferences of the market as opposed to foreign concepts and models is likely to promote stock market development and cross-border trade in securities in the region.

Part III of the thesis examines legal, regulatory and institutional constraints on cross-border trade in securities in the COMESA Region. This Part identifies lack of an effective legal, regulatory and institutional framework as one of the major constraints on cross-border trade in securities in the region. Further, Part III makes a case for the adoption of an effective conflict of laws rule for ascertaining the substantive property law in the COMESA Region. A central argument of this part is that the high transaction costs for cross-border securities deals are likely to put a premium on foreign securities and create equity home bias. Finally, Part III examines the quality of issuer and investor protection in ISMs in the COMESA Region. In this respect, the author argues that the narrow scope of SEC's representative action power and non-criminalization of extra-territorial securities market misconduct are likely to compromise issuer and investor protection in ISMs.

Part IV of the thesis provides empirical evidence on constraints which affect the efficacy of the legal, regulatory and institutional framework in facilitating growth of cross-border trade in securities in the COMESA Region. Notable such constraints are poor institutional-investor presence in securities markets, poor institutional enforcement capacity of the Zambian SEC, and lack of judicial independence on the part of the Zambian Capital Markets Tribunal.

Part V of the thesis examines the possible allocative effectiveness and efficiency that could come from the implementation of some of the proposed legal, regulatory and institutional reforms. This

part also highlights some of the challenges that are faced by securities markets and investors in the region. Further, this part draws together the conclusions made in various chapters of the thesis, and makes the conclusion of the study. This part also makes necessary recommendations for legal, regulatory, institutional and policy reform in the area of securities and markets regulation.

An outline of chapters comprised in each part of the thesis is given below.

1.12.1. THE CHAPTERS IN THE THESIS.

The preceding section has provided an outline of the parts of the thesis. In this section, we provide the chapters comprised in each part of the thesis.[93] Also, the subject covered by each chapter is briefly given in the following segments.

Chapter One.

Chapter 1 sets out the introductory and methodological aspects of the study and constitutes Part I of the thesis.

Chapter Two.

Chapter 2 forms the first segment of Part II of the thesis. This chapter examines the performance of COMESA securities markets in the past decade and half. The Chapter highlights the small size, low capitalization and inadequate liquidity on COMESA securities markets. As a possible way of overcoming liquidity challenges, Chapter 2 of this study makes proposals for remedial legal, institutional and policy reform. The Chapter also explores the possibility of increasing the investor base for bond-like/bond-linked equities in the secondary market by developing functional bond

[93] This thesis is made up of eight chapters.

markets. Chapter 2 further discusses possible ways of increasing demand and supply of securities to domestic stock exchanges and the proposed RSE. A central argument of this Chapter is that cross-border trade in securities could be promoted by increasing demand and supply of securities to securities exchanges. Enhanced supply and demand for securities is also likely to ease the liquidity challenges that are faced by securities markets in the region.[94]

Chapter Three.

Chapter 3 makes up the second segment of Part II. This chapter examines constraints on regional integration of securities markets in the COMESA region. This chapter supplies empirical evidence on capitalization, investor participation, and FPI flows to the LuSE. Also, empirical evidence on geographical location of listed-equity funds for the region is provided in this chapter. A central argument of this chapter is that the political economy which drove the formation of many securities markets in the region and the concentration of equity funds in South Africa have not provided adequate incentives for growth of cross-border trade in securities. Further, Chapter 3 makes a case for regional integration of stock markets through cross-listings. This chapter makes a case for the establishment of a RSE, a RCF and a RSEC. Chapter 3 also examines constraints on securities market development in the region. The chapter identifies legal transplants as a notable constraint on the development of securities markets in the region. The chapter argues that institutions that are based on the real needs, culture, beliefs, practices and preferences of the market, as opposed to

[94] Sharad N. Bhattacharya, Sankarshan Basu and Mohammed M. Elgammal, 'Stock Market and its Liquidity:Evidence from ARDL bound testing approach in the Indian Context' (2019) 7(1) Journal of Cogent Economics and Finance 1; See also, Kahuthu L.W., 'The Effect of Stock Market Liquidity on Stock Returns of Companies Listed on the Nairobi Stock Exchange (Strathmore University Masters' Thesis 2017) http://suplus.strathmore.edu/handle/11071/5594 accessed 28 January 2020.

foreign concepts and models, are likely to accelerate stock market development and cross-border trade in securities.

Chapter Four.

Chapter 4 forms the first segment of Part III of the thesis. This chapter examines constraints on cross-border trade in securities in the COMESA Region. A notable constraint on the growth of cross-border trade in securities in the region is lack an effective legal, regulatory and institutional framework. A central argument of this chapter is that an effective legal, regulatory and institutional framework is likely to stimulate growth of cross-border trade in securities in the region. The presence of exchange controls in most COMESA jurisdictions has been identified as a constraint on the growth of cross-border trade in securities, in this respect. The author argues that exchange controls are a non-tariff barrier to cross-border trade to the extent that they limit the amount of capital and securities that could be exported or imported within the region. The author also argues that, as such, exchange controls are likely to hinder the growth of cross-border trade in securities in the region. The application of *lex situs* to proprietary aspects of cross-border securities dispositions is another constraint on the growth of cross-border trade in securities in the region. Also, the fragmented domestic payment systems in the region have been identified as a constraint on the growth of cross-border trade in securities. The author argues that the integration of domestic payment systems is likely to speed up cross-border transfer of funds and increase cross-border trade in securities.

Chapter Five.

Chapter 5 forms the second segment of Part III of the thesis. This chapter looks at harmonization of regulatory rules as a possible way of enhancing the quality of regulation in securities markets

in the COMESA Region.[95] This chapter makes a case for harmonization as a substitute for the current regulatory competition model. The author argues that the implementation of the harmonization model is likely to reduce regulatory and transaction costs for cross-border securities deals. Finally, Chapter 5 makes a case for the harmonization of regional securities and property laws.

Chapter Six.

Chapter 6 forms the third segment of Part III of the thesis. It examines the quality of issuer and investor protection in ISMs in the COMESA Region. The Chapter identifies the narrowness of SEC's representative action power as one of the notable constraints on effective regulation of ISMs. The other notable constraint is non-criminalization of extra-territorial securities market misconduct. A central argument of this chapter is that unregulated or poorly regulated extra-territorial securities market misconduct, is likely discourage participation of risk-averse and less wealthy investors.

Chapter Seven.

Chapter 7 forms Part IV of the thesis. This chapter provides empirical evidence on constraints which affect the efficacy of the legal, regulatory and institutional framework in promoting cross-border trade in securities in the region. This chapter identifies poor institutional enforcement capacity of the Zambian SEC as a notable constraint on the efficacy of the said framework. Other notable constraints include lack of judicial independence on the part of the Zambian Capital

[95] See, Indira Carr and P.A. Stone, *International Trade Law* (4th edn, Routledge-Cavendish 2010); Samamba Lennox Trivedi, 'Enhancing Regulation of International Securities Markets in Eastern and Southern Africa through Harmonization of Regulatory Rules' (2018) 4(4) Afri. L. J. 1 (hereinafter 'Samamba Lennox Trivedi VI'); Michael Trebilcock, Robert Howse and Antonia Eliason, *the Regulation of International Trade* (Routledge 2013). The Chapter also discusses the concept of harmonization of regulatory rules as a possible way of increasing cross-border trade in securities in the COMESA region.

Markets Tribunal, limited participation of institutional investors in securities markets, and high transaction costs for cross-border securities deals.

Chapter Eight.

Chapter constitutes the first segment of Part V of the thesis. Chapter 8 examines the possible allocative efficiency that could come from the implementation of some of the proposed remedial legal, regulatory and institutional reforms. The chapter also fleshes out some of the challenges faced by securities markets and investors in the COMESA region. Further, the chapter suggests possible methods of implementing the proposed legal and regulatory international instruments.

Chapter Nine.

Chapter 9 makes up the second segment of Part V of the thesis. This chapter draws together conclusions which have been made in different chapters of the thesis. Chapter 9 also gives the conclusion of the thesis and makes necessary recommendations for legal, regulatory, institutional and policy reform in the area of securities and markets regulation in the COMESA region.

The following Chapter examines the legal, regulatory and institutional framework so as to establish whether or not it provides sufficient incentives for the growth of demand and supply of securities to securities exchanges.

PART II

CHAPTER 2

CONSTRAINTS ON DEMAND AND SUPPLY OF SECURITIES TO SECURITIES EXCHANGES IN THE COMESA REGION.

2.0. INTRODUCTION.

Chapter 1 of the thesis has set out the introductory and methodological aspects of this study, and examined the background to the regulation of cross-border trade in securities in the region. It was noted in chapter 1 that although the post-COMESA framework does not provide sufficient incentives for cross-border trade in securities, it is quite outward focused. The chapter demonstrated that the prevailing political economy determines the inward or outward focus of the legal, regulatory and institutional framework. This chapter examines constraints on demand and supply of securities to securities exchanges.

The Kenyan Capital Markets Authority observes that one of the major constraints on high uptake of capital markets products in Sub-Saharan Africa is low supply and demand.[96] Therefore, given the central thesis of this study, this chapter argues that an effective legal, regulatory and institutional framework is likely to increase supply and demand for securities, and increase cross-border trade in securities in the region. This chapter also argues that such measures are also likely to ease the liquidity challenges that are faced by COMESA FSMs.

[96] Kenyan Capital Markets Authority, 'Study on the low uptake of Capital Markets Products in Kenya' (2018), at 20, 65, 71-73.

2.1. AN OUTLINE OF CHAPTER 2.

Chapter 2 of the thesis is divided into ten sections. The first section gives the general introduction to the chapter.[97] The second section outlines the chapter.[98] The third section briefly discusses the reasons why FSMs are gaining popularity among investors.[99] The fourth section gives a definition of FSMs.[100] This section, further defines the scope of the study by distinguishing FSMs from emerging stock markets (ESMs).[101] The fifth section also examines the geographical distribution of FSMs.[102] The sixth section makes a case for investing in FSMs.[103] The seventh section examines the breadth and depth of COMESA FSMs. This section also makes suggests possible ways of improving the liquidity of COMESA FSMs. The eighth section examines constraints relating to lack of an international passport to multi-jurisdiction securities advertisement in the COMESA region.[104] This section argues that lack of such an international passport is likely to increase compliance costs for licensees. The eighth section also argues that the burden and cost of preparing documents for each target jurisdiction is likely to discourage multi-jurisdiction securities advertisement. This section also examines constraints relating to the narrow definition of prospectus.[105] The section argues that by covering only 'shares and debentures' in the definition of 'prospectus', the legal, regulatory and institutional framework is likely to promote trade in a narrow range of securities. The section argues further that such a restrictive definition is likely to

[97] See, section 2.0 of Chapter 2 of the thesis.
[98] See, section 2.1 of Chapter 2 of the thesis.
[99] See, section 2.2 of Chapter 2 of the thesis.
[100] See, section 2.3 of Chapter 2 of the thesis.
[101] See, section 2.3.1 of Chapter 2 of the thesis.
[102] See, section 2.4 of Chapter 2 of the thesis.
[103] See, section 2.5 of Chapter 2 of the thesis.
[104] See, section 2.6 of Chapter 2 of the thesis.
[105] See, section 2.6.1. of Chapter 2 of the thesis.

reduce cross-border demand for listable securities, and hinder growth of cross-border trade in securities in the region.

The ninth section examines constraints relating to quantitative restrictions on cross-border investment of pension assets in listed securities.[106] This section argues that quantitative restrictions are a non-tariff barrier to cross-border trade in securities to the extent that they limit the amount of capital that could be exported for investment. The tenth section draws together conclusions made in various sections and subsections of this Chapter.[107]

The following subsection gives some of the reasons why FSMs are being courted by emerging market and developed market investors.

2.2. SOME REASONS WHY FRONTIER STOCK MARKETS ARE GAINING POPULARITY AMONG INVESTORS.

This subsection examines the reason why FSMs are gradually gaining popularity among emerging market and developed market investors. There are three major reasons why FSMs are gaining popularity among emerging market and developed market investors. Firstly, as emerging markets get increasingly integrated with other emerging markets and with developed markets, their capacity to facilitate IPD reduces.[108] This precipitates the migration of emerging market and developed market investors to FSMs, since FSMs are less correlated with these markets. Secondly, FSMs have performed better than emerging markets in the past two decades.[109] Thirdly, as the global

[106] See, section 2.7 of Chapter 2 of the thesis.
[107] See, section 2.8 of Chapter 2 of the thesis.
[108] Olufemu A. Aluko and Bolanle A. Azeez, 'International Portfolio Diversification in the Nigerian Stock Market' (2018) 4(2) Future Business Journal 189-194.
[109] Oey P., 'Frontier Markets Begin to Emerge' *Morningstar* (London, 17 December 2014) 2-5.

economy slows, the high long-term investment returns in FSMs make these markets so attractive to investors.[110] Thus, FSMs are gaining popularity among emerging market and developed markets investors on account of the following factors:

(i) ESMs and DSMs are not only highly correlated with markets of their own class but also with each other.[111] Thus, failure in one emerging market is likely to spill-over to other emerging markets as well as developed markets, and vice versa.[112] Consequently, investing in one assets class between these market classes does not offer the best IPD opportunities;[113]

(ii) On the contrary, FSMs are not only less correlated with each other but also with other markets—emerging markets and developed markets.[114] Thus, failure in one FSM is unlikely to spill-over to other FSMs let alone emerging markets and developed markets.[115] That is why, it is submitted, FSMs offer the best IPD opportunities to emerging market and developed market investors;[116] and

(iii) FSMs offer higher long-term returns than emerging markets and developed markets.

What then are FSMs? The following section gives a definition of FSMs and contrasts FSMs with ESMs.

[110] Guerrero T., 'Frontier Markets: More Profitable, less Volatile', *Financial Times* (London, 22 May 2014) 3-4
[111] Gavin Serkin, *Exploring the Top Ten Emerging Markets of Tomorrow* (Wiley 2015); Justin F. Buckett and Michael E.M. Sudarkasa, *Investing in Africa: an Insider's Guide to the Ultimate Emerging Market* (1st edn, Wiley 2000); Samamba Lennox Trivedi IV, 48-49, *op.cit*
[112] *ibid*
[113] *ibid*
[114] *ibid*
[115] *ibid*
[116] *ibid*

2.3. A DEFINITION OF FRONTIER STOCK MARKETS (FSMs).

This section defines the scope of this study further by defining FSM. The distinction between FSMs and ESMs defines the scope of this study, further. There is neither a standard set of defining characteristics nor a universally accepted definition of FSM.[117] However, FSMs are regarded as emerging emerging-securities-markets or pre-emerging securities markets.[118] That is to say, markets which are generally emerging markets but are not good enough to be included into the emerging market index.[119]

The following subsection defines the scope of the study further by distinguishing FSMs from ESMs.

2.3.1. DISTINGUISHING FRONTIER STOCK MARKETS (FSMs) FROM EMERGING STOCK MARKETS (ESMs or EMs).

The preceding subsection has examined the reason why FSMs are gradually gaining popularity among developed and emerging market investors. It was noted that FSMs are less correlated with ESMs and DSMs. The subsection demonstrated that FSMs could offer IPD opportunities to DSM and ESM investors. In this subsection, we define the scope of this study further by distinguishing FSMs from ESMs.

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[117] Gavin Graham, Al Emid and David Feather, *Investing in Frontier Markets: Opportunities, Risk and the Role of an International Portfolio* (1st edn, wiley 2013); Panagiotis Andrikopoulos, Greg N. Gregoriou and Vasileos, *Handbook of Frontier Markets: Evidence from Asia and International Comparative* Studies (Vol. 2, 1st edn, 2016); Samamba Lennox Trivedi, 'Eastern and Southern African Frontier Stock Markets: A Case for their Attractiveness and Growth Potential' (2018) 3(3) African Law Journal 38, 39 (hereinafter 'Samamba Lennox Trivedi IV')

[118] *ibid*

[119] Guerrero, T., 'Frontier Markets: More Profitable, less Volatile', *Financial Times* (London, May 2014) at 2-3.

In distinguishing FSMs from ESMs, there is need to assign a definition to ESMs, also. There is no universally accepted definition of EM.[120] However, EM may be defined as a market that is situated in a developing country with a legal, regulatory and institutional framework that is not developed enough for a developed country.[121] Thus, strictly speaking, an EM is neither a developing market nor a developed one.[122] Although location in developing countries is the common feature of FSMs and ESMs, these markets are readily distinguishable by their levels of breadth, depth, liquidity, accessibility and capitalization.[123] ESMs are graded higher than FSMs on each of the said benchmarks.[124] As Guerrero observes:

> Frontier Markets are a subset of Emerging Markets, which have market capitalization which are small and/or low annual turn-over and/or market restrictions unsuitable for inclusion in the larger Emerging Market Indexes but nonetheless demonstrate relative openness and accessibility by foreign investors and are not under extreme economic and political instability.[125]

[120] Barry CB & Lockwood LT, *New Directions in Research on Emerging Capital Markets: Financial Markets, Institutions and Instruments* (Vol. 4(5), Blackwell Publishers 1995) 16 (hereinafter 'Barry and Lockwood (1995)').
[121] Tarun Khanna and Krishna G. Palepu, *Winning in Emerging Markets: A Roadmap for Strategy and Execution* (Havard Business Press 2010), (hereinafter, 'Khanna & Palepu (2010)').
[122] The International Finance Cooperation defines an emerging market as one that is found in a developing country: International Finance Corporation, *Emerging Markets Fact-Book* (International Finance Corporation 1994) 34-35; Barry and Lockwood clarify the scope of the IFC definition of EM by defining a developing country as a country which, by World Bank guidelines, has low-to-middle income: Barry CB & Lockwood LT, *New Directions in Research on Emerging Capital Markets: Financial Markets, Institutions and Instruments* (Vol. 4(5), Blackwell Publishers 1995) at 35, fn 8

[123] See generally, Gavin Serkin, *Exploring the Top Ten Emerging Markets of Tomorrow (Bloomberg Financial)* (Wiley 2015); G. Andrew Karolyi, *Cracking the Emerging Market Enigma* (OUP 2015; See also, Samamba Lennox Trivedi IV, 41, *op.cit*
[124] *ibid.*

[125] Thomas Guerrero (2013), *op.cit*

Also, as ESMs get increasingly integrated with each other and with DSMs, their IPD potential declines.[126] This is in sharp contrast to FSMs which are not only less correlated with each other, but also with ESMs and DSMs.[127]

Khama and Palepu argue that classifying markets using per capita is likely to yield erroneous result.[128] They argue that ranking world's economies by per capita income or gross domestic product would suggest that the Arab Emirates, for example, is among the world's most developed economies when in actual fact it is still an emerging market because of its market structure.[129] Khama and Palepu submit that, the level of institutional development and market structure are better yardsticks.[130] Thus, given the distinction between FSMs and ESMs in terms of per capita income, GDP and the legal, regulatory and institutional frameworks, the legal arguments made in this thesis strictly relate to FSMs. Similarly, proposals for legislative, regulatory, institutional and policy reform made in this thesis relate only to FSMs.

The following section puts the legal arguments made in this Chapter in proper socio-economic context.

2.4. THE GEOGRAPHICAL DISTRIBUTION OF FRONTIER STOCK MARKETS.

The preceding subsection has distinguished FSMs from ESMs. It was noted that FSMs are pre-emerging markets. In this subsection, we examine the geographical distribution of FSMs. This

[126] Olufemu A. Aluko and Bolanle A. Azeez, 'International Portfoilio Diversification in the Nigerian Stock Market' (2018) 4(2) Future Business Journal 189-194.
[127] Uludag B.K. and Ezzat H., 'Are Frontier Markets worth the Risk?' in Andrikopoulos P., Gregoriou G.N. and Kallinterakis V., *Handbook of Fronteir Markets: Evidence from Asia and International Comparative Studies* (Elsevier 2016)
[128] Khanna & Palepu (2010), *op.cit.*
[129] *ibid*
[130] *ibid*

exercise puts the legal arguments which we have made in this chapter in proper socio-economic context.

FSMs are geographically distributed as indicated in Table 1 below.

Table 1: Geographical Distribution of Frontier Stock Markets.

EUROPE	AFRICA	MIDDLE EAST	ASIA	AMERICAS
Romania	Zambia	Qatar	Bangladesh	Argentina
Malta	Kenya	Jordan	Pakistan	Ecuador
Serbia	Mauritius	Kuwait	Sri Lanka	Jamaica
Ukraine	Ghana	United Arab Emirates	Vietnam	Trinidad and Tobago
Bulgaria	Morocco	Bahrain		
Croatia	Nigeria	Oman		
Cyprus	Tunisia	Lebanon		
Estonia	Botswana			
Lithuania	Cote d'Ivoire			
Kazakhstan	Namibia			
Slovakia	Tanzania			
Macedonia				
Slovenia				

Source: Financial Times Stock Exchange (2014), Morgan Stanley (2013), Standards and Poors (2011), Dow Jones (2011) and Russell Investments (2013).

Geographical distribution of FSMs in COMESA and SADC regions is as indicated in Table 2 below.

Table 2: Distribution of Frontier Markets in COMESA and SADC Region

COUNTRY	REGIONAL BLOCK
Zambia	COMESA/SADC
Kenya	COMESA/EAC[131]
Mauritius	COMESA/SADC
Egypt	COMESA
Namibia	SADC
Botswana	SADC
Tanzania	SADC/EAC

Source: Collected from Table 1 above.

As indicated in Table 2 above, Eastern and Southern Africa is home to most of Africa's FSMs. With respect to this wealth of FSMs in the region, the author argues that the location of most of African FSMs in the COMESA region makes the region more attractive to EM and DM investors for IPD. The author also argues that liquidity of smaller markets in the region could be enhanced by promoting cross-listing between FSMs and the smaller markets, and cross-border trade in securities.[132] Similarly, liquidity of COMESA FSMs could be enhanced by promoting cross-listing into the JSE

[131] 'EAC' stands for the East African Community.

[132] Serking observes that "with advanced economies shackled by debt and sluggish growth, investors are increasingly turning to emerging markets for better returns. Yet money managers who come out on top in China, India and Brazil are now focussing their attention on markets that have not yet emerged (pre-emerging or frontier markets)": Gavin Serkin, *Exploring the Top Ten Emerging Markets of Tomorrow (Bloomberg Financial)* (Wiley 2015) (Hereinafter, 'Serkin (2015));

and the proposed RSE.[133] This view is shared by Muuka and Mwenda when they state that a RSE for the Eastern and Southern Africa, multiple listings and cross-border trade in securities would facilitate development of efficient and competitive capital markets in the COMESA region.[134]

The following section examines the performance of COMESA FSMs. It also compares the state of COMESA FSMs to that of ESMs and DSMs.

2.5. THE CASE FOR INVESTING IN FRONTIER STOCK MARKETS (FSMs).

The preceding section has examined the geographical distribution of FSMs and the reason these markets are gaining popularity among DSM and ESM investors. It was noted that FSMs are less correlated with DSMs and ESMs. It was also noted that most of the FSMs for the African region are located in the COMESA region. The section demonstrated that COMESA FSMs could offer IPD opportunities to DSM and ESM investors. In this section, we examine the performance of COMESA FSMs between the year 2000 and 2015. We also make a case for investing in these markets by establishing their attractiveness and growth potential. The case for investing in FSMs consists in four fundamental characteristics of this asset class, namely:[135]

a) Their greater economic growth potential than emerging markets and developed markets;
b) Wrong investor perception of these markets as regards their volatility and risk;
c) Their lower correlation with other asset classes than might be expected; and

[133] The Johannesburg Stock Exchange could serve as meaningful competitor to the regional stock exchange given the high capitalization, depth and breadth of the former. Competition between the two exchanges could go a long way in improving the quality of service delivery, regulation and spur innovation: See, Mwenda, PhD Thesis (2001), 131-134, *op.cit*

[134] Gerry N. Muuka and Kenneth K. Mwenda, 'Integration of Capital Markets in Eastern and Southern Africa, in Henry Kyambalesa and Mathurin C. Houngnikpo, *Economic Integration and Development in Africa* (1st edn, Routledge 2016)

[135] Speidell L.S. and Krohne A., 'The Case for Frontier Equity Markets' (2007) 16(3) Journal of Investing 12-22; Samamba Lennox Trivedi IV, 42-43, *op.cit*

d) Their greater economic freedom than that of most emerging markets.[136]

The following subsections briefly consider these characteristics.

2.5.1. THE ATTRACTIVENESS OF THE GREATER-THAN-EMERGING- STOCK-MARKETS GROWTH OF FRONTIER STOCK MARKETS.

This subsection examines the effect of the fast growth rate of COMESA FSMs on their capacity to attract FPI. Empirical evidence shows that FMs are growing faster than EMs including some of the DMs.[137] This positive feature makes FSMs a competitive viable investment alternative to EMs.[138]

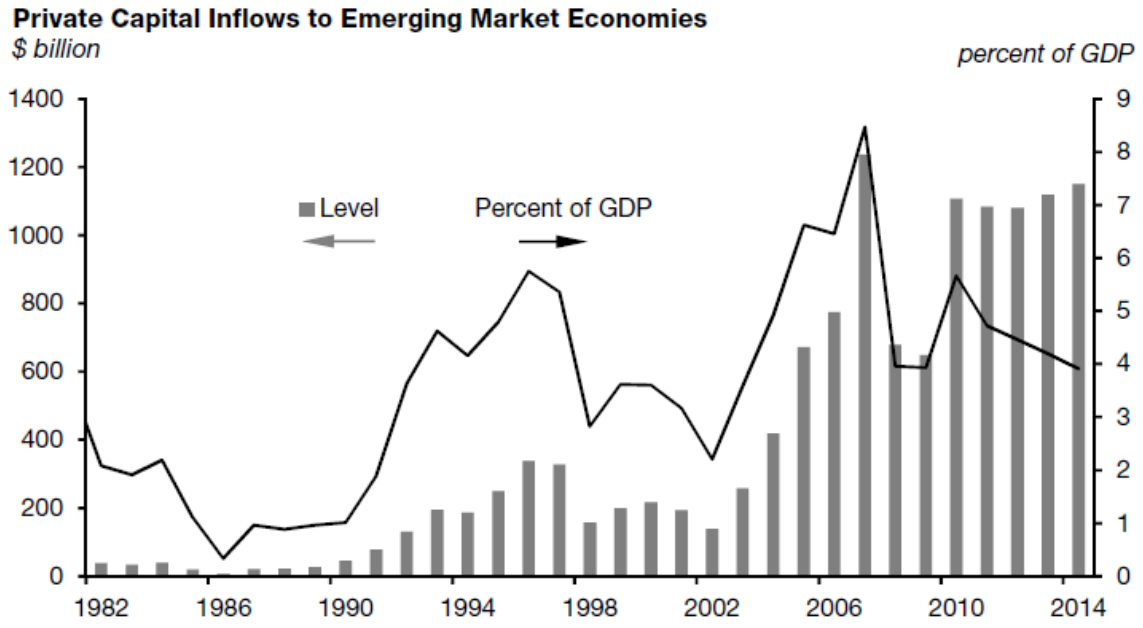
Graphs 1 and 2 below make a comparison between capital flows to EMs and FMs for the period 1980 to 2015. Graph 1 below shows levels of private capital flows to EMs between 1980 and 2015.

[136] *ibid*

[137] Dimitrijevic and Mistele observe that "frontier markets account for 71 of the 75 fastest growing economies and 19 per centum of the world's Gross Domestic Product (GDP), yet investors ignore them": Marko Dimitrijevic and Timothy Mistele, *Frontier Investor: How to Prosper in the Next Emerging Markets* (Columbia Business School Publishing 2016).

[138] Serkin (2015), *op.cit.*

Graph 1: Private Capital Flows to Emerging Markets between 1980 and 2015.



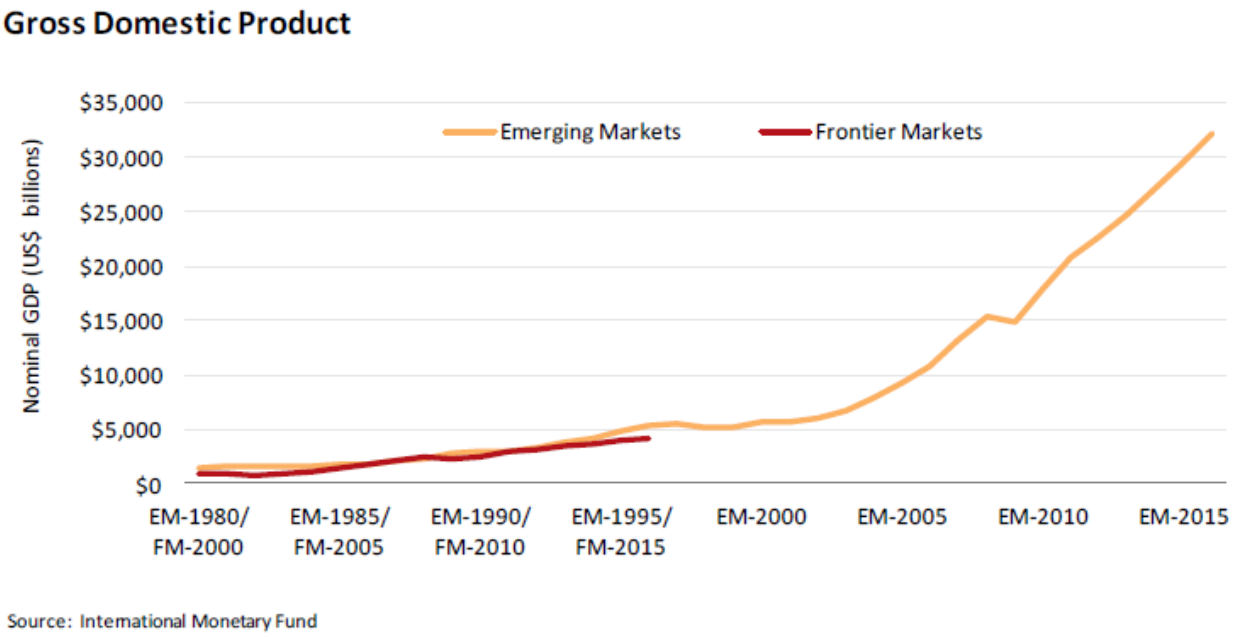
Source:Institute of International Finance, 2014.

EMs have their cradle in the 1980s. During this period, they recorded declining private capital inflows. The sharp decline in private capital flows to EMs from 2011 to 2015 resembles the decline experienced in the 1980s.[139] Between 2002 and 2008,[140] EMs posted remarkably sharp growth until the advent of the Global Financial Crisis (GFC) in 2008.

Graph 2 below shows greater Gross Domestic Product (GDP) growth in FMs between 2000 and 2015 than in EMs between 1980 and 2015.

[139] The liberalization of the economies in EMs appears to account for the sharp increase in private capital flows to EMs between 1990 and 1996. The period between 1973 and 1986 may be associated with the great economic depression which affected mostly natural resource-dependent countries most of which are emerging economies.
[140] The year 2008 being the onset of the Global Financial Crisis (the GFC).

Graph 2: GDP Growth in Frontier Markets between 2000 and 2015 in comparison with Emerging Market Growth between 1980 and 2015.



Source: International Monetary Fund

The steady GDP growth in FMs between 2000 and 2015 resembles the accelerated growth recorded by EMs between 1980 and 1995. The stead GDP growth in COMESA markets is estimated to go beyond the year 2020.[141] As Graph 2 shows, around 2008, EMs posted declining GDP growth in sharp contrast to the steady rise in FMs over the same period.

Empirical evidence shows that countries with larger GDP, high growth rates, a good investment climate and modern infrastructure such as internet can successfully attract FPI.[142] The FPI inflows can in turn, positively impact economic growth in the recipient country.[143] The author argues that the steady GDP growth in FMs is likely attract informed investors. The author also argues that

[141] Africa Development Bank, 'African Economic Outlook 2020' (2020); International Monetary Fund, *Regional Economic Outlook—Sub-Saharan Africa (International* Monetary Fund 2020).
[142] Roberto Meurer, 'Portfolio Investment Flows, GDP and Investment in Brazil' (2016) 8(12) International Journal of Economics and Finance 1-9
[143] *ibid*

international publicity of the growth potential of FMs is likely to increase foreign demand for listed securities in the region.[144]

The following subsection examines the effect of the lower risk and volatility in FSMs on their capacity to attract FPI.

2.5.2. WRONG RISK-PERCEPTION OF FRONTIER MARKETS AS A RUSE TO INVESTORS.

The preceding subsection has examined the effect of the fast growth rate of FSMs on their capacity to attract FPI. It was noted that between 2000 and 2015, FSMs grew faster than ESMs with a projection beyond the year 2020. The subsection demonstrated that the steady GDP growth in COMESA FSMs is likely to enhance their capacity to attract FPI. In this subsection, we turn to examine the effect of the lower risk and volatility in FSMs on their capacity to attract FPI.

Many investors shun FMs because they believe that these small and relatively illiquid markets are overly risky and volatile to invest into.[145] However, as indicated in Graphs 3 and 4 below, volatility has been much lower in FMs than in DMs and EMs.[146] Despite this positive feature, this asset class

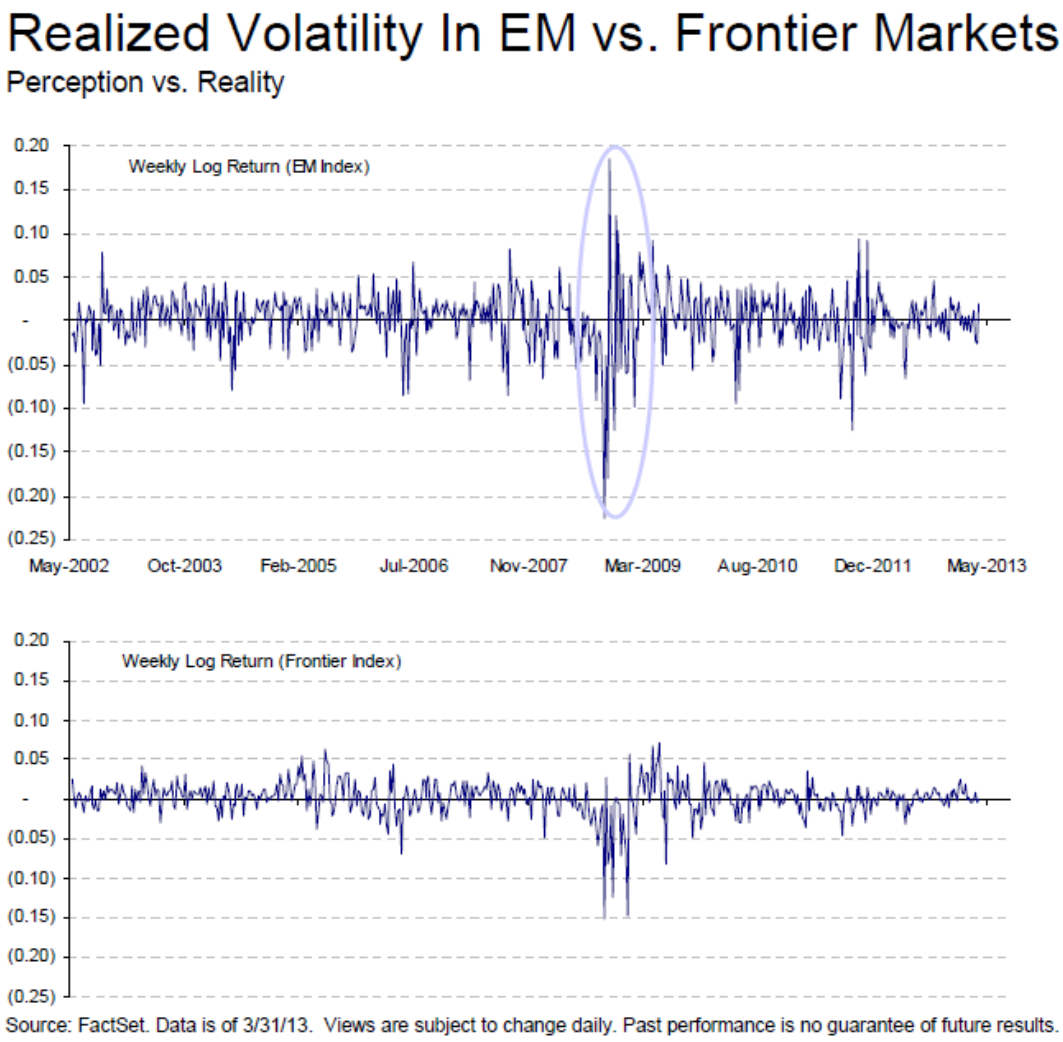
[144] See Subsection 2.3.5 of this Chapter for a qualification on this argument

[145] International Monetary Fund, Changing Times for Frontier Markets: A Perspective from Portfolio Investment Flows and Financial Integration' (2016), International Monetary Fund Working Paper WP/16/177; Oey (2014), *op.cit.*

[146] Empirical evidence shows that despite promising high returns, emerging markets are highly risky: See, Kehl J.R., 'Emerging Markets in Africa' (2007) 1(1) African Journal of Political Science and International Relations 1; Kiertisa Toh, 'Emerging Growth Economies in Subs-Sahara Africa' (2016) 61(2) the American Economist 229; Duc K. Nguyen and Sabri Boubaker, *the Dynamics of Emerging Markets: Empirical Assessments and Implications* (Springer 2010); Mohamed E.H. Arouri, Duc K. Nguyen and Sabri Boubaker (eds), *Emerging Markets and the Global Economy: a Handbook* (1st edn, Academic Press 2013)

is still at the far edge of the international investment universe.[147] Graphs 3 and 4 below depict a comparison between realized volatility in FMs and EMs for the period 2002 and 2013.[148]

Graph 3 and Graph 4: Realized Volatility in Emerging Markets in Comparison to Volatility in Frontier Markets.



[147] Oey P., 'Frontier Markets Begin to Emerge' , *MORNINGSTAR* (London, 15th July 2015) at 1.

[148] The distance that the wave swings either upwards or downwards, from the normal—the straight horizontal line—represents the intensity of volatility in the market at any given point in time. Thus, as can be gathered from the upper graph—particularly the waves in the oval enclosure—the volatility of emerging markets was much higher than that of frontier markets for the same period. This trend is true for almost all points falling both to the left and right side of the oval-enclosed waves in comparison to those falling to the left and right side of the middle waves in the frontier index.

The author argues that, vigorous international publicity of the [real] riskiness and volatility in FMs is likely to attract EM and DM investors as they seek high long-term returns and IPD.[149] The following subsection examines the effect of FSMs' lower correlation with other markets on their capacity to attract FPI.

2.5.3. LOWER CORRELATION OF FRONTIER MARKETS WITH OTHER MARKETS AS AN INCENTIVE TO INVESTORS.

The preceding subsection has examined the effect of the low risk and volatility in FSMs on the capacity of these markets to attract FPI. It was noted that, contrary to popular perception, FSMs are less volatile and risky than ESMs. In this subsection, we examine the effect of FSMs' lower correlation with other markets on their capacity to attract FPI**.**

Empirical Evidence on low correlation of Frontier Stock Markets with other Markets.

An empirical study by Speidell and Krohne, posts low correlation between FSMs, and ESMs and DSMs.[150] Jayasuriya and Shambora investigate the benefits of diversifying portfolios across market classifications, considering optimal portfolios of DSMs, ESMs and FSMs. The results of the study show improved portfolio risk and returns when investors diversify their portfolios into six FSMs.[151] The author argues here that international publicity of the IPD capacity of FSMs, is likely to attract ESM and DSM investors to COMESA FSMs.

[149] *ibid*
[150] L Speidell and A Kronhne, 'The Case for Frontier Equity Markets' (2007) 16(3) Journal of Investing (2007) 12-22
[151] S Jayasuriya, W Shambora and JJ Yang, 'Oops We Should Have Diversified!' (2009) 19 Journal of Applied Financial Economics 1779-1785

2.5.3.1. Constraints relating to the narrow range of Listed Financial Assets.

Given the central thesis of this study, this subsection argues that the efficacy of the legal, regulatory and institutional framework in facilitating IPD could be enhanced by promoting supply of a variety of financial assets to securities exchanges.[152] The author argues that foreign demand for securities could be enhanced by increasing opportunities for IPD in COMESA FSMs.[153]

Despite the low correlation of COMESA FSMs with ESMs and DSMs, it is observed that most FSMs concentrate on equity securities.[154] Debt securities, public debt securities and other types of listable securities are often side-lined.[155] The author argues that the bias towards equities only serves as constraint on the growth of the debt securities segment of COMESA securities markets. The author also argues that the exclusion of other types of securities from COMESA FSMs is likely to make it difficult for investors to sufficiently hedge against financial market risk.[156] This view is rationalized by the position that effective IPD partly depends on product diversification.[157] The author argues further that in the absence of product diversification, the low correlation of COMESA FSMs with other markets is likely to have limited influence in enhancing the efficacy

[152] Supply of a variety of financial assets could consist in supply of other types of securities than equities.

[153] The African Development Bank observes that "the limited number and type of financial instruments which are issued on capital markets in Southern Africa makes it extremely difficult to hedge against financial market risk. The limited number of financial assets is one of the causes of the poor state of capital markets in the region: African Development Bank, 'Intra-SADC Cross-border Investment' (2003) *Regional Integration Brief*, at 4.

[154] Sunil K.Bundoo, 'Stock Market Development and Integration in SADC (Southern Africa Development Community)' (2017) 7(1) Review of Development Finance 64-72

[155] *ibid*; See also, Samamba Lennox Trivedi, *Transnational Investment and Trade in Securities in the COMESA Region: Legal, Regulatory and Institutional Constraints* (Vol. I, LAP LAMBERT Academic Publishing) 75 Hereinafter, 'Samamba Lennox Trivedi, BOOK I, Vol. I').

[156] Adequate product diversification of a stock market generally increases investor participation: See, Andrew M. Chisholm, *an Introduction to International Capital Markets: Products, Strategies, Participants* (Wiley 2009)

[157] A common path towards diversification is to reduce risk or volatility by investing in a variety of assets: See, Roger Wohlner, 'Here is why diversification matters: Keeping investments smartly diversified yields better (and safer) results' (2013) https://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/2013/05/31/heres-why-diversification-matters accessed 11 December 2018. Empirical evidence also shows that investors do tilt their cross-border holdings towards countries which offer better diversification opportunities: Nicolas Coeurdacier and Stephane Guibaud, 'International Portfolio Diversification is better than you think' (2010) http://econ.sciences po.fr/sites/default/files/file/ncoeurdacier/correlationpuzzle_jimf_revision_july.pdf accessed 11 December 2018

of the legal, regulatory and institutional framework in facilitating IPD. This view is rationalized by the position that hedging against financial market risk depends not only on the correlation of a certain market or asset class with other markets or asset classes but also the range or variety of financial assets which have been listed as tradable securities.[158] Thus, the author argues that unless issuers and stock markets in the region are encouraged to issue and list other types of securities than equities, the low correlation of these markets with other markets is likely to have limited success in facilitating IPD. Related to the limited supply of financial instruments is low investor financial education since the latter also negatively affects the quality of portfolio diversification.[159] Given empirical evidence on low financial education in Zambia and many other COMESA states,[160] the author also argues here that the IPD opportunities offered by COMESA FSMs are likely to have limited success in attracting investors for IPD. Consequently, as a possible way of enhancing the efficacy of the legal, regulatory and institutional framework in facilitating IPD, it is highly recommended that policy makers and regulators in the COMESA Region provide incentives to issuers and securities exchanges for the listing of other types of listable securities.[161] And, as observed above, such efforts should be complemented by vigorous investor financial education.

The following subsection examines the effect of the higher economic freedom in FMs on their capacity to attract FPI.

[158] See, Jayeola D., et al, 'Effect of diversification of assets in optimizing risk of portfolios' (2017) 13(4) Malaysian Journal of Fundamental and Applied Sciences 1; See also, Samamba Lennox Trivedi, BOOK I, Vol. I, at 62-63, *op.cit*

[159] See, Abreu M. and Mendes V., 'Financial Literacy and Portfolio Diversification' (2010) 10(5) Quantitative Finance 515-528.

[160] See, Fanta A., 'Financial Literacy and Inclusion in the SADC Region: Evidence using the FinScope Surveys' (2016); Lapukeni Angella-Faith, 'Financial Inclusion, ICBT and the Role of ICT in COMESA' (2015); See, Chapter 7 of the thesis for further evidence on low investor financial education in Zambia.

[161] Such as debt securities, public debt securities and a host of other types of securities introduced by the Zambian Securities Act 2016: *ibid*

2.5.4. THE HIGHER-THAN-EMERGING MARKETS ECONOMIC FREEDOM IN AFRICAN FRONTIER MARKETS AS AN INCENTIVE TO INVESTORS.

The preceding subsection has examined the effect of limited financial assets in COMESA FSMs on the efficacy of the low correlation of FSMs with other markets in facilitating IPD. It was noted that issuers in the region concentrate on equities at the expense of debt securities and other types of listable securities. The subsection demonstrated that the efficacy of COMESA FSMs' low correlation with other markets in facilitating IPD could be enhanced by issuing and listing a wide range of financial assets. In this subsection, we examine the effect of the higher economic freedom in COMESA FSMs on the capacity of these markets to attract FPI.

2.5.4.1. A DEFINITION OF ECONOMIC FREEDOM.

There is no universally accepted definition of economic freedom. This may be attributed to the broadness of the terms, 'economy' and 'freedom'. However, Hall and Robert define economic freedom as 'freedom of an individual to choose for themselves and engage in voluntary transactions as long as they do not harm other persons or their property'.[162] For purposes of this thesis, economic freedom means freedom to legally acquire and dispose of securities and externalize proceeds of sale. The Heritage Foundation Economic Freedom Index 2016 reveals that most African FMs have better economic freedom than most EMs.[163]

[162] Hall Joshua and Robert Lawson, *'Economic Freedom of the World: Annual Report 2013'* (2013) 1.
[163] See, Table 3 below. This evidence is contrary to popular perception that FMs have lesser economic freedom.

Table 3: Heritage Foundation Economic Freedom Index 2016: Economic Freedom in Frontier Markets of Africa vs Economic Freedom in Emerging Markets in 2016.

EMERGING MARKETS			FRONTIER MARKETS		
COUNTRY	**SCORE**	**CHANGE**	**COUNTRY**	**SCORE**	**CHANGE**
Russia	50.6	-1.5	**Zambia**	58.8	+0.1
China	52.0	-0.7	**Kenya**	57.5	+1.9
Hong Kong	88.6	-1.0	**Mauritius**	74.7	-1.7
India	56.2	1.6	**Egypt**	56.0	+0.8
South Africa	61.9	-0.7	**Botswana**	71.1	+1.3
Brazil	56.5	-0.1	**Tanzania**	58.5	+1.0
Chile	77.7	-0.8	**Namibia**	61.9	+2.3
Greece	53.2	-0.8	**Ghana**	63.0	0.0
Venezuela	33.7	-0.6	**Nigeria**	57.5	+1.9
Poland	69.3	+0.7	**Cote d' Ivoire**	60.0	+1.5
Turkey	62.1	-1.1	**Morocco**	61.3	+1.2
Mexico	65.2	-1.2	**Tunisia**	57.6	-0.1
Hungary	66.0	-0.8			

Source: Heritage Foundation 2016

The lowest scorer in the FM category Egypt (56.0) actually scored higher than Russia (50.6), China (52.0), Greece (53.2) and Venezuela (33.7) from the EM category. The second lowest scorers in the FM category, Kenya (57.5) and Nigeria (57.5) outdid India (56.2) and Brazil (56.5) in the EM

category. On the upper side of the FM category, the highest scorer Mauritius (74.7) and second highest Botswana (71.1) were only outdone by highest EM scorer Hong Kong (88.6) and second highest Chile (77.7). South Africa (EM) and Namibia (FM) scored 61.9 each.

The following subsection introduces empirical evidence on the relationship between high economic freedom and the capacity of a securities market to attract FPI.

2.5.4.2. RELATIONSHIP BETWEEN HIGH ECONOMIC FREEDOM AND INTERNATIONAL INVESTMENT ALLOCATION.

This subsection sets the legal arguments made in this subsection and other parts of the thesis in socio-economic context. This is achieved by introducing empirical evidence on the relationship between higher economic freedom and the capacity of a securities market to attract FPI.

Empirical evidence shows that there is a positive relationship between economic freedom and international capital allocation.[164] Higher economic freedom index implies higher capacity of a market to attract FPI.[165] Thus, return-seeking international investors tend to shift their capital allocations in response to changes in the economic freedom of countries.[166] Consequently, the author argues that aggressive international publicity of the impressive economic freedom in FSMs is likely to increase FPI flows to the region.[167]

[164] M Singhania and N Saini, 'Determinants of FPI in Developed and Developing Countries' (2017) 19(1) Global Business Review 187-213
[165] *ibid*
[166] A Rosenber, E Capelli and N Walsh, 'Economic Freedom and International Investment Allocation' (2010) Washington University in St Louis Spring Papers, No. 167, 1-3.
[167] See, qualification made in subsection 2.3.5 of this Chapter.

The following subsection discusses the determinants of real or effective demand for listed securities.

2.5.5. DETERMINATS OF REAL DEMAND FOR LISTED SECURITIES.

Real demand for financial assets is a function of many factors.[168] Thus, the argument that international publicity of the rosier state of COMESA FSMs is likely to increase demand for listed securities and increase cross-border trade needs qualifying. Some of the factors that determine real demand for listed securities are as follows:

(i) availability of securities through listings on stock exchanges;[169]

(ii) market and securities accessibility;[170]

(iii) investor access to information relating to issuers and their securities—market efficiency;[171]

(iv) investor financial education and literacy;[172]

(v) investor's risk behaviour and experience;[173]

(vi) wealth or savings of an investor.[174]

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[168] See, Floyd R.L., 'The Demand for Financial Assets: A Portfolio Approach' (PhD Thesis, Iowa State University 1972).

[169] Wilkinson J.K., 'Investability and its implications for the returns of Emerging Market Securities' (2004) Texas Tech University.

[170] *ibid*

[171] I Listiarti and T Suryani, 'Determinant factors of investors' behaviour in investment decision in Indonesian capital markets' (2014) 17(1) Journal of Economics, Business, and Accountancy Ventura 45 – 54.

[172] S Khan and A Rehman, 'Financial Literacy, Behavioural Biases and Investor's Portfolio Diversification: Empirical Study of an Emerging Stock Market' (2017) 2(2) Journal Finance and Economics Research 145-164

[173] Nawrocki, David N and Viole, Fred, 'Behavioural Finance in financial market theory, utility theory, portfolio theory and the Necessary Statistics: A Review' (2014) Journal of Experimental and Behavioural Finance1-23

[174] *ibid.* See also, empirical evidence provided in Chapter 6 of the thesis on the relationship between investor financial education, literacy and stock market participation.

Thus, whenever an argument is made in thesis that 'international publicity of the rosier state of COMESA FSMs is likely to increase demand for listed securities', the argument should be understood as implying that international publicity is but one of the many other factors that influence investment choices of investors.[175] The author argues that unless the improvable[176] determinants are improved, international publicity of the attractiveness of COMESA FSMs is likely to have limited success in increasing foreign demand for listed securities.

The following section examines the breadth and depth of COMESA FSMs.

2.6. THE BREADTH AND DEPTH OF COMESA AND SADC STOCK MARKETS.

The preceding section has examined the capacity of COMESA FSMs to attract FPI. It was noted that COMESA FSMs have the capacity to attract FPI. The section demonstrated that international publicity of the rosier state and growth potential of COMESA FSMs is likely to attract ESM and DSMs investors for IPD. In this section, we introduce empirical evidence on the breadth and depth of COMESA FSMs. Such an undertaking serves to establish whether or not the capacity of these markets to attract FPI, has facilitated growth of breadth and depth (liquidity).[177]

COMESA stock markets are generally characterized by few listings, low capitalization and low trading volumes.[178] Elsewhere, the poor state of COMESA stock markets has been attributed to

[175] Publicity could take the form of a typical securities advertisement, or road shows, or radio or television programmes, et cetera.
[176] Policy makers and regulators can improve about any other determinant than risk aversive or seeking behaviour and risk experience of investors.
[177] Also, the empirical evidence supplied serves to put the legal arguments made in this Chapter and other parts of the thesis in proper socio-economic context.
[178] See, Table 4 below; See also, Bruce Hearns, Jenifer Piesse and Roger Strange, 'Market Liquidity and Stock Size Premia in Emerging Financial Markets' (2010) 3(1) Journal of Macroeconomics and Finance in Emerging Markets 1; Kunofiwa Tsaurai, 'What are the Determinants of Stock Market Development in Emerging Market? (2018) 22(2) Academy of Accounting and Financial Studies Journal 1528.

the poor state of listed companies, the political economy driving the formation of exchanges, and low demand for securities.[179] Therefore, the state of COMESA securities markets could be improved by identifying and remedying constraints on real demand for securities. As a possible way of increasing economic activity in stock markets in the COMESA Region, the introduction of a RSE has been proposed in Chapter 3. That chapter also proposes that cross-listing among DSEs, and between the DSEs and the RSE be promoted. As a possible way of improving performance of listed entities, proposals have been made in Chapter 4 for the introduction of a credible credit rating system for issuers and their securities.

Table 4:The Breadth and Depth of COMESA and SADC Stock Exchanges as at December 2012.

Stock Market	Market Capitalization USD Millions		Market Capitalization % of GDP		Market Liquidity Value of Shares Traded % of GDP		No. of Domestic Listed Companies	
	2005	2012	2005	2012	2005	2012	2005	2012
Egypt Exchange	79 672	58 008	88.8	22.5	28.3	7.8	744	234
Rwanda Stock Exchange	---	625	---	---	---	---	---	---
Dar Es Salaam Stock Exchange	588	1 803	4.2	6.4	0.1	0.1	6	17
Uganda Securities Exchange	103	7 294	1.1	36.7	0	0.1	5	10
Botswana Stock Exchange	2 437	4 588	23.8	31.8	0.4	0.8	18	24
Malawi Stock Exchange	230	754	8.4	17.7	0.3	0.4	9	14
Stock Exchange of Mauritius	2 617	7 093	41.7	67.6	2.4	2.8	42	87

[179] P Honoham and B Thorsten, *Making Finance Work for Africa* (The World Bank 2007) 53-54

Namibian Stock Exchange	415	1 305	5.7	10	0.1	0.2	13	7
Johannesburg Stock Exchange	565 404	612 308	228.9	159.3	81.2	81.1	388	348
Swaziland Stock Exchange	197	--	7.6	---	0	---	6	5
Lusaka Stock Exchange	989	3 004	13.8	14.5	0.2	0.9	15	20
Zimbabwe Stock Exchange	2 402	11 816	41.7	109.3	5.8	14.9	79	76

Source: World Development Indicators. <http://wdi.worldbank.org/table/5.4 > accessed 24 March 2016

The performance of COMESA and SADC stock market between 2005 and 2012 is quite impressive. Most of the exchanges in Table 4 above recorded an increase in market capitalization and number of listed companies. However, liquidity remains inadequate. There are however, two exceptions, namely Zambia and Zimbabwe which recorded quite significant increases in liquidity. Generally, the author observes that despite the steady growth in capitalization, the breadth and depth (liquidity) of these markets remain(s) inadequate. The breadth and depth of a stock market are functions of investor participation.[180] Thus, the lack of breadth and depth could be attributed to the low investor activity in COMESA FSMs. It is therefore, submitted that the capacity of COMESA FSMs to attract FPI has not translated into high investor participation.

As a possible way of overcoming this constraint, it is proposed that international publicity of the rosier state of COMESA FSMs be embarked on. And as noted above, such a measure should be complemented by measures aimed at improving other factors that determine real demand for listed securities.[181]

[180] See, Wuyts G., 'Stock Market Liquidity: Determinants and Implications' (2007) 2 Review of Business and Economic Literature 279-316; Lybek T. and Sarr A., 'Measuring Liquidity in Financial Markets' (2003) International Monetary Fund Working Paper, WP/02/232.

[181] See, Subsection 2.3.5 of this Chapter for other determinants of real demand for listed securities

The following subsection discusses possible ways of enhancing liquidity of COMESA FSMs.

2.6.1. CONSTRAINT RELATING TO LOW LIQUIDITY IN COMESA STOCK MARKETS.

The preceding subsection has examined whether or not the capacity of COMESA FSMs to attract FPI has increased investor participation. It was noted that the capacity of these markets to attract FPI has not translated into high investor participation. In this subsection, we examine possible ways of enhancing liquidity of COMESA FSMs.

Clark observes that although the rate of return on investment in African securities markets is higher than the rates obtaining in other markets, African markets have not attracted the level of FPI that is required to help them emerge and develop.[182] Also, SADC has observed that so far, inadequate liquidity and low capitalization are the major obstacles to investment in securities in the region.[183] Given the central thesis of this study, this subsection argues that meaningful FPI flows to the region could be attracted by developing liquid stock markets. The subsection also argues that high demand and supply of securities to securities exchanges is likely to increase liquidity and cross-border trade in securities.

The following subsection gives some characteristics of a liquid stock market.

[182] Robert A. Clark, *Africa's Emerging Securities Markets: Developments in Financial Infrastructure* (Greenwood Publishing Group 1998)
[183] Southern Africa Development Community, *Regional Indicative Strategic Development Plan 2005-2020*, at 80 (SADC Strategic Development Plan 2005-2020) http://www.sadc.int/files/5713/5292/Regional_Indicative_Strategic_Plan.pdf accessed 25 January 2020.

2.6.1.1. SOME CHARACTERISTICS OF A LIQUID STOCK MARKET.

According to Mensah, there are five (5) characteristics of a liquid stock market.[184] These are tightness, immediacy, depth, breadth, and resiliency. Tightness refers to low transaction costs.[185] It could also refer to the difference between the buy and sell price, the bid-ask spread—the difference between the current bid and current ask price of a given security—including the cost implicit in a securities transaction.[186] Immediacy means speed at which orders can be executed and settled.[187] Depth refers to the number of actual or potential orders which are above or below the current trading price of a security.[188] Breadth is the number and volume of orders.[189] Resiliency refers to the ability of a stock market to receive orders that quickly flow to cancel out the imbalances in the orders.[190] Besides these characteristics of stock market liquidity, there are also dimension of stock market liquidity. An understanding of the characteristics and dimensions of liquidity will put the 'argument(s) that certain incentives or constraints are likely to increase or reduce stock market liquidity', in proper perspective. Thus, there are four dimensions to stock market liquidity namely:[191]

i) Time dimension (the time it takes to conclude transactions and settle trades);

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[184] Sam Mensah, 'Strategies for Improving Liquidity: Capital Market Development in Africa': Selected Topics—A Training Manual for Policymakers, Regulators and Market Operators' (2004c) 4-7; Mensah S. and Moss T., *African Emerging Markets: Contemporary Issues* (Ghana Capital Markets Forum 2004)

[185] Lutwama S.J., 'Strategies of Improving Liquidity in Uganda's Capital Markets Industry' (2006) SSRN Electronic Journal, DOI: 10.2139/ssrn.1499634.

[186] *ibid*

[187] *ibid*

[188] *ibid*

[189] *ibid*

[190] *ibid*

[191] Bruce Hearns and Jenifer Piesse, 'Pricing Southern African Shares in the Presence of Illiquidity: a Capital Asset Model augmented by Size and Liquidity Premium' (2000) SSRN Electronic Journal; Bruce Hearns, Jenifer Piesse and Roger Strange, 'Market Liquidity and Stock Market Premia in Emerging Financial Markets' (2009) 83(1) South African Journal of Economics 1.

ii) The cost dimension (transaction costs of a securities deal);

iii) The volume dimension (the total number of orders (actual or potential) and trades); and

iv) The price-effect dimension (that is the effect of a trade on the price of a security).

The following subsection suggests possible ways of enhancing liquidity of securities markets in the COMESA Region.

2.6.1.2. STRATEGIES FOR IMPROVING LIQUIDITY IN COMESA STOCK MARKETS.

The preceding subsection has set out the characteristics of a liquid securities market. In this subsection, we examine possible ways of improving liquidity of COMESA securities markets. The International Organization for Securities and Exchange Commissions (IOSCO) observes:

> At a macro-level, liquid stock markets ensure efficient allocation of capital, hence lowering the cost of capital. At a micro-level, liquid stock markets facilitate access to a wide range of investors and a large pool of diverse financial instruments.[192]

Thus, strategies for improving liquidity of securities markets fall into two broad categories, namely:

i) Supply-side influencing interventions; and

ii) Demand-side influencing interventions.[193]

These interventions are considered in turn, below.

[192] International Organization for Securities and Exchange Commissions, 'Factors Affecting Liquidity in Emerging Markets' (2007) at 6, 23 (IOSCO (2007))
[193] Joseph Lutwama (2006) 5, *op cit*

2.6.1.2.1. Supply-Side Interventions.

Supply side interventions consist in measures that are aimed at increasing the number of companies and securities that could be listed on a stock exchange.[194]

A. Increasing the number of Listed Issuers as a means of increasing Stock Market Liquidity.

The number of listed issuers may be increased by the following interventions, namely:

i) Relaxing listing requirements for domestic and foreign SMEs which may not qualify for listing on current conditions;
ii) Providing attractive tax incentives for listed issuers;
iii) Providing attractive tax incentives for foreign companies; and
iv) Introducing an international passport to multi-jurisdiction cross-listing/disclosure.

B. Increasing the Number of Listed Securities as a Means of Stimulating Growth in Stock Market Liquidity.

The number of listed securities is a function of the number of listed issuers.[195] It is also a function of the number of financial instruments recognized as listable securities.[196] The role of the number of listed issuers in increasing stock market liquidity has been discussed above. In this sub-section, we examine the definition of 'securities' as a means of increasing number of listed securities.

[194] *ibid*
[195] See, Samamba Lennox Trivedi IV, at 65, *op.cit*
[196] *ibid*

Merits relating to the Broad Definition of 'Securities' under the Zambian Securities Act 2016

The Securities Act of 1993 has been repealed and replaced with the Securities Act No. 41 of 2016.[197] The Securities Act of 2016 defines 'securities' in much broader[198] terms than the repealed Act. Thus, 'securities' means shares, debt securities, public debt securities, derivatives, any rights, options or derivatives in respect of any such shares, and debt securities or public debt securities.[199] The said term also means any right under a contract to secure a profit or avoid a loss by reference to fluctuations in the value or price of any shares, debt securities or public debt securities or group of such securities.[200] In this sense, securities includes a right under a contract to secure a profit or avoid a loss by reference to fluctuation in an index of shares, debt securities or public debt securities.[201] Further, 'securities' means commercial paper, depository and warehouse receipts, unit trusts and interests under collective investment schemes.[202] 'Securities' also imports other instruments which are commonly known as securities,[203] or prescribed as such by rules of the Commission.[204]

[197] See Zambian Securities Act 2016, s 222(1)
[198] Securities enumerated in paragraphs (d)-(J) are new inclusions.
[199] See, Zambian Securities Act 2016, s 2 (Definition of the term).
[200] *ibid*
[201] *ibid*
[202] *ibid*
[203] Equity shares have been left out given the statutory definitional distinction between 'share' and 'equity share'. Since commercial practice treats equity shares as shares, they may well come in through this window of hope. However, their effective inclusion would need, it would appear, judicial recognition and sanction: see *Goodwin v Robarts & Others* (1875) Exchequer Chambers 337
[204] See, Zambian Securities Act 2016, s 2 (Definition of the term).

The author argues that such a broad definition of 'securities' in the Securities Act 2016 is generally[205] likely to increase the supply of securities to securities exchanges. The author also argues that this regime is also likely to increase liquidity of securities exchanges.[206]

The following subsection examines claw-backs at the broad definition of securities.

Constraints relating to the Narrow Class Securities that could be listed on Domestic Securities Exchanges.

The preceding subsection has established that the broad definition of 'securities' in the Securities Act 2016 is likely to increase supply of securities to securities exchanges. In this subsection, we examine some clawbacks on the broad definition of 'securities' in the Zambian Securities Act 2016.[207] The subsection also makes proposals for remedial legislative reform.

There is a caveat on the class of securities that could be admitted to official listing on DSEs in Zambia despite the large pool of recognized securities.[208] 'Listed securities' is defined as "securities of a listed company."[209] 'Listed company' is defined as "a company incorporated under the Zambian Companies Acts."[210] Consequently, it appears that only domestic companies can list on DSEs. 'Issuer' is defined as "a person or other entity that issues, has issued or proposes to issue securities to the public in accordance with the Act."[211] At general law, a person could be a natural

[205] The word 'generally' has been used to connote the constraint that is inherent in the definition of 'listed securities' in section 2 of the Zambian Securities Act 2016. The definition seems to restrict eligibility for listing to securities issued by domestic company issuers to the exclusion of those of both domestic and foreign cooperatives, other body corporates, trusts, associations, and foreign companies.
[206] The latter argument is made with proviso that the increased supply of securities is met with a corresponding increase in demand for those securities: See, Peter L. Bernstein, 'Liquidity, Stock Markets and Market Makers' (1987) 16(2) Financial Management 54-62; IOSCO (2007), at 6, 23, *op.cit*
[207] The Zambian Securities Act 2016
[208] 'Recognized securities' refers to securities which are generally recognized as securities by Securities Acts but excluded from listing on stock exchanges by claw-backs in the very Acts of Parliament.
[209] Zambian Securities Act 2016, s 2
[210] *ibid;* Zambian Companies Act 2017, s 3 (definition of 'company').
[211] Zambian Securities Act 2016, s 2

person or a juristic person. Thus, both domestic and foreign companies, cooperatives, other bodies corporate, trusts and associations qualify as issuers. In this context, the author argues that by restricting the definition of 'listed securities' to securities of domestic companies, legislators have effectively excluded securities of other listable entities than companies from listing.[212] As a possible solution to this shortcoming in the legal and regulatory framework, the following amendment is proposed:

'Listed securities' means 'securities of a listed issuer'.

Such a broad definition is likely to claw in securities of both domestic and foreign companies, cooperatives, collective investment schemes, local authorities, other bodies corporate, trusts and associations.[213] That way, the supply of securities to DSEs and the RSE is likely to increase.[214] With the increase in the number of listed securities—supply—the liquidity of the stock markets is likely to increase.[215]

The definitions of 'securities' in the United States of America, and in England are slightly broader than the one given in Zambia. Although this is the case for all COMESA countries, the definitions of 'securities' in COMESA countries is broad enough to facilitate supply of a wide range of financial assets to securities markets.[216] In Zambia, 'securities' is broadly defined as 'any other instrument commonly known as a security or which is prescribed as such by the rules of the

[212] Other *listable entities* such as foreign companies, and other foreign and domestic bodies corporate, trusts, cooperative societies and associations: Samamba Lennox Trivedi V, 66, 73, *op.cit*; Samamba Lennox Trivedi IV, *op.cit*

[213] *ibid*

[214] *ibid*

[215] This argument is made with proviso that there is a corresponding increase in demand for the listed securities*: ibid*

[216] See also the definition of securities in the Zimbabwean Securities Act (2004), s 2; section 2 definition of securities in the Kenyan Capital Markets Act (2000), s 2; *cf* the definition of securities in the United States Securities Act 1933 and the English Financial Markets Services Act 2000.

Commission'.[217] Zimbabwe and Kenya have similar provisions.[218] It is therefore submitted that despite the narrower scope of the definition of securities in most COMESA jurisdictions, the class of recognized securities may be enlarged by the competent authority in response to commercial demands. Any instruments that are not included in the prescriptive rules of the SEC but are commonly known as or regarded as securities in the commercial world would need judicial recognition.[219] Failing judicial recognition, such instruments would not be admitted to official listing on the LuSE.

The following subsection discusses additional ways of increasing supply of securities to securities exchanges in the region.

Further proposals for increasing supply of securities to Domestic Stock Exchanges and the Regional Stock Exchange.

The preceding subsection has examined legal constraints on the supply of securities to DSEs. It was noted that only companies could list their securities on Zambian securities markets. The subsection demonstrated that supply of securities to DSEs could be increased by allowing other styles of issuer than companies to list as well. In this subsection, we make further proposals for increasing supply of securities to DSEs and the RSE. Such proposals would not only increase liquidity of DSEs but also ensure success of the proposed RSE.

[217] See, Zambian Securities Act 2016, s 2(k) (definition of 'securities').
[218] In Zimbabwe, 'securities' includes 'any other instrument declared by the Minister to be a security for the purposes of the Act: Zimbabwean Securities Act 2004, s 2(f); similarly, in Kenya, 'securities' includes 'any other instruments prescribed by the Authority to be securities for purposes of the Act': Kenyan Capital Markets Act 2000, s 2(m)

[219] See, *Goodwin vs Robarts & Others* (1875) Exch 337 (Exchequer), at 346.

Liquidity of DSEs and the RSE may be boosted by increasing supply of a variety of securities to these securities exchanges. This could be achieved by defining 'securities' further as any financial instrument which is defined as a security under the laws, regulations and rules of any COMESA or SADC member state, or financial instruments which are commonly known as securities or prescribed as securities by the rules of the Commission of any COMESA or SADC member state.[220] The author argues that if such a provision were complemented by an international passport, cross-border cross-listings are likely to increase in the region. It is also argued that the high supply of securities which such a combination of measures is likely to yield is likely to stimulate growth in liquidity provided there is a corresponding increase in demand for the supplied securities.

The following subsection examines possible ways of increasing demand for the securities which would be supplied to DSEs and the RSE.

2.6.1.2.2. Demand-Side Interventions.

Preceding subsections have examined strategies for increasing the supply of different types of securities to DSEs and the RSE. In this subsection, we examine possible ways of increasing demand for securities that would be supplied to securities exchanges. A balance between supply and demand for listed securities sustains cross-border trade in securities.[221] It also serves to increase liquidity and reduce price volatility in securities exchanges.[222]

[220] Domestic Securities and Exchange Commission, or the Securities and Exchange Commission of a COMESA or SADC member state, or the Regional Securities and Exchange Commission, from time to time.
[221] *ibid*
[222] See, Chapter 3, Section 3.1

Demand-side interventions for liquidity enhancement consist in measures that increase the number of participating investors.[223] In this regard, the liquidity of a market is likely to increase if a large pool of investors is participating on the stock exchange.[224] Mensah explains that in a large market no single participant can influence the price of securities by their own actions.[225] This is why larger stock markets are more likely to reflect fundamentals than smaller stock markets.[226]

The following are possible ways of increasing demand for listed securities, namely:[227]

i) Educating the general public about capital markets so that they can actively participate in them by investing;
ii) Increasing the institutional investor base; and
iii) Fostering regional integration of stock markets through cross-listings and promoting regional cross-border trade in securities.[228]

The following subsection explores further ways of growing the investor base of securities markets.

2.6.1.2.2.1. Increasing investor participation through Bond Market Development.

The preceding subsection has examined possible ways of increasing demand for listed securities. It was noted that demand for listed securities could be increased through investor education, cross-listings, and institutional investor participation. In this subsection, we examine the possibility of increasing the investor base through effective bond markets in the COMESA Region. Given the

[223] Peter L.Bernstein, 'Liquidity, Stock Markets and Market Makers' (1987) 16(2) Financial Management 54-62
[224] *ibid*
[225] S Mensah (2004), *op cit*
[226] *ibid*
[227] J Lutwama, 'Strategies of Improving Liquidity in Uganda's Capital Markets Industries' (2006) 10(3) Capital Markets Journal 1-13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499634 > accessed 23 May 2016.

[228] *ibid, at* 6.

central thesis of this study, this section argues that functional bond markets could serve as an additional source of investors for domestic equity markets.[229]

The following subsection introduces empirical evidence on the state of bond markets in the region.

2.6.1.2.2.2. Constraints relating to undeveloped Bond Markets in Eastern and Southern Africa.

This subsection puts the legal arguments that have been made in this subsection and elsewhere in the thesis in proper socio-economic context. This is achieved by providing empirical evidence on the state of bond markets in the region.

The state of Eastern and Southern African bond markets.

Efforts to establish the state of bond markets in Eastern and Southern African states are often frustrated by the scarcity of data on the subject.[230] Eastern and Southern African bond markets are in their infancy.[231] While there is quite notable activity in the primary market, secondary market activity which has the potential of benefiting bond-like/bond-linked securities in the equity

[229] See empirical evidence given below to this effect

[230] United States Agency for International Development Southern Africa Competitive Hub (Trade Hub), *'SADC-COMESA Bond Market Mapping Study Report 2009*, No. 2, 5 <www.mfw4a.org.nc...sadc-comesa-bond-market-mapping-study.html > accessed 26 June 2016 (USAID Report 2009). There is not enough information that has been captured on the operations and performance of bond markets in the said region. No information was found outside the period 2006-2010.

[231] USAID Report, *ibid*

markets is non-existent.[232] To this very effect, the Macroeconomic and Financial Management Institute of Eastern and Southern Africa (MEFMI)[233] observes that:

> Bond markets, however, which are an integral part of the capital markets, remain largely underdeveloped in Africa with corporate bond markets non-existent or in their infancy. Although several countries have listed the bonds on the stock exchange, secondary market trading remains virtually non-existent due to the "buy and hold" strategy of domestic banks who hold the bulk (about 70 per cent) of the debt, in part due to the limited lending opportunities and prudential requirements like liquid asset ratios in some countries.[234]

The author argues here that the limited secondary-market bond listing and trading in most COMESA countries is likely to hinder growth of the investor base in secondary equity markets. This view is rationalized by the empirically proven link between performance of bonds and the performance of bond-like/bond-linked equities in the secondary market.[235] As a possible way of overcoming this constraint, proposals are made for introduction of secondary listing and trading of bonds in the region.[236]

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[232] *ibid.* The Zambian Bonds and Derivatives Market (BaDEx) has seven listed entities (listed debt securities) with virtually no secondary trading. The entities are (1) Veritas General Insurance PLC (2) Engineering Institute of Zambia Properties PLC (3) Nanga Farms PLC (4) Professional Insurance Corporation Zambian PLC (5) Ikulileni Investment PLC. Worse still, BaDEx has no equity market in much the same way the LuSE is without a developed bond market. These two negative features serve as constraints the efficacy of the positive relationship between the performance of bonds and bond-like/bond-linked equities to increase the demand for listed equities in the secondary market. As a possible way of increasing the efficacy of the said relationship to increase demand for equities in the secondary market, it is proposed that both markets develop the other segment.

[233] The following Eastern and Southern African countries are members of MEFMI, namely (1) Zambia (2) Swaziland (3) Lesotho (4) Mozambique (5) Malawi (6) Botswana (7) Namibia (8) Zimbabwe (9) Angola (10) Tanzania (11) Kenya (12) Uganda, and (13) Rwanda.

[234] Macroeconomic and Financial Management Institute of Eastern and Southern Africa (MEFMI), *Guidelines for Government Securities Issuance in MEFMI Region* (1st edn, MEFMI 2013) 3-4

[235] See, empirical evidence below, on the positive relationship between the two phenomena.

[236] This proposed measure could be complemented by measures aimed at increasing cross-listing of bonds into larger and deeper markets like the Johannesburg Stock Exchange which have vibrant bond markets. It is submitted that the said constraint is a constraint on the efficacy of the legal framework to increase investor participation and cross-border trade in securities in the region.

Empirical evidence on the state of Africa's Bond Markets.

Tables 5 and Table 6 below indicate that, by comparison, as at 2010, Sub-Saharan bond markets were still smaller in size and capitalization than bond markets in other developing, emerging and developed economies.

In Sub-Saharan Africa, as at 2010, the government bond market contributed 14.8 per cent to the total capitalization of the African bond market. This represents a 21 per cent fall in the contribution of government bonds to the total market capitalization since 2006. Corporate bonds contributed only a paltry 1.8 per cent to the total capitalization of the African bond market. This represents a 80 per cent increase in the contribution of corporate bonds to total bond market capitalization since 2006. However, government securities still represented the larger portion of the total market capitalization. In Asia, there is not much difference between the contribution of government securities and corporate securities to the total bond market capitalization. For example, Malaysia has recorded 53.7 against 57.0. China has 27.3 against 22.8, while South Korea recorded an even higher figure for corporate bonds.[237] Latin America exhibited a similar trend. Chile has a higher record for corporate bonds than for government bonds.[238] Similarly, Brazil and Mexico recorded very narrow gaps between the two segments.[239] The trend exhibited by Central Europe is similar to the one exhibited by Sub-Saharan Africa.[240] Among the developed countries, Australia and the United States of America recorded larger contributions from corporate securities than they did

[237] 48.0, against 59.5.
[238] 13.1, against 17.0.
[239] 39.4, against 22.7, and 22.6 against 17.1, respectively.
[240] A trend characterized by wide gaps between the government bonds segment and the corporate bonds segment in favour of the former.

government securities.[241] By contrast, Japan posted an even much greater contribution from government bonds.[242]

From SADC and COMESA regions, the combined capitalization of these two regions, as collected from Table 7 below, was USD 105.03 million. Over 84 per cent of this combined capitalization came from South Africa. South Africa recorded a corporate bonds segment that was about the size of the government bonds segment.[243] Quite interestingly, only Botswana, recorded a larger corporate bond segment than the government bond segment.[244] Generally speaking, in SADC and COMESA countries, the government bonds segment was much larger than the corporate bond segment.[245] The author argues that cross-listing of COMESA bonds into the JSE is likely to boost investor activity in the FSMs. The author also argues that cross-listing of bonds and cross-border trade in bonds are likely to stimulate notable growth in liquidity of COMESA stock markets.[246] These measures are also likely to stimulate growth in firm's investor confidence.[247] Thus, as

[241] 27.4, against 51.0, and 75.7 against 98.6, respectively.
[242] 205.4, against 37.8. This could be explained by the legal system origin theory and the political ideology theory of finance. The legal system theory of finance holds that a countries legal system determines development of its financial system. The political ideology theory of finance holds that a countries political ideology has a bearing on development of its financial system. Communist regimes promote government (public) ownership. Private ownership of property, such as securities, is less promoted: See, Laura Nyantung Beny, 'The Political Economy of Insider Trading Laws and Enforcement: Law vs Politics? International Evidence (2012) (hereinafter 'Beny (2012)') http://ssrn.com/abstract=304383 accessed 2 January 2019
[243] 47, 035, against 41, 199. And boasting incomparably-high levels of liquidity of 4089.9 per cent.
[244] 306, against 533.
[245] About 16 per cent of the capitalization of the combined region was shared among other countries than South Africa. This paltry 16 per cent may be explained by the fact that most of these countries have bond markets which are in their infancy and in dire need of development.
[246] Empirical evidence shows that firms may benefit from cross-border cross-listings in terms of liquidity and firm's investor confidence: Samuel O. Onyuma, Robert K. Mugo and John K. Karuiya, 'Does Cross-border Listing (Still) Improve Firm Financial Performance in Eastern Africa' (2012) 1(1) Journal of Business, Economics and Finance 98-109.
[247] *ibid*

investors consume the cross-listed bonds, they are likely to consume cross-listed bond-like or bond-linked equities, also.[248]

Table 5: Bond Market Capitalization Comparison, 2010.

Region	Country	Market Capitalization (% GDP)		Contribution to Total Domestic Debt (%	
		Government	Corporate	Government	Corporate
Developing Countries and Emerging Africa					
Africa	**All**	14.8	1.8	89.2	10.8
	South Africa (SA)	31.2	20.0	60.9	39.1
	All exclu SA	14.2	1.3	91.8	8.2
	CEMAC[249]	10.5	0.7	93.8	6.3
	WAEMU[250]	14.1	2.3	86.0	14.1
	Oil exporter	7.7	1.1	87.5	12.5
	Fragile economy	18.4	1.2	93.9	6.1
	Low Income	15.3	1.1	93.3	6.7
	Middle Income	15.1	3.5	81.2	18.8
Asia	**China**	27.3	22.8	54.5	4.5
	Hong Kong	35.9	13.8	72.2	27.8
	Malaysia	57.3	57.0	50.2	49.8
	South Korea	43.8	59.5	42.4	57.6

[248] Campbell R Harvey, 'Does the Bond Market Do Better than Stock Markets in Predicting Economic Growth?' (1989) Financial Analysts Journal 1-18
[249] Central African Economic and Monetary Union
[250] West African Economic and Monetary Union

Latin America	**Argentina**	13.3	2.6	83.7	16.3
	Brazil	39.4	22.7	63.4	36.6
	Chile	13.1	17.0	43.5	56.5
	Mexico	22.6	17.1	56.9	43.1
Central Europe	**Czech Republic**	23.3	11.2	67.5	32.5
	Hungary	57.3	7.0	89.1	10.9
	Poland	42.6	1.8	95.9	4.1
Developed Countries					
Global	**Australia**	27.4	51.0	35.0	65.0
	Canada	63.2	26.5	70.5	29.5
	Japan	205.4	37.8	84.5	15.5
	USA	75.7	98.6	43.4	56.6
	Europe	55.8	46.4	54.6	45.4

Source: IMF staff compilations based on data from IMF, IFS, WEO and World Bank, 2013.

Table 6: Sub-Saharan Africa Bond Market Capitalization, 2006-2010.

Group		Year				
		2006	2007	2008	2009	2010
Government Securities Market Capitalization as percentage (%) of GDP	All	18.7	15.4	14.6	14.1	14.8
	South Africa (SA)	27.3	23.9	22.4	27.0	31.2
	All ex South Africa	18.4	15.1	14.3	13.7	14.2
	CEMAC	15.5	13.8	11.3	10.4	10.5
	WAEMU	14.8	14.7	15.6	12.7	14.1
	Oil exporters	9.7	8.9	9.1	9.1	7.7
	Fragile Countries	20.1	18.5	19.1	18.4	18.4
	Low Income	22.6	17.2	16.5	16.5	15.3
	Middle Income	19.9	14.7	12.7	12.2	15.1
Corporate Bond Market Capitalization as a percentage (%) of GDP	All	1.0	1.5	1.5	1.7	1.8
	South Africa	18.2	19.4	19.2	19.9	20.0
	All ex South Africa	0.5	0.9	1.0	1.2	1.3
	CEMAC	0.0	0.2	0.6	0.9	0.7
	WAEMU	1.6	2.2	2.3	2.5	2.3
	Oil exporters	0.2	0.3	0.6	0.8	1.1
	Fragile countries	0.6	0.9	1.0	1.1	1.2
	Low Income	0.5	0.8	0.8	0.9	1.1
	Middle Income	2.3	3.2	3.1	3.4	3.5

Contribution of Corporate Bonds to the Market by percentage (%)	All	5.1	8.9	9.3	10.8	10.8
	South Africa	2.7	5.9	6.7	7.8	8.2
	All ex South Africa	39.9	44.7	46.1	43.4	39.1
	CEMAC	0.0	1.4	5.0	8.0	6.3
	WAEMU	9.8	13.0	12.8	16.4	14.0
	Oil exporters	2.0	3.3	6.2	8.1	12.5
	Fragile Countries	2.9	4.6	5.0	5.6	6.1
	Low Income	2.2	4.4	4.6	5.2	6.7
	Middle Income	10.4	17.9	19.6	21.8	18.8

Source: IMF staff compilations based on data from IMF, IFS, WEO and World Bank, 2013.

Table 7: Capitalization and Liquidity of COMESA-SADC Bond Markets, 2008.

Country	Nominal Value Outstanding		Value Traded		Liquidity			GDP USD Mn	Cap % GDP
	Govt Bonds USD Million	Other USD Million	Govt Bonds USD Million	Other USD Million	Govt Bonds USD Million	Other USD Million	Overall		
Angola	2, 796	n/a	n/a	n/a	n/a	n/a	---	61.3	4.6
Botswana	306	533	39	4	12.8%	0.8%	5.2%	12.4	6.8
Kenya	4, 777	112	1, 227	[2]	[2]	[2]	25.1%	27.0	18.1
Lesotho	0	0	0	0	0	0	---	1.6	0.0
Malawi	36	0	0	0	0	0	0.0%	3.6	1.0
Mauritius	3, 330	n/a	154	---	13.2%	n/a	---	6.9	48.1

Mozambique	154	55	2.64	0.66	1.7%	1.2%	1.6%	8.1	2.6
Namibia	633	246	43	15	6.8%	6.2%	6.6	7.4	11.8
Rwanda	25	2	0.9	0.3	3.4%	15.0%	4.0%	3.3	0.8
South Africa	47,035	41,199	1,923,695	143,935	4089.9%	349.4%	2343.3%	283.1	31.2
Swaziland	50	10	---	---	---	---	---	2.9	2.1
Tanzania	650	37	---	---	---	---	---	16.7	4.1
Uganda	718	43	214	---	29.8%	---	28.2%	11.8	6.5
Zambia	1, 722	268	1.2	0.0	0.1%	0.0	0.1%	11.4	15.1

Source: USAID Southern Africa Global Competitive Hub (Trade Hub), 2009.

Notes:

[1] "Other" includes quasi-governmental, municipal, parastatals, corporates, banks, etc.

[2] data includes both government and corporate bonds.

---close to zero value

n/a means not available.

The following segment gives empirical evidence on the relationship between the performance of bonds in secondary markets and the performance of bond-like/bond-linked equities.

Empirical evidence on Bond Market Development and the Benefits accruing to Secondary Equity Markets.

This segment fleshes out some of the constraints on the efficacy of the legal, regulatory and institutional framework in facilitating growth of equity markets in the COMESA Region. This is achieved by introducing empirical evidence on the positive link between the performance of bonds and the performance of bond-like or bond-linked equities in secondary markets.

There are a number of benefits that may accrue to a secondary equity market as the bond market develops. These benefits stem from the following empirically founded propositions:[251]

i) bond markets serve as better predictors of economic growth than stock markets;[252]

ii) stock market illiquidity is related to bond risk;[253] and

iii) bond market performance commoves with bond-like stocks.[254]

The author argues that functional bond markets in the COMESA region are likely to serve as a reliable indicator of the growth potential of a prospective equity market. The author also argues here that financially educated investors are likely to invest in bond-like/bond-linked equities in markets where the attractive bonds are listed or cross-listed.[255] It is therefore submitted that the poor state of COMESA bond markets serves as a constraint on the efficacy of the legal, regulatory and institutional framework in facilitating growth and success of equity markets in the region.

The following subsection makes proposals for possible ways of establishing a functional bond market.

[251] Campbell R Harvey, 'Does the Bond Market Do Better than Stock Markets in Predicting Economic Growth?' (1989) Financial Analysts Journal 1-18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=812927 > accessed 26 May 2016

[252] *ibid*
[253] *ibid*
[254] *ibid*
[255] I Listiarti and T Suryani, 'Determinant factors of investors' behaviour in investment decision in Indonesian capital markets' (2014) 17(1) Journal of Economics, Business, and Accountancy Ventura 45 – 54. This way, a bond market would be complementing the demand-side interventions enumerated above in increasing demand for listed securities. Thus, not only would such measures increase liquidity but also reduce volatility of domestic stock exchanges as well as the regional stock exchange: Samamba Lennox Trivedi IV, *op.cit*; Samamba Lennox Trivedi V, *op.cit*

2.6.1.2.2.3. Proposals for Establishing a successful Bond Market in Eastern and Southern African Countries.

The preceding subsection has examined the state of bond markets in the COMESA Region. It was noted that bond markets in the region are in the early stage of development. The subsection demonstrated that functional bond markets could serve as an additional source of investors for equity markets in the region. In this subsection, we examine possible ways of establishing a functional bond market.

Generally, the development of a functional bond market follows a fairly well-established sequence of steps some of which may happen in parallel.[256] The process involves the following steps:[257]

a) Establish an appropriate macroeconomic and financial environment;
b) Establish an equity market;
c) Establish a government bond market;[258]
d) Develop market institutions and infrastructure;
e) Develop legal and regulatory framework;
f) Develop an investor base;
g) Develop skills and capacity of market participants; and
h) Establish a corporate bond market.

[256] USAID Report 2009, at 8, *op cit*
[257] *ibid*
[258] The International Monetary Fund and the World Bank, observe that the development of a well-functioning government bond market in developing countries will often precede and facilitate the development of a private sector bond market: The International Monetary Fund & the World Bank, Developing Government Bond Markets: A Handbook (The IMF & World Bank 2001) at 2, in Kenneth K. Mwenda, *Understanding Securities Law and Regulation in Zambia* (Juta Law 2015) at 17, fn 21. It is therefore generally recommended that COMESA countries develop their government bond markets first.

The following section examines the legal, regulatory and institutional framework so as to establish whether or not it provides enough incentives for effective cross-border securities advertisement.

2.7. CONSTRAINTS ON CROSS-BORDER SECURITIES ADVERTISEMENT.

The preceding section has examined the depth and width of COMESA FSMs. The section also examined some strategies for increasing liquidity of COMESA FSMs. It was noted that these markets are characterized by inadequate liquidity. The section demonstrated that liquidity of COMESA FSMs could be enhanced by increasing demand and supply of securities to DESs and the RSE. In this section, we examine the efficacy of the legal, regulatory and institutional framework in facilitating effective multi-jurisdiction securities advertisements. Given the central thesis of this study, this section argues that foreign demand for listed securities could be increased by introducing an international passport to multi-jurisdiction securities advertisement.[259] The author argues that the meeting of high supply and high demand for securities is likely to increase cross-border trade in securities in the region. And increased cross-border trade in securities is likely to ease the liquidity challenges faced by stock markets in the region.[260]

2.7.1. REGULATING SECURITIES ADVERTISEMENT IN ZAMBIA.

Generally, securities regulators have moved away from merit-based regulation.[261] Thus, modern regulation of public issues of securities is based on the principle of full, timely and accurate disclosure.[262] This implies that regulators are not concerned with question whether or not a

[259] 'Securities exchanges' here refers to 'domestic stock exchanges (DSEs) and the regional stock exchange (RSE).
[260] Jenah S.W., 'Commentary on a Blueprint for Cross-border Access to U.S. Investors: A New International Framework' (2007) 48 Harv. Int'l L. J. 69.
[261] Ana Carvajal and Jennifer Elliot, 'Strengths and Weaknesses in Securities Market Regulation: A Global Analysis' (2007) International Monetary Fund, IMF Working Paper WP/07/259
[262] *ibid*

particular securities issue is too risky or safe for the investors.[263] Rather, regulators are concerned with the question whether or not an issuer has made full, timely and accurate disclosure of material facts about the issuer and its securities.[264] Consequently, the regulation of securities advertisements is a regulatory attempt to ensure that investors are given full, timely and accurate price-sensitive information about a particular securities issue before they can make their investment decisions. Before we venture to examine the regulation of securities advertisement in Zambia, it is imperative to define 'an effective legal, regulatory and institutional framework' for cross-border securities advertisement.

Meaning of effective legal, regulatory and institutional framework for cross-border securities advertisement.

The legal, regulatory and institutional framework for the regulation of securities advertisements is effective if it facilitates advertisement of securities to a larger section of the investing community domestically and across international borders at minimum cost.[265] An effective, legal, regulatory and institutional framework for advertisement of securities must also balance the desire to reach a wider community of investors with investor protection.[266] Thus, an effective framework, should provide compensation to investors who suffer pecuniary loss on account of a misleading securities advertisement. In line with this philosophy, in Zambia, when an advertisement takes the form of a prospectus or any other disclosure document for that matter, the civil remedies which are available under sections 166 and 167 of the Zambian Securities Act are available if the advertisement turns out to be misleading. In any other case, common law actions for deceit or misrepresentation would

[263] *ibid*
[264] *ibid*
[265] Samamba Lennox Trivedi, 'Regulating Cross-border Securities Advertisement in COMESA Region—Some Gaps in the Law' (2018) 8(6) International Journal of Marketing and Technology 1, 2 (hereinafter 'Samamba Lennox Trivedi XIII').
[266] *ibid*

be available to the investor.[267] As a possible way of complementing the civil remedies, it is also a crime to make a securities advertisement which is unregistered or does not comply with the prescribed format.[268] As a possible way of improving investor protection in ISMs in the region, proposals have been in Chapter 3 of the thesis for the introduction of a RSE, a RCF and a RSEC. These infrastructural features are designed to cooperate with and complement regulatory efforts of correspondent domestic regulatory bodies.

Regulating Cross-border Securities Advertisement in Zambia.

By Rule 2(2) of the Securities (Advertisements) Rules 1993, an advertisement issued outside Zambia is treated as issued in Zambia if—

a) it is directed to persons in Zambia; or
b) it is made available to persons in Zambia as a newspaper, journal, magazine or [illegible word] published and circulating principally outside Zambia or in a sound or television broadcast transmitted principally for reception outside Zambia.

This provision seems to suggest that a licensee who desires to advertise securities to the Zambian investing public must comply with Zambian regulations. Also, where an advertisement is made in a foreign jurisdiction, the licensee has to comply with Zambian regulations notwithstanding that they have complied with home requirements. To this very effect in Kenya, a securities advertisement needs to comply with Kenyan regulations notwithstanding that it has complied with the requirements of the home State of the issuer.[269]

[267] See, *Derry v Peek* [1889] 14 App. Cas 337 (House of Lords).
[268] Securities (Advertisement) Rules 1993, rr 5 and 8, *Zam.*
[269] That is a securities advertisement which takes the form of a prospectus or would require a prospectus: See, The Capital Markets (Securities) Public offers, Listing and Disclosure) Regulations 2002, r 16(1), *Kenya*

Currently, there is no rule of international securities law that exempts a licensee who has complied with the securities advertisement requirements of their home country or other COMESA state from complying with those of other COMESA states when a multi-jurisdiction securities advertisement is sought.[270] The regional legal, regulatory and institutional framework does not provide for such an exemption either.[271] In this respect, a question may be asked, in the event that a licensee seeks a multi-jurisdiction securities advertisement, would it not be cumbersome, time-consuming and costly to do so in the absence of an international passport? Of course it would be. The author argues that absent such an exemption, the cost and time of preparing disclosure document and complying with the pre-listing and post-listing administrative and regulatory requirements of each and every target jurisdiction is likely to hinder growth of cross-border securities advertisement in the region.

As a possible solution to this shortcoming in the legal, regulatory and institutional framework, proposals are made for the introduction of an international passport to multi-jurisdiction securities advertisement. Under such an arrangement, licensees who comply with the securities advertisement rules of one COMESA jurisdiction will not have to comply with those of other jurisdictions in which they intend to advertise the securities of a particular issuer. Approval of a single DSEC will serve as an international passport to multi-jurisdiction securities advertisement.

The following segment makes a case for the introduction of an international passport to region-wide cross-border advertisement.

[270] Samamba Lennox Trivedi XIII, *op.cit*
[271] *ibid*

The case for an International Passport to Multi-Jurisdiction Securities Advertisement

This segment makes a case for an international passport to multi-jurisdiction securities advertisement. This is achieved by demonstrating the effect of Digital Satellite Television (DSTv) on effective regulation of multi-jurisdiction securities advertisements.

Let us consider a licensee who complies with the Zambian Securities Advertisement Rules for purposes of a securities advertisement to air on Zambia National Broadcasting Corporation (ZNBC) for a certain period of time. And the ZNBC channel is accessible by viewer-investors in other COMESA jurisdictions by way of DSTv.[272] In this respect, a question may be asked, 'how would a licensee know beforehand the other jurisdictions in which the securities advertisement would air so that they comply with the requirements of those other jurisdictions beforehand as well'? Admittedly, even with a calculated guess, it would be difficult, if not impossible to do so. This seems to justify the implementation of an international passport to multi-jurisdiction securities advertisement since such a device would overcome the uncertainty of the duty to comply with the securities advertisement rules of other COMESA markets. The negative impact of DSTv on effective cross-border securities regulation serves to highlight the need for the proposed international passport. However, as argued by the author elsewhere, such an international passport would only make regulatory sense if the regulatory rules were harmonized.[273] It is therefore, submitted that the legal, regulatory and institutional framework does not provide enough incentives for effective cross-border advertisement of securities.

[272] By subscribing for specific bouquets offered by various DSTv companies. Thus, DSTv has the capacity to facilitate the availability of securities advertisements to a broader section of the investing community in the COMESA Region and beyond.

[273] Samamba Lennox Trivedi XIII, 21-22, *op.cit*

The following subsection examines constraints relating to the narrow definition of 'prospectus' under the Zambian legal, regulatory and institutional framework.

2.7.2. Constraints relating to the Narrow Class of Securities that could be distributed under Prospectuses under the Zambian Legal Framework.

The preceding subsection has examined constraints on effective cross-border securities advertisement. It was noted that the current framework requires licensees to comply with regulations of each and every jurisdiction in which they wish to advertise their securities. The subsection demonstrated that an international passport to multi-jurisdiction securities advertisement could relieve licensees from such a burden and promote cross-border advertisement. In this subsection, we turn to examine constraints relating to the narrow definition of 'prospectus' under the Zambian legal, regulatory and institutional framework. The central premise of this subsection is that prospectuses serve to expose the advertised-securities to a larger market than they would normally find. Thus, prospectuses are likely to increase demand for the advertised securities. Thus, in order to increase trade in securities, there is need to increase the types of securities that could be distributed under prospectuses.

Constraints relating to the narrow definition of 'Prospectus' under the Zambian Legal, Regulatory and Institutional Framework.

It has been noted above that one way of increasing supply of securities to securities exchanges is "enlarging the definition of 'securities'". In Zambia, this has been achieved by the broad definition of 'securities' that has been given in section 2 of the Zambian Securities Act 2016.[274] Despite the

[274] Thus, a whole lot of new species of securities has been introduced: Zambian Securities Act 2016, s 2 (definition of 'securities'). *Cf* Zambian Securities Act 1993, s 2 (definition of 'securities') (repealed).

broad definition of 'securities', only 'shares' and 'debentures' may be distributed under prospectuses under the Zambian legal, regulatory and institutional framework.[275] Thus, many other listable securities[276] have been excluded from distribution under prospectuses.[277] Consequently, the author argues that such a narrow scope of distributable securities is likely to reduce the supply of securities to securities exchanges. It is also argued here that such a narrow definition of prospectus is likely to promote growth of cross-border trade in securities in a narrow class of securities at the expense of other marketable securities. Further, prospectuses of foreign issuers holding other securities than shares and debentures would not be recognized as prospectuses for cross-listing purposes in Zambia. With such a regulatory approach, the mutual recognition scheme which has been proposed in chapter 3 of the thesis is likely to have limited success in promoting cross-border cross-listings in the region. Therefore, as a possible way of increasing supply of securities, and promoting cross-border cross-listings and trade in securities, the following amendment is proposed:

> Prospectus means a notice, circular, brochure, advertisement, publication or request issued in paper or other document, whether electronic or otherwise, inviting applications or offers from the public to subscribe or purchase, or offering to the public for subscription or purchase, <u>of securities of an issuer or proposed issuer,</u> and includes a statement attached to or intended to be read with the prospectus.[278]

[275] Zambian Securities Act 2016, s 2 (Definition of 'prospectus').

[276] Such as equity securities, public debt securities, debt securities and other species of securities which have been included in the broad definition of 'securities' in section 2 of the Securities Act 2016.

[277] The LuSE Listing Rules 2012 do not help matters too since they only define 'prospectus' as defined under the Securities Act": See, LuSE Listing Rules 2012, definition section

[278] Securities (Registration of Securities) Rules 1993, rule 2. It is worth noting here that the approach proposed above is embodied in the definition of prospectus in the Registration of Securities Rules 1993 made under the repealed Securities Act of 1993. Therein, 'prospectus' is defined as 'a prospectus, notice, circular, advertisement of other invitation to the public to acquire or apply for securities'. A Statutory Instrument made under a repealed Act of Parliament remains in force until repealed by repealing or other subsequent Act of Parliament or statutory instrument: Zambian Interpretation and General Provisions Act, s 15. The said Statutory Instrument has not been so repealed and therefore, in force. It is also an entrenched principle of law that a statutory instrument cannot effectively override the parent Act so that its position on a certain matter takes precedence: *Attorney General v Mooka Mubiana* (Supreme Court of Zambia, Appeal No. 38 of 1993). Therefore, the current legal position on the types of securities that could be distributed under a prospectus in Zambia is the one provided in the Securities Act 2016 as stated above. The proposed amendment of the particular portion of the Securities Act 2016 is therefore, justified.

It is submitted that this proposed regulatory approach is in line with the spirit and letter of Article 81 of the COMESA Treaty 1993 which places an obligation of Member States to ensure that citizens and persons resident in Member States are allowed to acquire stocks, shares and other securities in territories of other Member States, and encourage cross-border trade in government debt securities within the Common Market.[279] Since shares and stock are equity securities, 'other securities' as used in Article 81 of the COMESA Treaty 1993 may be construed as reference to 'debt securities, public debt securities and several other listable securities than equities.

The following section examines constraints relating to quantitative restrictions on cross-border investment of pension assets in listed securities.

2.7.3. Threats of compromised Investor Protection under the proposed International Passport to Multi-Jurisdiction Securities Advertisement.

Securities markets, like other markets, are not insulated from externalities such as misconduct of unscrupulous participants. This very fact justifies regulatory intervention in the public interest.[280] The author argues here that, the high number of securities advertisements that would come from the implementation of the proposed international passport to multi-jurisdiction securities advertisement is likely to increase the chances of misleading advertisements. One of the major regulatory concerns that such a system raises is how to take care of such a risk. If that kind of risk is not controlled, the proposed international passport is likely to have limited success in promoting

[279] COMESA Treaty 1993, Art 81(a)(b)

[280] The public interest theory of regulation explains that regulation seeks the protection and benefit of the public at large. This theory contends that regulation is practiced for achieving collective aims. The theory explains that government regulatory intervention in markets is a response to market failures, monopolistic market, and externalities to maximise social welfare: Michael H. Domas, 'The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?' (2003) 15(2) European Journal of Law and Economics 165-194.

cross-border demand for securities. Thus, as a possible way increasing the efficacy of the said regulatory measures, it has been proposed:

(i) in chapter 3 of the thesis that a RCF and a RSEC be introduced;[281]

(ii) in chapter 6 of the thesis that a comprehensive power on the part of DSECs to commence civil recovery actions for and on behalf of market participants be introduced in other COMESA states which have not clothed their domestic regulators with such a power;[282] and

(iii) in chapter 6 of the thesis for the introduction of a power on the part DSECs, in COMESA states which have not yet done so, to act in support of other regulators.[283]

2.8. CONSTRAINTS RELATING TO QUANTITATIVE RESTRICTIONS ON CROSS-BORDER INVESTMENT OF PENSION ASSETS.

The preceding section has examined constraints on cross-border advertisement of securities. It was noted that the current framework requires licensees to comply with the regulations of each and every jurisdiction in which they intend to advertise their securities. It was also noted that only shares and debentures may be distributed under prospectus. The section demonstrated that cross-border securities advertisement could be increased by:

i) introducing an international passport to multi-jurisdiction securities advertisement in the COMESA Region;

[281] See, chapter 3 of the thesis for the respective roles of the RCF and the RSEC.
[282] See, chapter 6 of the thesis for the regulatory objective of such a power.
[283] See, chapter 6 of the thesis for the regulatory objective of such a power.

ii) redefining 'prospectus' as a document under which securities of an issuer may be distributed; and

iii) the availability of civil remedies (compensation) for pecuniary loss caused by misleading securities advertisements.

In this section, we turn to examine the effect of quantitative restrictions on the growth of demand for securities listed in foreign securities markets. This section also introduces empirical evidence on the geographical distribution of quantitative restrictions in the COMESA Region. This puts the legal arguments which have been made in this section and elsewhere in the thesis in proper socio-economic context.

Ashok and Spataro observe that pension funds could mobilize long-term savings and channel them to investment in securities markets.[284] And, the World Bank observes that the capacity of pension funds to contribute to capital market development and economic growth has been theoretically argued and empirically proven.[285] Increased pension fund participation in securities markets stimulates growth of liquidity.[286] Given the central thesis of this study, this section argues that high institutional presence in foreign securities markets in the region is likely to increase demand for listed securities. It is also likely to increase cross-border trade in securities in the region,[287] and ease the liquidity challenges faced by domestic securities markets.[288]

[284] Ashok Thomas and Lucas Spataro, 'The Effect of Pension Funds on Market Performance: A Review' (2014) 30(1) Journal of Economic Surveys 1

[285] The World Bank, Pension Funds, *Capital Markets and the Power of Diversification* (The World Bank 2000)

[286] Philip E. Davis, 'The Role of Pension Funds as Institutional Investors in Emerging Markets (2005) 1-25.

[287] See, Samamba Lennox Trivedi, 'Quantitative Investment of Pension Assets as a Constraint on the Growth of Cross-border Trade in Securities' (2018) 4(4) African Law Journal 135 (hereinafter 'Samamba Lennox Trivedi X')

[288] The International Organization for Securities and Exchange Commission (IOSCO) observes that, increasing participation of pension funds increases liquidity of stock markets: International Organization for Securities and Exchange Commissions, 'Factors affecting Liquidity of Emerging Markets' (2007) at 27

The Pension Schemes Regulation Act No. 40 of 1996,[289] introduces the concept of cross-border investment of pension assets in Zambia. Thus, with the permission of the Minister of Finance, on recommendation of the Board, a pension scheme may invest not more than thirty per cent of its net assets in listed and quoted equities, and corporate bonds outside Zambia.[290]

Quantitative Restrictions in other Eastern and Southern African States.

Quantitative restrictions are quite wide spread in the COMESA region. They are geographically distributed as shown in Table 8 below.

Table 8: Quantitative Restrictions on Cross-border Investment of Pension Assets in some Eastern and Southern African Countries as at 2015.

Country	**Status on Cross-border Investment/ Portfolio Limits in Listed Equities**
Egypt	Not more than 20% of fund size
Kenya	Not more than 70% of fund size
Malawi	Cross-border investment not allowed

[289] As amended by Act No. 27 of 2005.

[290] Pension Schemes (Investment Guidelines) 2011, regs 7(1), 9(1)(2), 11 as read in light of the Pension Schemes Regulations Act 1996, s 25. By 'listed equities' it is meant shares of a company excluding shares in a property company, whether such shares are preferred or not, including convertible debentures: Pension Schemes (Investment Guidelines) Regulations 2011, reg 3 (definition of 'equities'). This definition seems to claw in ordinary shares, equity shares, stock, hybrids (subordinated debt, convertible debt securities, convertible preference shares, and preference shares) and bonds, and notes. The ambit of this definition is fairly wide to promote cross-border trade in securities in a fairly-wide range of securities. It would do better to include non-convertible debentures, though. Thus, a pension scheme may invest between 1.5% and 21% of its net assets in listed securities of the kind enumerated above: Pension Scheme Regulation Act 1996, s 25; Pension Scheme (Investment Regulations) 2011, reg 7(1). 1.5% of the remainder (9%, 21% of the allowed 30% having been invested in listed and quoted equities) may be invested cross-border in pure debt securities (corporate bonds): Pension Scheme (Investment Guidelines) 2011, reg 9(1)(2). The remaining 7.5% of the allowed 30% may be invested cross-border in other assets than property: Pension Scheme (Investment Regulations) 2011, reg 11(2).

Mauritius	Not more than 10% of fund size
Namibia	Not more than 30% of fund size
South Africa	Not more than 25% of the fund size
Tanzania	Cross-border investment not allowed
Zambia	Not more than 30% of the fund size
Zimbabwe	Cross-border investment not allowed

Source: Collected from the OECD Annual Survey of Investment Regulation of Pension Funds in OECD and Non-OECD Countries (2018), Tables 1 and 2.

Quantitative restrictions stall growth of cross-border trade in securities in two ways. Firstly, quantitative restrictions reduce demand for foreign securities.[291] Secondly, these measures create equity home bias.[292] Therefore, quantitative restrictions are not good for cross-border trade investment and trade in securities in the COMESA region. As a possible way of increasing cross-border trade in securities in the region, it is proposed that quantitative restrictions be removed.[293] The author argues that quantitative restrictions on the export of capital should only be imposed when there is a pressing economic constraint. This argument is rationalized by the SADC Protocol on Fin & Invest 2006 which encourages free movement of capital within the region with liberty to

[291] Schoenmaker D. and Darvas Z., 'Institutional Investors and the Home Bias in Europe's Capital Markets Union' (2017), Bruegel Working Paper 2/2017; Baker M., 'European Union Pension Funds and Home Bias: Geographical Asset Allocation in Light of the Three Goals set by the European Commission (MSc Thesis, Erasmus University Rotterdam 2013).

[292] *ibid*

[293] The United Nations observes that although eastern African countries have made significant advances in promoting cross-border investment of pension assets in listed assets, pension investment is restricted to the EAC: The United Nations, 'Pension Funds, Insurance Companies as Key Drivers of Regional Integration (2017) 1-15. The author argues here that given the liquidity of eastern African pension funds, extending their investment to COMESA members who are not EAC members is likely to increase stock market activity in the region.

restrict the same if the economic situation justifies. To this very end, the SADC Protocol on Fin & Invest 2006, provides:

> Art 15(1) State Parties shall encourage the free movement of capital.
>
> (2)Notwithstanding the provisions of paragraph 1, State Parties may regulate capital movements subject to their domestic laws and regulations, when necessitated by economic constraints.[294]

The following subsection makes a case for qualitative regulation of cross-border investment of pension assets through the prudent-person rule.

2.8.1. THE CASE FOR QUALITATIVE RESTRICTION THROUGH THE PRUDENT PERSON RULE.

The preceding subsection has examined the effect of quantitative restrictions on foreign demand for listed securities. It was noted that quantitative restrictions limit the amount of capital that could be exported for investment in listed securities. The subsection demonstrated that foreign demand for listed securities may be increased by removing quantitative restrictions in the COMESA Region. In this subsection, we make a case for qualitative regulation of cross-border investment of pension assets through the prudent-person rule.

The prudent-person-rule may be stated as follows:

> A fiduciary must discharge his or her duties with the care, skill, diligence and prudence that a prudent person acting in a like capacity would use under the same circumstances

[294] SADC Protocol on Fin & Invest 2006 (Annex 1: Annex on Cooperation), Art 15(1)(2). This proviso is an accommodation of an empirically proven position that capital market/current account liberalization is mainly associated with growth in countries with a certain institutional threshold—a threshold which most emerging markets and frontier markets in the COMESA Region are yet to achieve: Kevin P. Gallager, *RULING CAPITAL: Emerging Markets and the Regulation of Cross-border Finance* (Cornell University Press 2015), at 56-60.

in the management of the affairs of an organization of the like character, aims and objectives.[295]

The case for the prudent-person-rule as a substitute for quantitative restrictions consists in the following empirically-proven propositions, namely:

a) The illegality of quantitative restrictions on cross-border investment of pension assets in the COMESA region;
b) The higher economic cost of quantitative restrictions than that of the prudent-person rule;[296] and
c) Empirical evidence which indicates much better performance of pension funds regulated by the prudent-person rule than those regulated by quantitative restrictions.[297]

These factors are considered below, in turn.

2.8.1.1. THE ILLEGALITY OF QUANTITATIVE RESTRICTIONS ON INVESTMENT OF PENSION ASSETS IN THE REGION.

Quantitative restrictions violates the spirit of the COMESA Treaty 1993. The COMESA Treaty 1993 enshrines free of movement of capital in the region.[298] The free movement of capital in the region is realized by:

[295] The World Bank, 'Pension Investment Restrictions Compromise Fund Performance' (2013) *World Bank Pension Fund Premier* 1-8, at 2. Under this rule, fund managers are expected to use their skill, experience and expertise to judge whether or not they should invest, how much they should invest, and whether or not the contemplated investment would hurt the interests of the pensioners: *ibid*

[296] For empirical evidence, see: R Rees and E Kessner, 'Assets Allocation and Funding Policy for Corporate-Sponsored Defined Benefits Pension Funds' (1999) 14 Journal of Portfolio Management 66-73; EP Davis, *Pension Funds, Retirement-Income Security and Capital Markets: An International Perspective,* (OUP 1995)

[297] S Srinivas, E Whitehouse and J Yermo, 'Regulating Private Pension Funds: Structure, Performance and Investments: Cross-Country Evidence' (2000) Social Protection Reform Working Paper 02/13, The World Bank, Washington, DC <www.worldbank.org/pensions> accessed 19 March 2017; EP Davis (1995); (2000c), *op cit*

[298] COMESA Treaty 1993, Art 81. Article 81 of the COMESA Treaty 1993 is almost verbatim and seriatim reproducing the substance of Article 86 of the East African Community Treaty 1999 (EAC Treaty 1999).

a) The unimpeded flow of capital within the region through the removal of controls—exchange controls, quantitative restrictions and other like controls—on the transfer of capital among Member States;
b) Ensuring—by Member States—that their citizens and residents freely acquire stocks, shares and other securities or invest in enterprises in territories of other Member States; and
c) Encouraging—by Member States—cross-border trade in government securities such as treasury bills, development and loan stocks within the region.[299]

The underlying object of Article 81 of the COMESA Treaty and Article 86 of the EAC Treaty is to increase cross-border trade in securities in the region. Against this background, quantitative restrictions may well be disapproved as a non-tariff barriers to cross-border investment and trade in securities. Increased cross-border trade in securities in the region could to be achieved through:[300]

(i) Unimpeded supply and demand for securities across international borders in the region;

(ii) Unrestricted purchase of securities across international borders in the region; and

(iii) Un-impeded cross-border transfer of funds for the purchased securities.

Thus, it is submitted that the prevalence of quantitative restrictions in the COMESA Region hinders the growth of demand for securities. Quantitative restrictions achieve this end by reducing the sphere of influence of pension funds in securities markets in the region. As a possible way of increasing demand for listed securities and cross-border trade in securities in the region, it is proposed that quantitative restrictions be replaced with the prudent-person rule. The prudent-person rule would allow fund managers to invest as much as the prevailing situation permits using

[299]COMESA Treaty 1993, Art 81(a)(b)(c). These provisions of the COMESA Treaty 1993 almost verbatim and seriatim reproduce the substance of clauses (a), (b) and (c) of Article 86 of the EAC Treaty 1999.
[300] *ibid*

their judgement, skill and investment experience and expertise.[301] Such a regulatory approach is likely to promote cross-border investment and trade in securities.[302] In any event, the interests of beneficiaries would be protected by common law rules and principles of equity which impose duties on fund managers and trustees (common law and fiduciary duties).[303]

The following section draws together conclusions and inferences which have been made in various sections of this Chapter.

2.9. CONCLUSION.

This Chapter has examined the legal, regulatory and institutional framework so as to establish whether or not it provides adequate incentives for the growth of demand and supply of securities to securities exchanges in the region. The conclusion reached in this chapter is that the said framework does not provide sufficient incentives for the growth of demand and supply of securities to securities exchanges in the region. On the supply side, it was noted that the said framework only allows companies to list their securities on DSEs. The author argued that such a regulatory approach is likely to limit the supply of securities to securities exchanges. It was also noted that Zambian corporate issuers have concentrated on equities. The author argued that such a practice is likely to serve as a constraint on the efficacy of the said framework in increasing supply of securities. Proposals were made for a balance between equities and other securities. As a possible way of increasing supply of securities to securities exchanges, it was proposed that 'securities' be defined further as any financial instrument of an issuer which is defined as a security under the law of any COMESA or SADC member state or commonly known as a security or prescribed as

[301] Organization for Economic Cooperation and Development, 'Prudent Person Rule" Standard for the Investment of Pension Fund Assets' (2016).
[302] *ibid*
[303] For duties of trustees and other fiduciaries, see generally, Gadner S., *The Law of Trusts* (Claredon Press 1996).

such by a DSEC of any COMESA or SADC member state. It was also proposed that 'prospectus' be redefined as a document under which other recognized securities than shares and debentures may be distributed. On the demand side, it was noted that lack of an international passport to multi-jurisdiction securities advertisement is likely to increase transaction costs for multi-jurisdiction securities advertisements and hinder growth of foreign demand for securities. As a possible way of increasing foreign demand for securities, proposals were made for the introduction of an international passport to multi-jurisdiction securities advertisement in the COMESA Region. It was also noted that quantitative restrictions limit the amount of capital that could be exported for investment in listed securities. Thus, the author argued that quantitative restrictions only serve as a constraint on the growth of foreign demand for listed securities. As a possible way of overcoming this constraint, it was proposed that quantitative restrictions be replaced with the prudent-person rule. It was further noted that bond markets in the COMESA Region are in the early stage of development. The author argued that the poor state of bond markets in the region hinders growth of demand for bond-like/bond-linked equities in the secondary market. The following Chapter examines constraints on regional integration of stock markets.

CHAPTER 3

CONSTRAINTS ON INTEGRATION OF STOCK MARKETS IN EASTERN AND SOUTHERN AFRICA.

3.0. INTRODUCTION.

Chapter 2 has examined constraints on demand and supply of securities to DSEs and the RSE. It was noted that the legal, regulatory and institutional framework does not provide sufficient incentives for growth of demand and supply of securities to securities exchanges. The chapter demonstrated possible ways of increasing supply and demand for listed securities. In this Chapter, we turn to examine legal, regulatory, institutional and policy constraints on regional integration of stock markets through cross-border cross-listings. The central premise of this chapter is that the cost of cross-border cross-listings and trade in securities can obstruct or facilitate access to broader and deeper markets by issuers and investors. Given the central thesis of this study, this chapter argues that regional integration of COMESA FSMs through a RSE and cross-listings is likely to increase access to better markets, lower the cost of capital for issuers and investors, and promote cross-border trade in securities. The chapter also argues that such measures are likely to ease the liquidity challenges that are faced by FSMs in the region.

3.1. AN OUTLINE OF CHAPTER 3.

Chapter 3 of the thesis is divided into eight sections. The first section gives the general introduction to the chapter.[304] The second section gives an outline of the chapter.[305] The third section gives the historical perspective of LuSE.[306] The third section has a subsection which examines investor

[304] See, section 3.0 of Chapter 3 of the thesis.
[305] See, section 3.1 of Chapter 3 of the thesis.
[306] See, section 3.2 of Chapter 3 of the thesis.

participation and FPI flows to the LuSE.[307] The author argues that in order to accelerate development of the LuSE, there is need to incentivize both domestic and foreign investor participation. The second subsection examines constraints relating to geographical location of listed-equity funds for Sub-Saharan Africa.[308] Empirical evidence is provided to the effect that most of these Funds are located in South Africa. The evidence also shows that the said Funds restrict their investment to South Africa. The author argues in this section that the concentration of listed-equity funds in South Africa, and restriction of their investment to that country only serve as constraints on the growth of cross-border trade in securities in the region. Empirical evidence provided in this section also shows that over the years, listed foreign portfolio flows to the Sub-Saharan region have been rising. The author argues that unless key reforms are made, COMESA FSMs will continue to get only a tiny fraction of the listed-FPI flows to the region.

The fourth section makes a case for regional integration of securities markets through cross-listings. The fourth section is divided into six subsections. The first subsection gives the two types of regional integration of securities markets. The second subsection examines the legal, regulatory and institutional framework so as to establish whether or not it provides adequate incentives for the growth of cross-listings. The third subsection examines the role of a compensation fund in stock market development.[309] The author argues that a properly managed, liquid and effective Fund is likely to encourage cross-border cross-listing and trade in securities. The third subsection also makes a case for the establishment of a RCF as a Fund of last resort. The author argues that the introduction of a RCF is likely to encourage participation of domestic and foreign issuers and investors, and increase cross-border trade in securities in the region. The fourth subsection

[307] See, subsection 3.2.1 of Chapter 3 of the thesis.
[308] See, section 3.2.2 of Chapter 3 of the thesis.
[309] See, subsection 3.3.3 of Chapter 3 of the thesis.

examines constraints relating to lack of a RSE in the region.[310] The author argues that a RSE and, enhanced cross-listing among DSEs, and between those DSEs and the RSE are likely to increase cross-border trade in securities.[311] Such measures are also likely to ease the liquidity challenges that are faced by DSEs in the region.[312] The fifth subsection makes proposals for the introduction of a RSEC as a possible way of enhancing the quality of regulation in ISMs. The sixth subsection examines constraints relating to the low level of cross-border cross-listings in the COMESA Region. The author argues that the low level of cross-border cross-listings in the region present itself as a constraint on regional integration of stock markets.

The fifth section examines the impact of dual membership of COMESA states on the implementation of the regional integration agenda. The author argues in this section that dual membership makes it difficult for COMESA member states to implement the agenda for regional integration of stock markets.

The sixth section examines constraints relating to non-recognition of a single prospectus as an international passport to multi-jurisdiction cross-listing.[313] In this section, it is noted that the regional legal, regulatory and institutional framework does not provide an international passport to multi-jurisdiction cross-listing. The author argues in this respect that the cost and time of complying with the disclosure requirements of each target jurisdiction is likely to discourage multi-jurisdiction cross-listings in the COMESA Region. As a possible solution to this shortcoming in the law, the sixth section makes proposals for the introduction of an international passport. Section six also examines constraints relating the narrow class of securities that could be distributed under

[310] See, subsection 3.3.4 of Chapter 3 of the thesis. Hereinafter, the regional stock exchange will be referred to as 'the RSE'.
[311] Hereinafter, domestic stock exchanges will be referred to as 'DSEs'.
[312] Mwenda, PhD Thesis (2001), *op.cit*
[313] See, section 3.5 of Chapter 3 of the thesis

prospectuses under the Zambian legal, regulatory and institutional framework. The author argues that by recognizing shares and debentures as the only types of securities that can be distributed under prospectuses, the regulatory framework effectively leaves out other marketable securities. The author also argues that mutual recognition of prospectuses, for multi-jurisdiction cross-listing purposes, could be promoted by adopting a uniform definition of 'prospectus' in the region. The author argues further that enhanced mutual recognition of prospectuses is likely to promote growth of multi-jurisdiction cross-listings in the COMESA region.

The seventh section gives empirical evidence on the positive effect of cross-border cross-listing on stock market capitalization, liquidity and development.[314] The seventh section examines constraints on securities market development. The section identifies legal transplants as a major constraint on securities market development in the COMESA Region. The section argues that institutions that are based on the real needs, culture, practices, beliefs and preferences of domestic and ISMs are likely to promote stock market development, and promote cross-border trade in securities in the region. The eighth section draws together the arguments made in various sections of the chapter, and makes the conclusion of the chapter.[315]

3.2. THE LUSAKA STOCK EXCHANGE—AN OVERVIEW.

This section examines the policy objectives that drove the formation of the LuSE. By so doing, this section aims to establish whether or not those objectives have contributed to the inward or outward focus of the legal, regulatory and institutional framework which regulates cross-listings in Zambia.

[314] See, section 3.6 of Chapter 3 of the thesis.
[315] See, section 3.7 of Chapter 3 of the thesis

The Lusaka Stock Exchange (hereinafter 'the LuSE') was established pursuant to the repealed Securities Act 1993. The LuSE was established on the 17th day of December 1993 being the commencement date of the said Act of Parliament.[316] Although the Securities Act of 1993 has been repealed by section 222(1) of the Securities Act No. 41 of 2016, business of the LuSE has been allowed to continue as if licensed under the 2016 Act.[317] The LuSE commenced business on the 21st day of February, 1994. The International Finance Corporation (IFC) and the World Bank provided technical and financial assistance in setting up the LuSE. In the first two years of its operation, the LuSE was funded by the United Nations Development Program (UNDP) and the Zambian Government as a joint project.[318]

Legal requirements for setting up a Stock Exchange in Zambia.

In Zambia, only a company incorporated pursuant to the Companies Act 2017 may establish and operate a securities exchange.[319] A company incorporated as such needs to apply to the SEC for a license to establish and operate a securities exchange.[320] Once granted a license by the SEC, the licensed company may proceed to establish and operate a stock exchange.[321] Establishing and operating a stock exchange contrary to sections 21(1) of the Securities Act 2016 constitutes an

[316] See, Zambian Securities Act 1993, s 9(1) (repealed).
[317] Zambian Securities Act 2016, s 222(4).
[318] Lusaka Stock Exchange, 'LuSE—Historical Perspective' <www.luse.co.zm> accessed 14 June 2016; <www.pangaeapartners.com/luseinfo.htm > accessed 14 June 2016. The establishment of the LuSE was part of the government's broader economic reform program aimed at stimulating a dynamic and efficient private sector which would serve as a primary engine for economic growth: *ibid*

[319] Securities Act 2016, s 21(1)(a)(b). Companies incorporated pursuant to predecessor Companies Act are also eligible.
[320] Zambian Securities Act 2016, s 21(1)
[321] *ibid*

offence.[322] Any person who is found guilty of the said offence is liable to a fine not exceeding one million penalty units or imprisonment for a term not exceeding ten years or to both.[323]

There is a distinction between the legal personality of the licensed corporation—the operator—and the legal personality of the operated entity—the stock exchange.[324] The operator of LuSE is incorporated as a public limited liability company in the name of Lusaka Securities Exchange PLC. The LuSE itself, which is now a private company limited by shares, was initially incorporated as a company limited by guarantee in the name of Lusaka Stock Exchange Limited. LuSE's membership in its original status comprised stock-brokering corporate entities.[325] LuSE was set up with the following objectives:[326]

i) To provide a source of long-term capital to the privatized companies in a fair and transparent manner;
ii) To encourage the international community to invest in Zambia;
iii) To provide an opportunity to the Zambian people to invest in the privatized companies and create wealth through ownership of shares;
iv) To facilitate the privatization of state-owned enterprises as part of the IMF/World Bank economic reforms,[327] and;

[322] Zambian Securities Act 2016, s 20(1)(a)(b)(c)(2)
[323] *ibid*
[324] See also, generally the English case of *Salomon vs Salomon & Co.* [1897] AC 22; Davis P. (ed), *Gower's Principles of Modern Company Law* (Sweet and Maxwell 1997).
[325] Under this club-like ownership structure, LuSE had six members namely, Inter-market Securities Limited, Madison Asset Management Company Limited, Pangaea/Renaissance, Stockbrokers Zambia Limited, Equity Capital Resources PLC, and African Alliance Securities Zambia Limited.

[326] Lusaka Stock Exchange , 'LUSE-Historical Perspective' <www.luse.co.zm> accessed 16 June 2016.
[327] N'gambi observes that the Zambian economy has historically been linked to copper production. He further observes that prior to liberalization of the economy, the mines were state-owned. After 1991, the Zambian Government embarked on the privatization programme: Sangwan Patrick N'gambi, 'The Resource Nationalization Cycle, Stabilization Clauses and the need for Flexibility in Concession Agreements' (PhD Thesis, Leicester University 2014) at 8 https://lra.le.ac.uk/bitstream/2381/31484/1/SangwaniPatrickCorrectedThesis.pdf> accessed 13 February 2019.

v) To provide an orderly and transparent market for securities trading.

As the list above suggests,[328] the focus of the creators of LuSE was the domestic industry.[329] Listings were expected to come from domestic privatized companies.[330] Earlier, Mwenda had observed that the establishment of the LuSE and the enactment of the Securities Act of 1993 were hurried up to deal with the privatization program.[331] This appears to rationalize the definition of 'listed company' in successive securities legislation as 'a company incorporated under the Zambian Companies Act'.[332] Foreign entities were not the focus, so it seems. And as such, the framers of the successive securities legislation in Zambia could not give thoughtful consideration to the concept of cross-border cross-listing. The author argues here that such an approach is unlikely to increase foreign issuer participation through cross-listings. In line with this argument, since inception in 1994 to the present day (twenty-six years on), LuSE only boasts a single cross-listing out of the twenty-five (25) listings.[333] As a possible solution to this shortcoming in the regulatory and institutional framework, necessary proposals for reform have been made in section 3.3.1.2. By contrast, the creators of the LuSE appear to have had in mind both domestic and foreign investors.[334] This view is rationalized by the non-discrimination approach to investor treatment

From the mining sector, the following entities are listed on the LuSE, namely (i) Mopani Copper Mines PLC (ii) Konkola Copper Mines PLC (iii) Kansanshi Copper Mines PLC (iv) ZCCM-IH (v) CHIBM, and (vi) CMET: See, Appendices for sectorial diversification of the LuSE.

[328] See items (i)(iv)(v) in the list.

[329] See, items (i), (iv) and (v) in the list above.

[330] See, items (i) and (iv) in the list above. Zambia Forests and Forestry Industry Corporation Limited has just been listed on the LuSE as the 23rd listing. Other parastatals that await listing include, Zamtel Limited, Zesco Limited, and Kawambwa Tea Limited. And, many other parastatals in the Industrial Development Corporation Limited Group (the IDC Group) are yet to be added to the list.

[331] Kenneth K. Mwenda, Zambia's Stcok Exchange and the Privatization Programme: Corporate Finance in Emerging Markets (Edwin Meller Press 2001); Roger M.A. Chongwe, 'Kenneth Kaoma Mwenda, *Zambia's Stock Exchange and the Privatization Programme: Corporate Finance in Emerging Markets* (Edwin Mellen Press 2001)' (2001) H-Net Reviews in the Humanities and Social Sciences 1-7, at 1.

[332] See, definition of 'listed company' in, Securities Act 1993, s 2 (repealed); Securities Act 2016, s 2. See, definition of 'company', in Companies Act 2017, s 3.

[333] Shoprite Checkers PLC which is primarily listed on the Johannesburg Stock Exchange and secondarily listed on LuSE : See, Tables 10 and Table 13.

[334] See items (ii) and (iii) in the list above

that exists at the core of successive securities and investment legislation.[335] The author argues here that the attractive incentives that have been provided to domestic and foreign investors are likely to push demand above supply.[336] The author also argues that excessive demand is likely to compromise sustainable trade and precipitate stock market volatility. Sustainable trade in securities, requires a balance between supply and demand for listed securities.[337] Thus, the author argues here that, given the high transaction costs of cross-border securities deals, the high prices resulting from low supply of securities are likely to increase the overall cost of cross-border trade. The author also argues that the resulting high cost of cross-border trade in securities is likely to discourage cross-border trade, and lower liquidity securities markets in the region. As a possible way accelerating development of the LuSE and other securities exchanges in the region, it is proposed that a balance be struck between supply and demand for listed securities. This is what Irving implies by observing that 'in further developing eastern and southern African capital markets, there is need to enhance liquidity by boosting supply and demand for securities'.[338]

[335] See, the Investment Act 1993 (repealed); The Zambia Development Agency Act 2006.

[336] Financial assets such as securities are not subject to the law of diminishing returns as do real goods/assets: See Chapter 7 of the thesis. With respect to real goods, in the event that demand exceeds supply, the law of diminishing return will step in to control the pricing of the commodity. On the contrary, where demand for financial assets exceeds supply, the insatiable investor appetite for too few securities is likely to increase prices sharply: See generally, Georgakopoulos N., 'Frauds, Markets and Fraud-on-the-market: The Tortured Transition of Justifiable Reliance from Deceit to Securities Fraud' (1995) 49(671) University of Miami Law Review 671; John C. Burch and Bruce S. Foerster (eds), *Capital Markets Handbook* (Wolter Kluwer 2005).

[337] Sustainable trade in securities is trade that is driven by a balance between demand and supply of securities to a particular securities exchange so as to ensures price stability and reduce volatility in the securities market: Wuyts G., 'Stock Market Liquidity: Determinants and Implications' (2007) 2 Review of Business and Economic Literature 279-316; D Begg, S Fischer and R Dornbusch, *Economics* (8th edn, McGraw Hill 2005) 33-35; Samamba Lennox Trivedi BOOK I, at 352, *op.cit*

[338] Jacqueline Irving, *Regional Integration of Stock Exchanges in Eastern and Southern Africa* (International Monetary Fund 2005), at 18 (Hereinafter 'Irving (2005)'); Adelegan (2008) *op.cit*

The following section introduces empirical evidence on investor participation and FPI flow to the LuSE.

3.2.1. INVESTOR PARTICIPATION AND FPI ON THE LuSE.

The preceding section has examined the policy objectives that drove the formation of the LuSE. It was noted that the policy objectives which drove the formation of LuSE have had a bearing on the in-ward focus of the legal, regulatory and institutional framework. The section demonstrated that providing incentives for both domestic and foreign issuers and investors could enhance the competitiveness of the LuSE.[339] In this subsection, we examine whether or not the legislative bias towards the investor—investor non-discrimination—has promoted both domestic and foreign investor participation.

(a). Domestic and Foreign Participation on Lusaka Stock Exchange for the Period 1997-2014.

This subsection supplies empirical evidence on foreign investor participation on the LuSE since 1997. Table 8 below shows the level of foreign participation on the LuSE from 1997 to 2014. This evidence puts the legal arguments which we have made in this section and the rest of the thesis in proper socio-economic context.

Although the Privatization Act 1992 recognized both Zambian citizens and foreigners as eligible buyers of shares in privatized companies, the incentives which were provided under the said Act

[339] Including other securities exchanges in the COMESA Region.

favoured Zambian citizens.[340] Thus, it could ordinarily be expected that during the early years, domestic participation on the LuSE would fairly outweigh foreign participation. However, as indicated in Table 9 below, from 1997-2002, foreign participation on the LuSE was much higher than domestic participation. In in the year 2003, LuSE recorded a reversal of this foreign participation upward trend. Domestic participation was, for the first time, much higher than foreign participation. This upward swing in the level of domestic participation continued to the year 2014. The author argues here that meaningful development of LuSE could be accelerated by promoting both domestic and foreign participation. In order to achieve this goal, it is proposed that the following measures be implemented, namely:

i) Education the public on the benefits of investing in domestic stock markets;[341]
ii) Providing lower taxes to issuers as a way of encouraging listing on securities exchanges;[342]
iii) Providing special incentives such as lower listing costs to Small and Medium Scale Enterprises (SMEs);[343]
iv) Promoting cross-listing of LuSE securities into deeper stock exchanges like the JSE;[344] and
v) Promoting securities advertisement;

[340] Privatization Act No. 21 of 1992, ss 29-30 (repealed).

[341] Empirical evidence has been provided in Chapter 7 of the thesis to the effect that there is poor financial education and literacy among the investing public in Zambia. As a possible way of increasing investor participation, proposals have been made there for increasing investor education and literacy.

[342] Listed securities are exempt from property transfer tax. However, securities are personal property of the holder: Zambian Companies Act 2017, s 141(1). Thus, this incentive goes to promote investor participation. In order to attract issuers, corporate tax exemption or lower rates could serve to increase issuer participation.

[343] LuSE, Botswana Stock Exchange and Nairobi Stock Exchange have established alternative markets for Small and Medium Scale Enterprises offering special incentives to these entities as a means of encouraging listings. Increased listing increases the supply of securities to stock markets. However, given the poor participation of venture capital funds—which are crucial to the success of alternative markets—on these markets, the alternative markets are likely to underperform. Empirical evidence is given in Chapter 7 of the thesis to the effect that there is no venture capital fund that is registered or authorized to participate on the LuSE.

[344] This aspect has been elaborately tackled in Chapter 3 of the thesis (this very chapter). Cross-listing serves to increase both supply of and demand for listed securities.

Table 9: Foreign and Domestic Participation on the LuSE 1997-2014						
	Turnover (K)		Volume		Trades	
Year	Foreign	Domestic	Foreign	Domestic	Foreign	Domestic
1997	8,141,400,853	187,343,438	82,276,797	3,446,992,426	N/A	N/A
1998	3,299,768,018	3,165,483,249	101,122,702	56,739,237	N/A	N/A
1999	17,020,008,533	15,969,762,421	69,878,600	63,138,063	140	1,783
2000	22,912,176,205	2,379,845,155	165,961,029	16,569,889	113	1,713
2001	175,047,993,204	14,635,759,063	9,579,587,57	304,338,179	275	1,866
2002	4,646,296,409	6,242,719,992	55,906,717	26,849,802	161	1,404
2003	19,764,505,313	29,679,302,752	54,862,715	256,580,459	231	1,872
2004	23,255,342,412	10,253,168,589	151,247,097	60,034,768	93	1,993
2005	18,070,980,712	21,345,728,751	41,549,768	113,518,643	158	2,361
2006	31,756,193,809	51,856,709,296	340,600,196	514,109,344	164	3,498
2007	87,859,592,540	205.204,011,581	1,475,143,50	1,325,123,686	367	5,832
2008	320,824,655,594	293,728,026,860	874,196,696	711,610,010	1,002	7,383
2009	92,560,887,729	133,940,210,570	386,749,208	489,241,601	549	6,090
2010	116,885,567,897	142,542,797,874	195,419,284	340,872,206	553	5,977
2011	150,108,101,269	625,221,437,749	296,628,278	851,640,872	791	6,329
2012	78,881,423,557	281,857,220,690	176,510,907	1,902,844,041	391	5,293

2013	189,463,616	112,515,000	141,847,331	156,994,776	1,009	4,810
2014	214,894,900	175,700,205	81,832,286	158,479,325	201	2,356

Source: Lusaka Stock Exchange Monthly News Flash, May, 2014.

(b). Foreign Portfolio Investment on Lusaka Stock Exchange for the Period 1997-2014.

Table 10 below shows FPI flows to the LuSE for the period 1997-2014. Generally speaking, in the said period, there has not been a defined pattern of either increase or decrease in FPI flow to the LuSE. Save for the periods 2005-2007, December 2012 and January 2014, there is heavy fluctuation in the net position and the total turnover of FPI. And, except for the years 2000, 2002, 2004, 2008, December 2009, December 2011 and May 2014, the rest of the years posted far much higher FPI inflows than outflows. It is submitted that marginal as the levels of the net position may be, the positive net position serves to indicate that LuSE is fairly attractive to FPI. It is submitted that the investor-non-discrimination approach adopted by Zambian legislators and policy makers, has not quite translated into increased foreign investor participation on the LuSE. The author also argues here that cross-border cross-listing and trade in securities are likely to increase foreign investor participation on the LuSE and other COMESA markets.

Table 10: Foreign Portfolio Investment on the LuSE 1997-2014				
Year	Buying (USD) Million (inflow)	Selling (USD) Million (outflow)	Total Turnover (USD) Million	Net Position (USD) Million
1997	3,801,540	(2,368,497)	6,170,037	1,433,043
1998	1,719,529	(900,758)	2,620,288	818,771
1999	13,151,800	(608,692)	13,760,492	12,543,108
2000	6,529,591	(7,439,005)	13,968,596	(909,414)
2001	39,219,858	(31,695,715)	70,915,573	7,524,143
2002	477,930	(739,963)	1,217,893	(262,033)
2003	4,577,321	(2,326,223)	6,903,544	2,251,098
2004	4,752,958	(4,827,514)	5,430,842	(74,556)
2005	8,255,606	(2,947,875)	11,203,481	5,307,731
2006	11,691,163	(3,729,399)	15,420,562	7,961,764
2007	30,562,317	(17,832,216)	48,599,707	12,524,927
2008	58,308,695	(63,976,251)	122,284,946	(5,667,556)
Dec 2009	134,573	(334,010)	468,583	(199,437)
Dec 2010	195,996,625	(85,194,105)	281,190,730	110,802,520
Dec 2011	477,362	(1,210,164)	1,687,525	(732,802)
Dec 2012	1,037,993	(678,297)	1,716,290	359,696
Dec 2013	1,422,860	(998,112)	2,420,972	424,748
Jan 2014	1,355,386	(839,431)	2,194,817	515,956
Feb 2014	954,666	(853,609)	1,808,275	101,057
March 2014	926,916	(549,185)	1,476,101	377,730
April 2014	6,320,613	(6,258,254)	12,578,867	62,360
May 2014	4,500,097	(30,418,253)	34,918,350	(25,918,156)

Source: Lusaka Stock Exchange Monthly News Flash, May, 2014

Exchange rate: K 7.24

The following subsection gives empirical evidence on foreign issuer participation on the LuSE since its establishment in 1994.

3.2.2. ISSUER PARTICIPATION ON THE LuSE AND CAPITALIZATION.

The preceding subsection has examined whether or not the legislative bias towards the investor has promoted the growth of domestic and foreign investor participation. It was noted that the said policy has not promoted growth of foreign investor participation on the LuSE. The subsection demonstrated that domestic and foreign investors need different incentives. In this subsection, we examine whether or not the bias by Zambian policy makers against foreign issuers has translated into poor foreign issuer participation on the LuSE.

(a). Market Capitalization of the Lusaka Stock Exchange as at March, 2015.

Despite the challenges faced by FSMs, LuSE has contrived to grow in terms of the number of listed companies and market capitalization. From just four (4) companies at inception in 1994, the number of listed companies has grown to 25, as at 10th September, 2020. Table 11 below, shows that capitalization of LuSE has increased from ZMK 412.892 million in 1994, to ZMK 65, 395.00 million in 2015. Currently (the year 2020), capitalization of the LuSE stands at ZMK 55 billion.

Table 11: Market Capitalization and Performance of LuSE 2014-2015.				
	March 2015	May 2014	April 2014	March 2014
K mn (excluding Shoprite	31, 165	27, 730	26, 669	26, 904
K mn (Including Shoprite	65, 395	61, 969	60, 909	61, 143
In USD	9, 120	8, 559	9, 532	9, 721
Mkt Cap/GDP Ratio	23.45%	22.017%	21.175%	21.361%
Turnover/GDP Ratio	0.1867%	0.1753%	0.0711%	0.025%
Turnover/Mkt Capitalization	0.8378%	0.7864%	0.8177%	0.8106%
LuSE Depository Cap.	15, 369.72	14, 425.91	14, 328.64	11, 809

Source: Lusaka Stock Exchange Monthly News Flash, May 2014, and Lusaka Stock Exchange 2015 First Quarter Performance Report, March, 2015.

Note: Shoprite is dual-listed (on LuSE, and Johannesburg Stock Exchange (JSE)).

Market capitalization for the first quarter of 2015 increased by 6.95% of the capitalization for the same period in 2014.[345] The LuSE All Share Index (LASI) closed at 6, 099.65 points. This score was higher by 4.95% of the index for the same period in 2014.[346] This rise could be attributed to the share price increase in stocks like, BATA, ZCCM, NATBREW, REIZ, ATEL, and ZAMBREW.[347]

[345] From K 61, 143 to K 65, 395.
[346] Lusaka Stock Exchange 2015 First Quarter Market Performance Report 2015, at 1.
[347] *ibid.*

The volume of share traded in the first quarter of 2015 was significantly lower by 75.81% of the volume of trade in the first quarter of 2014.[348] Trade turnover decreased by 11.14% of the trade turnover for the same period in 2014.[349]

It is worth noting that although the performance of LuSE has been relatively impressive, most of the capital comes from domestic companies. In twenty six (26) years of her operation, LuSE has only managed a single cross-listing. Only Shoprite Checkers PLC is primarily listed on the JSE and secondarily listed (cross-listed) on the LuSE. This record is not a good indicator for a pre-emerging stock market. It is therefore submitted that the bias against foreign issuers by Zambian legislators and policy makers appears to have translated into low foreign issuer participation on the LuSE. As a possible way of promoting foreign issuer participation on the LuSE and other exchanges in the region, it is proposed that the remedial measures which we have proposed above be implemented.

3.3. CONSTRAINTS RELATING TO GEOGRAPHICAL LOCATION OF LISTED-EQUITY FUNDS FOR SUB-SAHARAN AFRICA.

The preceding section has examined whether or not the investor-non-discrimination philosophy adopted by Zambian legislators and policy makers has promoted growth of domestic and foreign investor participation. The section also examined whether or not the bias by Zambian policy makers against foreign issuers has translated into poor foreign issuer participation on the LuSE. It was noted that the Zambian investor-non-discrimination philosophy has not increased foreign investor participation on the LuSE. It was also noted that the bias against foreign issuers, by Zambian legislators and policy makers appears to have translated into poor foreign issuer

[348] *ibid.*
[349] *ibid.*

participation on the LuSE. The section demonstrated that in order to develop competitive securities markets, a balance must be struck between issuer and investor incentives. In this section, we turn to examine the effect of the geographical location of listed-equity funds for the Sub-Saharan region on cross-border cross-listing and trade in the COMESA Region. The central premise of this section is that geographical location of listed equity funds is critical to the reach of their investment activities.[350] Thus, given the central thesis of this study, this section argues that enhanced cross-border cross-listing into the JSE,[351] and the RSE is likely to boost liquidity of COMESA securities markets.[352] It is also likely to increase cross-border trade in securities in the region.[353]

The following subsection examines the geographical location and investment reach of most listed-equity funds for Sub-Saharan Africa.

3.3.1. GEOGRAPHICAL LOCATION OF REGIONAL LISTED-EQUITY FUNDS FOR SUB-SAHARAN AFRICA.

This subsection supplies empirical evidence on the location and investment reach of listed-equity funds for Sub-Saharan Africa. This exercise puts the legal arguments which we have made in this section and the rest of the thesis in proper socio-economic context.

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[350] This view is rationalized by the empirically-proven position that investors prefer to invest in domestic markets or at least in those close to home. This preference of domestic assets to foreign assets is referred to as 'equity home bias': I Cooper and E Kaplanis, 'The Implication of the Home Bias in Equity Portfolios' (1994) 5(2) Business Strategy Review 41-53; Samamba Lennox Trivedi, 'Exchange Controls as a Constraint on Growth of Cross-border Trade in Securities' (2018) 4(4) African Law Journal 45, 63

[351] Empirical evidence given below shows that South Africa is home to most listed equity funds for Sub-Saharan Africa. Evidence also shows that these equity funds restrict investment to this jurisdiction.

[352] Samuel O. Onyuma, Robert K. Mugo and John K. Karuiya, 'Does Cross-border Listing (Still) Improve Firm Financial Performance in Eastern Africa' (2012) 1(1) Journal of Business, Economics and Finance 92-109 (hereinafter 'Onyuma, Mugo and Karuiya (2012)')

[353] Samamba Lennox Trivedi VIII, *op.cit*

Empirical evidence provided in Table 12 below shows that most of the regional listed-equity funds are located in South Africa. The said evidence also indicates that these funds restrict their investment to South Africa which is their country of establishment. The author argues here that the concentration of most listed-equity funds for the region in South Africa, and the confinement of the investment reach of these funds to that jurisdiction, have not provided the necessary incentives for the growth of cross-border cross-listings. This view is rationalized by the position that cross-border cross-listings are mainly sought for purposes of exposing listed securities to deeper and broader stock markets.[354] Thus, since the JSE is the deepest and broadest stock market in Eastern and Southern Africa, it is quite hard to see why an issuer would cross-list into thinner stock markets elsewhere within the region. The author argues here that such a negative feature is likely to serve as a constraint on the efficacy of the legal, institutional and regulatory framework in promoting cross-border cross-listing and trade in the region. As a possible solution to these constraints, it is proposed that cross-listing into the JSE and the RSE be increased. Such a measure is likely to ensure that securities exchanges outside South Africa benefit from the depth and success of the JSE and the strength of the proposed RSE.[355]

[354] Ghadhab I. and Hellara S., 'Determinants of Multiple Foreign Listing Decisions' (2015) 26 Procedia Economics and Finance 663-681; Coffee C.J (2002), *op.cit*

[355] T Moss, V Ramachandran and S Stanley, 'Why doesn't Africa get more Equity Investment? Frontier Stock Markets, Firm Size and Asset Allocation of Global Emerging Market Funds' (2007) Working Paper Number 112/2007, 2-12 www.cgdev.org/sites/default/files/12773_file_Moss_Rama_Standley_Portfolio_Africa.pdf ; accessed 27 July 2018.

Table 12: Geographical Location of African Listed-Equity Investment Funds				
Fund Name	Management Company	Fund Status	Launch Date	Geographical Focus
Africa Emerging Market Fund	Emerging Mkt Mgt	Active	1994	PA
Blakeney Investor Fund	Blakeney Mgt Co.	Active	1995	PA
Calvert New Africa Fund	Calvert Group	Shut 2001	1995	PA
EMIS South Africa Index	Sinopial/BBV	Active	2001	SA
Fleming's New SA Fund	Robert Flemming	Shut 1998	1994	SA
G.T. Africa Fund	G.T. Mgt Co.	Shut 1999	1995	PA
Investec PA Fund	Investec Asset Mgt	Active	2005	PA
Morgan Stanely Afri Inves Fund	Morgan Stanely	Shut 2003	1994	PA
Orbis Afri Eqity Fund	Orbis Investment	Active	1998	SA
Regent Undervalued Assets Afri	Regent Fund Mgt	Shut 2000	1996	PA
Save & Prosper SA Fund	Save & Prosper	Shut 2000	1994	SA
Simba Fund	Baring Asset Mgt	Shut 2000	1995	PA
SA Trust	Old Mutual	Active	1995	SA
Southern Afri Investor Ltd	Mercury Asset Mgt	Shut 1998	1995	SA
Southern Africa Fund	Alliance Capital	Shut 2004	1994	SA

UBS Equity Fund SA	UBS Global Asset	Active	1948	SA

Source: The World Bank, 2013.

Note: PA stands for 'Pan Africa'; SA stands for 'South Africa'.

Only seven (7) out of the fifteen listed-equity funds established for Sub-Saharan Africa between 1994 and 2005 are still active.[356] Out of the seven (7) active equity funds[357], 4 are located in South Africa. And the 4 funds located in South Africa exclusively invest in South Africa on the JSE.[358] Only 3 invest elsewhere in addition to investing in South Africa.[359] This evidence shows that South Africa gets the lion's share of investment from the listed-equity funds established for the Sub-Saharan African region.

The following subsection compares FPI, FDI and bank lending flows to Sub-Saharan Africa for the period 2008 to 2013.

3.3.2. INTERNATIONAL PRIVATE CAPITAL FLOWS TO SUB-SAHARAN AFRICA 2008—2013.

The subsection appearing immediately above has examined the effect of the geographical location of listed-equity-funds on their investment reach. It was noted that most of the listed-equity-funds for the region are located in South Africa. It was also noted that the said funds restrict their investment to that country. The subsection demonstrated that the location of listed-equity funds

[356] Excluding UBS Equity Fund South Africa which has been operating in South Africa since 1948 when the Johannesburg Stock Exchange was also formed.

[357] Namely, Africa Emerging Market Fund, Blakeney Investor Fund, EMIS South Africa Index, Investec Pan Africa Fund, Orbis Africa Equity Fund, South Africa Trust, and UBS Equity Fund South Africa.

[358] These are UBS Equity Fund South Africa, South Africa Trust, Orbis Africa Equity Fund, and EMIS South Africa Index.

[359] These are Investec Pan Africa Fund, Blakeney Investor Fund, and Africa Emerging Market Fund. They invest both in South Africa and the rest of Africa.

has a bearing on the reach of their investment activities. In this subsection, we turn to examine FPI flows to the COMESA region. This serves to put in proper socio-economic context the legal arguments made on the efficacy of the legal, regulatory and institutional framework to increase FPI.

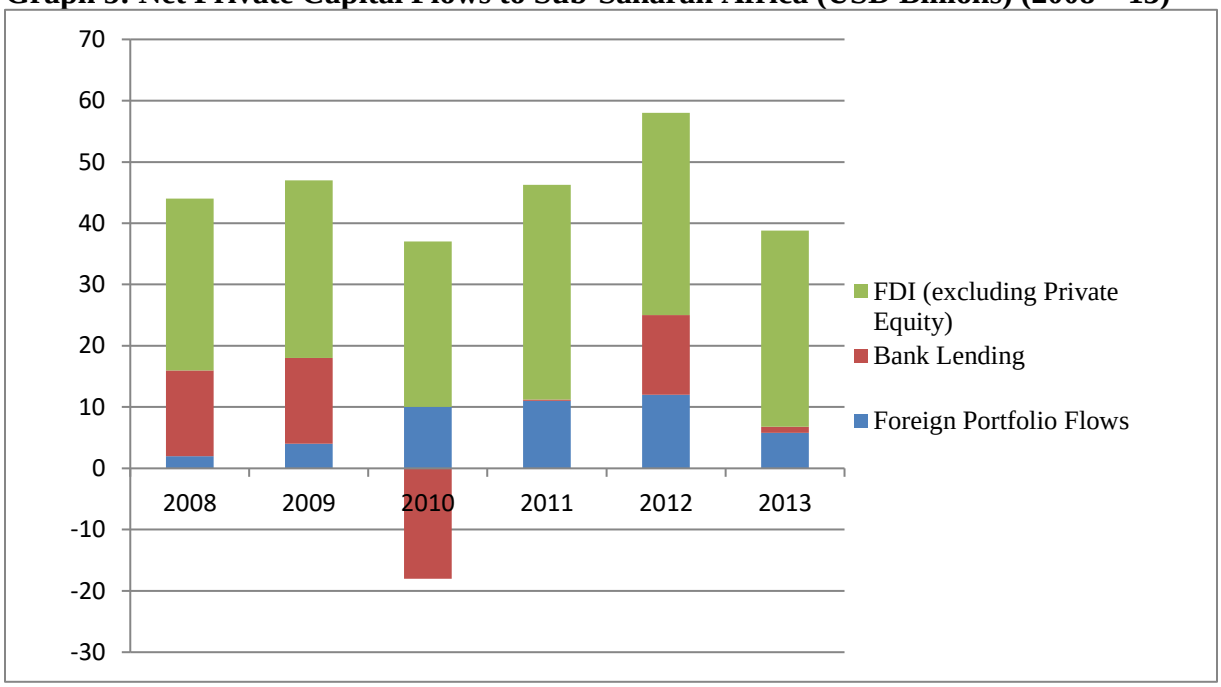
As indicated in Graph 5 below, for the period under consideration (2008—2013), the flow of FDI to the region has been relatively steady making FDI the major source of international private capital.[360] In contrast, bank lending fell in 2010 losing its second place to FPI.[361] FPI flows to the region have risen from about USD 1.5 billion in 2008 to USD 53.5 billion at the close of the period in 2013.[362]

[360] FDI brings in USD 183.65 billion or 65.74% of the total international private capital flows for the period under consideration.

[361] Bank lending attracted USD 42.2 billion or 15.1% of the total cross-border private capital flows to the region during the period under consideration.

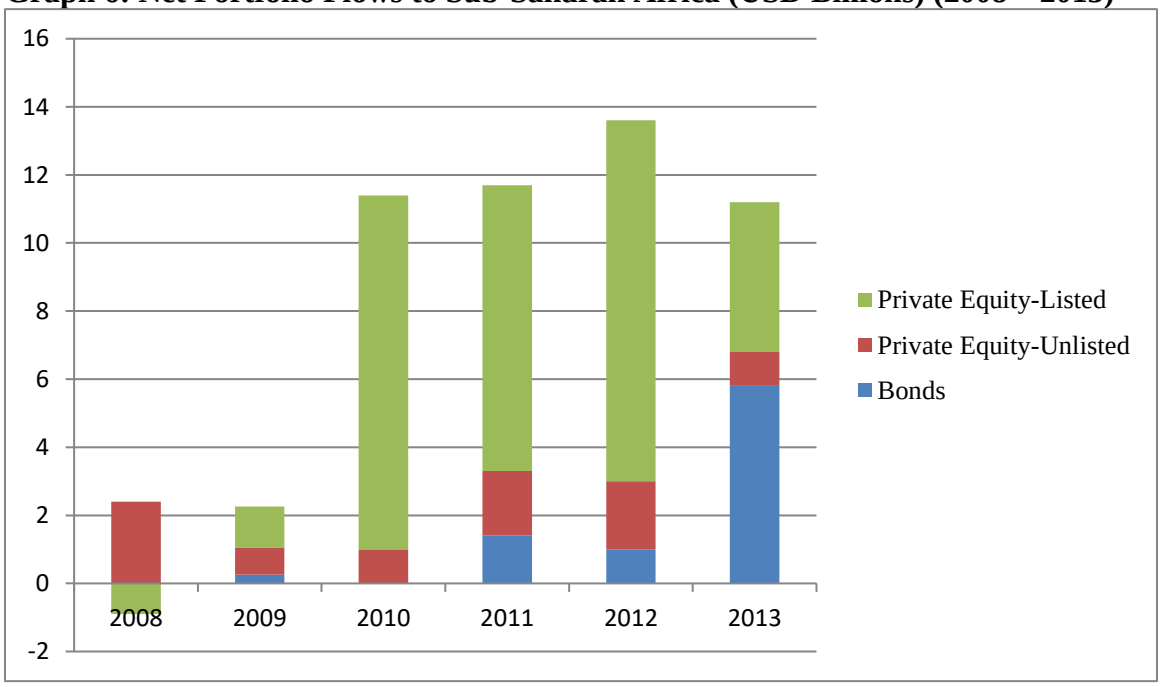
[362] This growth accounts for 19.15% of the total international private capital flows to Sub-Saharan Africa in the period under consideration. This tremendous growth has propelled foreign portfolio flows into the rank of the second-major source of international private capital in the region, the place previously occupied by bank lending until 2010. As can be collected from Graph 6 below, of the portfolio inflows total (USD 53.5 billion) listed private equity accounted for USD 34.3 billion or 64.1% of the total portfolio flows to the region. Private equity raked in USD 10.2 billion or 19.06% of the total, while bonds brought in USD 9.0 billion or 16.82% of the total.

Graph 5: Net Private Capital Flows to Sub-Saharan Africa (USD Billions) (2008—13)



Source: International Monetary Fund, World Economic Outlook Database, 2014.

Graph 6: Net Portfolio Flows to Sub-Saharan Africa (USD Billions) (2008—2013)



Source: International Monetary Fund, World Economic Outlook Database, 2014.

The author argues here that unless the proposal for reform which have made in Sub-sections 3.3.4.1 and 3.3.3.1.1 of this Chapter are implemented, COMESA FSMs will continue to get only a tiny fraction of the FPI flows to the Sub-Saharan region.

The following section examines the possibility of increasing FPI flows to COMESA stock markets through regional integration.

3.4. THE CASE FOR REGIONAL INTEGRATION OF COMESA STOCK MARKETS THROUGH CROSS-LISTINGS.

The preceding section has examined FPI flows to the LuSE. It was noted that although the LuSE has been receiving insignificant FPI flows, listed-equity flows to the region have been on the rise. The section has demonstrated that the capacity of a region or country to attract FPI depends on, among other factors, the effectiveness of the legal, regulatory and institutional framework.[363] In this section, we examine the efficacy of the said framework in promoting cross-border cross-listings. The central premise of this section is that the cost of raising capital is crucial to issuer participation in much the same way the cost of cross-border disposition of securities is to an investor. Therefore, given the thesis of this study, this section argues an effective legal, regulatory and institutional framework is likely to increase foreign participation, cross-border trade in securities and liquidity of DSEs. This view is rationalized by the position that cross-border trade in securities is a function of foreign issuer and investor participation in securities markets.[364]

[363] That is, effectiveness and stringency of legal and regulatory rules and effective enforcement of those rules.
[364] See, Jenah S.W., 'Commentary on a Blueprint for Cross-border Access to U.S. Investors: A New International Framework' (2007) 48 Harv. Int'l L. J. 69; Samamba Lennox Trivedi IV, 54, *op.cit*

Moreover, cross-border cross-listings also benefit the listing securities exchange by enhancing liquidity, and diversifying risk in a wider, more competitive and efficient market.[365]

3.4.1. FORMS OF REGIONAL INTEGRATION OF SECURITIES MARKETS.

There are two forms of regional integration of stock markets.[366] These are full integration and partial integration.[367] Full integration of stock markets consists in a single market achieved through a merger of existing individual stock markets.[368] This imports uniform rules, equal access, equal-treatment, a common trading platform, and a clearing and settlement process.[369] Partial integration, on the contrary, takes the form of regional cross-listings of stocks, interoperability, alliances and joint-ventures.[370]

The appropriate form of regional integration for COMESA securities markets.

Full integration of stock exchanges has its share of potential advantages and disadvantages. This approach to regional integration brings lower inter-market barriers, lower cost of capital, risk diversification and enhanced liquidity.[371] However, it also brings contagion, spill-over risk, financial risk and systemic risk.[372]

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[365] Irving (2005) at 19, *op.cit*

[366] Irving (2005), *op.cit*; Onyuma S.O., 'Regional Integration of Stock Exchanges in Africa' (2006) African Review of Money Finance and Banking 97-122.

[367] *ibid*

[368] South Africa and Namibia are the only countries to be fully integrated in eastern and southern Africa since 2000.

[369] Moses W. Chisadza, *the Role of Cross-listings in Establishing a Southern Africa Development Community Regional Stock Exchange* (Grin 2013), (hereinafter, 'Chisadza BOOK II'); OJ Adelegan, 'Can Regional Cross-listings Accelerate Stock Market Development? Empirical Evidence from Sub-Saharan Africa' IMF Working Paper 2008, 5-9 WP/08/281<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1316749 > accessed 17 July 2016

[370] *ibid*

[371] Faruque, H, 'Equity Market Integration,' in Discressin, J, Faruque, H and Fonteyne, W (eds.), *Integrating Europe's Financial Markets* (International Monetary Fund 2007) 86-120

[372] OJ Adelgan (2008) 8, *op cit*

Although COMESA FSMs are less integrated into the global financial system,[373] the very fact of integration makes these small markets vulnerable to systemic risk.[374] This view is rationalized by the poor regulatory oversight on these markets in the region.[375] An argument is made that, given the small size and inadequate liquidity of these markets, and the poor regulatory oversight, the consequences of systemic shocks could be far-reaching. Consequently, the contagion, spill-over and financial risks which are associated with full integration make full this measure not recommendable.[376] Contrary to the risks associated with full integration, Adelegan observes that 'partial integration through cross-listings brings lower contagion and spill-over risks'.[377] This makes partial integration generally recommendable as a possible way of improving liquidity and FPI flows to COMESA FSMs. Although the IMF concedes that both partial and full integration are likely to tackle the liquidity challenge, they, as we do, observe that the former should be pursued ahead of the latter.[378]

The following subsection exams the legal, regulatory and institutional framework so as to establish whether or not it provides adequate incentives for effective cross-listing of securities.

3.4.2. LEGAL FRAMEWORK FOR CROSS-LISTINGS IN ZAMBIA.

This subsection examines the legal, regulatory and institutional framework so as to establish whether or not it provides enough incentives for growth of cross-listings.

[373] It has been shown in Chapter 2 of this thesis that Eastern and Southern African stock markets are less integrated into the global financial system than do emerging and developed financial systems.
[374] Samamba Lennox Trivedi BOOK I, Vol I, *op.cit*
[375] See, section 7.1.6 of chapter 7 of the thesis for empirical evidence on the poor institutional enforcement capacity of the Zambian SEC.
[376] *ibid*
[377] OJ Adelegan (2008), *op cit*
[378] Charles K. Adjasi and Charles A. Yartey, 'Stock Market Development in Sub-Saharan Africa: Critical Issues and Challenges' (2007) International Monetary Fund IMF Working Paper No. 07/209.

Meaning of an effective legal, regulatory and institutional framework for cross-border cross-listings.

An effective legal, regulatory and institutional framework for cross-border cross-listing is one that facilitates the distribution of different types of securities across international borders at minimum cost.[379]

Regulating cross-listings in Zambia.

There is no provision in the Zambian Securities Act 2016 which governs listings. Part VIII of the Securities Act 2016 only deals with registration of securities. As far as listing of securities is concerned, only trade in [registered] listed securities is covered under Part VIII of the said Act of Parliament.

In Zambia, it is an offence for any person to deal in listed registered securities otherwise than on a licensed securities exchange.[380] The actual listing and modes of listing on DSEs, are not covered by the Securities Act 2016. These aspects are covered under the LuSE Listing Rules of 2012. The LuSE is empowered to make such rules as it considers necessary or desirable for its proper or efficient operation and regulation.[381] LuSE Listing Rules of 2012 are a product of this power. Under the LuSE Listing Rules 2012, a foreign issuer seeking to cross-list on the LuSE may apply as a 'new applicant'. This is a requirement for issuers who have not listed on the market before.[382]

[379] See, Samamba Lennox Trivedi, 'Legal Constraints on the Growth of Cross-border Cross-listings in Eastern and Southern Africa' (2018) 4(4) Afri. L. J. 72-102.
[380] Zambian Securities Act 2016, ss 20(1)(a)(b)(c)(2) and 21(1)(a). Any person found guilty of violating this provision is liable upon conviction to a fine not exceeding one million penalty units or to imprisonment for a term not exceeding ten years or to both: Zambian Securities Act 2016, s 20(2)
[381] Zambian Securities Act 2016, s 67(1)
[382] LuSE Listing Rules 2012, s 5.1. 'Applicant' is defined as an issuer company applying for further listing some of whose securities have been already listed. 'New applicant' is defined as an issuer company applying for the first time no class of whose securities is already listed: See, LuSE Listing Rules 2012, definition section (definition of 'applicant' and 'new applicant')

In the event that issuers wish to apply for further cross-listings, they have to apply as 'applicants'.[383] The LuSE Listing Rules define the term 'company' as:

> A body corporate [wherever incorporated or established] including any other legal person, association of persons or entities and any trust or similar device [wherever established] that issues securities which are capable of being listed on the Lusaka Stock Exchange.[384]

From the definition of 'company' given above, the following legal positions may be distilled, namely that:

a) Both domestic and foreign un-incorporated bodies like associations and trusts that issue securities may list on LuSE;[385]
b) Other domestic bodies corporate like cooperatives—domestic or foreign—which issue shares may also list on the LuSE;
c) Domestic companies incorporated pursuant to successive Zambian Companies Acts as well as foreign companies may also apply for cross-listing on the LuSE;[386] and
d) Other bodies corporate like domestic authorities and parastatals which issue public debt securities may list on the LuSE.

It is submitted that the LuSE Listing Rules 2012 claw in a wide range of listable issuers. The author argues that such a provision is likely to encourage cross-listings from foreign issuers of different styles. The following segment examines some claw-backs on the wide definition 'company' and 'listed company' that has been given in the LuSE Listing Rules.

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[383] LuSE Listing Rules 2012, s 5.1

[384] LuSE Listing Rules 2012, definition section (definition of 'company'). The term 'company' runs through the definition of 'applicant' and 'new applicant' in the LuSE Listing Rules 2012. It is worth noting that the definition of 'applicant', 'new applicant' and 'company' in the LuSE Listing Rules 2012 accords with the definition of 'listed securities' which we have proposed above in Sub-section 3.1.1 of this Chapter of the thesis.

[385] Provided the range of securities falls within the definition of 'securities' given under section 2 of the Securities Act 2016.

[386] Provided the range of their securities falls within the definition of 'securities' under section 2 of the Securities Act 2016.

Constraints relating to the narrow Definition of 'Listed Securities' under the Securities Act 2016.

The preceding subsection has examined the efficacy of the LuSE Listing Rules 2012 in promoting growth of cross-listings. It was noted that the LuSE Listing Rules recognize a wide range of listable issuers. In this segment, we examine the efficacy of the Zambian Securities Act 2016 in promoting cross-listings.

Despite the broad definition of 'company' in the LuSE Listing Rules 2012, the Zambian Securities Act 2016 narrowly defines 'listed securities' as "securities of a listed company".[387] 'Listed company' is a company incorporated under the laws of Zambia whose securities have been registered with the SEC and admitted to trading on a securities exchange.[388] There is thus, conflict between LuSE Listing Rules and the Zambian Securities Act 2012 regarding the scope of listable entities. Regarding this sort of conflict, the position in Zambia is that the Parent Act overrides any statutory instrument made under it.[389] It is therefore submitted that other entities than domestic companies cannot competently list on Zambian securities exchanges. The author argues here that this sort of restriction is likely to exclude many other listable issuers from cross-listing on domestic exchanges.[390] It is therefore, humbly submitted that the legal, regulatory and institutional framework does not provide adequate incentives for the growth of cross-listings in DSEs in Zambia.

[387] See, Zambian Securities Act 2016, s 2 (definition of 'Listed company')
[388]See, the definition of 'listed company' in the Zambian Securities Act 2016, s 2; definition of 'company' in the Zambian Companies Act 2017, s 3, and definition of 'company' in the Zambian Securities Act 2016, s 2
[389] See, the Interpretation and General Provisions Act, s 20(4), Cap 2 of the Laws of Zambia; *Bank of Zambia vs Anderson* (Supreme Court of Zambia Judgment No. 13 of 1993) and *Attorney General vs Mooka Mubiana* (Supreme Court of Zambia, Appeal No. 38 of 1993)
[390] Listable styles of issuers such as foreign companies, and domestic and foreign cooperatives, other forms of bodies corporate, trusts, collective investment schemes and associations.

As a possible way of overcoming this shortcoming in the regulatory framework, proposals are made for the amendment of the definition of 'listed company' and 'listed securities' as follows:

> 'Listed Company' should be amended to 'Listed issuer', and 'listed issuer' should mean "an issuer whose securities have been admitted to official listing and trading on a securities exchange".[391] 'Listed securities' should be redefined as "securities of a listed issuer".

Such an amendment is likely to ensure that many other styles of issuer than domestic companies and their securities are admitted to official listing on DSEs. Under this proposed regime, both domestic and foreign issuers may seek a new listing or cross-listing on the LuSE using the following methods, namely:[392]

a) An offer for sale (including placing);
b) An offer for subscription (including placing);
c) An issue with participation or conversion rights; or
d) A renounceable offer.

Applicants seeking further listing or cross-listings may list or cross-list using the following means, namely:[393]

a) A rights offer;
b) A claw-back offer;
c) A capitalization issue;
d) An issue for cash;

[391] And 'issuer' here means 'a body corporate [wherever incorporated or established] including any other legal person, association of persons or entities and any trust or similar device [wherever established] that issues securities which are capable of being listed on the Lusaka Stock Exchange'.
[392] LuSE Listing Rules 2012, s 5.3.
[393] LuSE Listing Rules 2012, ss 2.1, 5.2.

e) An acquisition or merger issue (or a vendor consideration issue);

f) A vendor consideration placing;

g) An exercise of options to subscribe for securities;

h) A conversion of securities from one class into securities of another class; and

i) Such other methods as may be approved by Lusaka Stock Exchange either generally or in any particular case.

The following subsection explores the possibility of encouraging cross-listings and investor participation through a RCF.

3.4.3. THE ROLE OF THE COMPENSATION FUND IN PROMOTING STOCK MARKET PARTICIPATION.

The subsection appearing immediately above has examined the efficacy of the legal, regulatory and institutional framework in promoting cross-listings. It was noted that although the LuSE Listings Rules are broad enough to accommodate issuers of different styles, the Securities Act restricts the scope of the LuSE Listing Rules to companies. The subsection demonstrated that the efficacy of the said framework could be enhanced by aligning the Securities Act with the Listing Rules. In this subsection, we turn to examine the efficacy of the securities market compensation system in promoting cross-listings.

Chimpango observes that one of the major constraints on the development of African stock markets are the legal and institutional frameworks that are based on foreign economic theories and

models.[394] Chimpango argues that in order to accelerate stock market development in Africa, there is need to base the legal and institutional frameworks on the practices, needs, preferences and beliefs that are prevailing in COMESA countries. This argument is based on North's Institutional Economics Theory which contends that legal rules and institutions can only be effective if they based on the real needs, cultures, practices and beliefs of the society for which they are made.[395] The compensation system which we have proposed in this thesis is designed to compensate market participants who suffer pecuniary loss as a result of acts or omissions of market operators, and other participants in securities markets. The central premise of this section is that a properly-managed, liquid and effective compensation fund has the potential of enhancing the integrity of the securities market.[396] Such a fund is also likely to enhance investor and issuer confidence.[397] Thus, given the central thesis of this study, this section argues that a compensation system that is based on the real needs, cultures and practices of COMESA markets is likely to ensure effective compensation and encourage participation in securities markets.[398]

The following subsection examines efficacy of DCFs in ensuring effective compensation for losses of securities market participants.

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[394] Boniface K. Chimpango, 'The Development of African Stock Markets: A Legal and Institutional Approach (Nottingham Trent University, PhD Thesis 2014), (hereinafter, 'Chimpango, PhD Thesis (2014)'). https://core.ac.uk/download/pdf/30624139.pdf accessed 30 January 2020

[395] See, Douglas North, *Understanding the Process Economic Change* (Princeton University Press 2005); See also, Douglass North, *Institutions, Institutional Change and Economic Performance* (CUP 1990).

[396] See, Kimani L.N., 'Investor Compensation Funding as a Determinant of Investor Confidence in the Capital Markets in Kenya (Masters' Thesis, University of Nairobi 2010), (Hereinafter, 'Kimani, Masters' Thesis (2010)').

[397] *ibid*

[398] Samamba Lennox Trivedi, 'The Role of a Compensation Fund in Promoting Securities Market Participation: A Case for a Regional Compensation Fund' (2018) 5(5) Afri. L. J. 94, at 117-118 (hereinafter 'Samamba Lennox Trivedi XVIII').

3.4.3.1. CONSTRAINTS RELATING TO THE NARROW SCOPE OF DOMESTIC COMPENSATION FUNDS.

This subsection examines the scope of DCFs and its efficacy in facilitating effective compensation of losses of market participants. The central premise of this subsection is that the breadth of a compensation fund has a bearing on the number of market participants.[399] For example, where a compensation fund only covers investors, other market participants might be discouraged from participating in the securities market for which the Fund exists. This statement must be qualified by position that some stock market participants may be risk-seeking or risk-averse. It therefore applies to those market participants who are risk averse. The Expected Utility Theory holds that response to risk or uncertainty depends on two main factors, namely:[400]

a) The personality of the individual; and
b) The wealth of that individual.

Risk-averse investors may not venture their capital in securities markets on account of the perceived investment risk.[401] Risk-seekers may invest in a risky market if the perceived return is attractive.[402] And different people respond differently to risk or uncertainty despite having the same level of wealth.[403] The less wealthy a person is the more risk-averse they tend to be, and vice versa.[404]

[399] *ibid* 114-115
[400] See Simon Grant and Timothy Van Zandt, 'Expected Utility Theory,' in Paul Annand, Prasanta Pattanaik and Clemmens Puppe (eds), *Handbook Book on Rational and Social Choice* (Oxford University Press, 2008) 3-8.
[401] *ibid*
[402] *ibid*
[403] *ibid*
[404] *ibid*

The role of quality regulation in promoting cross-listings.

Coffee observes that under the bonding theory, 'cross-listing firms are seeking ways to increase their equity financing at a lower cost of capital by utilizing stronger regulatory laws and enforcement in foreign jurisdictions than that available in their home country'.[405] Thus, foreign issuers tend to migrate to jurisdictions which are offering better regulation and enforcement.[406] The author argues here that by broadly covering 'any person', the Zambian Securities Act 2016 is likely to increase the efficacy of the legal, regulatory and institutional framework in promoting stock market participation. Similarly, the South African Financial Markets Act 2012 imposes an obligation on securities exchanges to maintain a compensation fund for purposes of compensating its clients.[407] However, there are key jurisdictions in the region whose compensation funds only cover investors. These jurisdictions include Kenya and Mauritius.[408] The author argues here that better incentives for investors will only serve to increase investor participation above issuer participation. And, under such conditions demand is likely to exceed supply. Although the law of diminishing marginal utility would set in to push the price of real goods back to the equilibrium point, financial assets are free from this law of economics.[409] Consequently, savings for investment and financial education and awareness allowing, consumption of more units of securities would not make additional ones any less desirable. Thus, excessive demand for securities is likely to drive the price farther up and serve as a non-tariff barrier to trade for less wealthy investors. Such non-

[405] John C Coffee, 'Racing Towards the Top? The Impact of Cross-listings and Stock Market Competition on International Corporate Governance' (2002) 102 COLUM L REV 1770 (hereinafter 'John C. Coffee (2002)').
[406] See generally, Cally Jordan, *International Capital Markets: Law and Institutions* (1st edn, OUP 2014);

[407] South African Financial Markets Act 2012, ss 8(1)(h), 15(1).

[408] Kenyan Capital Markets Act 2000, s 18(1); Mauritian Securities Act 2005, s 148(2).
[409] See, Nicholas L. Georgakopoulos, 'Frauds, Markets, and Fraud-on-the-Market: The Tortured Transition of Justifiable Reliance from Deceit to Securities Fraud' (1995) 49 U. Miami L. Rev. 671, at 679.

tariff barriers to trade are opposed to the COMESA Treaty which encourages cross-border trade and investment in securities by citizens of member states.[410]

There are also key jurisdictions which have not established compensation funds for their securities markets. These include Seychelles and Zimbabwe.[411] The author argues here that the total absence of compensation funds in these jurisdictions is likely to discourage cross-border listings by issuers. Also, lack of a compensation fund in these jurisdictions is likely to discourage investor participation.[412] The author argues further that lack of such an important regulatory feature is also likely to hinder growth of cross-border trade in securities in the region.[413] As a possible solution to these shortcomings in the legal, regulatory and institutional framework, proposals are made as follows:

(i) COMESA jurisdictions which have restricted the scope of their compensation funds to investors should extend cover to other market participants; and

(ii) Those jurisdictions which have not yet established compensation funds should do so on the terms stated in paragraph (i) above.

The author argues that the Zambian, South African and Malawian regulatory approach is likely to widen the scope of the domestic compensation system and increase both issuer and investor participation. As a possible way of complementing the regulatory efforts of the DCFs, it is proposed that a RCF be introduced as conceptualized below.

The following subsection makes a case for the introduction of a regional compensation fund.

[410] The COMESA Treaty enjoins Members States to encourage their citizens to participate in cross-border trade and investment in securities in the region: COMESA Treaty 1993, Art 81(b)(c).
[411] See, Seychelles Securities Act 2007, Pts 1-14; Zimbabwean Securities Act 2004, Pts I-XIV
[412] See, Kimani, Masters' Thesis (2010), *op.cit*; Samamba Lennox Trivedi XVIII, at 114-118, *op.cit*
[413] *ibid*

3.4.3.1.1. MAKING A CASE FOR A REGIONAL COMPENSATION FUND.

The subsection appearing immediately above has examined the efficacy of the domestic compensation system to encourage cross-listings. It was noted that although the Zambian compensation fund covers both issuers and investors, some jurisdictions in the region only cover investors while others provide no cover at all. The subsection demonstrated that a compensation system that covers a broad range of market participants is likely to encourage market participation. In this subsection, we make a case for a RCF as a complement to DCFs. The author argues that a RCF could prove useful in cases where the DCFs fail or neglect to compensate the losses of market participants.

3.4.3.1.1.1. THE *NEXUS* BETWEEN A REGIONAL STOCK EXCHANGE AND PROPOSAL FOR A REGIONAL COMPENSATION FUND.

Mwenda has recommended the establishment of a RSE in his work as a possible way of increasing cross-listings and liquidity of securities markets in the region.[414] The author argues here that the RCF, to the extent that it would enhance issuer and investor protection in securities markets, is likely to ensure success of the RSE.[415] Other regional institutions such as the RCF and the RSEC which we have proposed in this study, are prerequisites to the success of a RSE.[416]

[414] Mwenda, PhD Thesis (2001), *op cit*

[415] See, Kyle W. Pine, 'Lowering the Cost of Rent: How IFRS and Convergence of Corporate Governance Standards can help Foreign Issuers Raise Capital in United States and Abroad' (2010) 30 North Western Journal of International Law and Business 483; John C. Coffee (2002), *op.cit.* This view is rationalized by position that issuers and investors will only seek to cross-list or invest on the RSE if and only if the protection on it is better than that offered by DSEs: *ibid*

[416] For a similar observation, see, Irving (2005) 19, *op cit*

The following segment consolidates the case for the proposed RCF.

3.4.3.1.1.2. FURTHER ATTEMPTS AT A CASE FOR A REGIONAL COMPENSATION FUND.

This segment consolidates the case for the proposed RCF. A further case for a RCF may well consist in answers to the following scenarios: In the event that a DCF fails to effectively compensate the loss of a market participant, which domestic authority would take care of the short-fall? There is currently no domestic or regional body which would step in to make good the short-fall. In Zambia, the unpaid portion abates thereby discharging the Fund from further liability.[417] Also, recourse cannot be had to insurers of the Fund.[418] There are also cases where the defaulting licensed person is in arrears on insurance contributions to the DCF. In such cases the liability of the DCF is limited.[419] Which domestic or regional body would pay the difference between the loss of a market participant and the cover of the DCF in such circumstances? There is no domestic or regional body that would pay off the difference. Thus, in such cases recourse could be had to the RCF as a Fund of last resort. In case of systemic shocks in the regional financial system, which authority would make good such losses of issuers and investors? There is currently no body in the region which provides insurance against such losses in the region. Not even the Trade and Development Bank of COMESA (formerly Preferential Trade Area Bank) has such a mandate. Also, a RCF could prove useful to investors who suffer pecuniary loss as a result of insider dealing in jurisdictions where civil remedies are not available for such causes of action. Mwenda observes that, under the repealed Zambian Securities Act 1993, civil recovery was available to investors

[417] Securities (Compensation Fund) Regulations, Statutory Instrument No. 162 of 1993, reg 18(1)(2).
[418] Other persons or bodies of persons with whom the Fund has taken out insurance for indemnification against liability of the Fund in respect of claims: Securities (Compensation Fund) Regulations 1993, reg 19(1)(2).
[419] Zambian Securities Act 2016, s 182(1)

after a conviction for insider dealing.[420] The Zambian Securities Act 2016 has not retained section 54 of the Securities Act 1993 which provided for civil recovery as aforesaid. Thus, the repeal of section 54 of the Securities Act 1993, and the availability of criminal sanctions, disgorgement and administrative penalties under the Securities Act 2016 seem to point to Parliamentary intendment to definitely rule out the right to civil recovery in Zambia.[421]

Regional Compensation Fund as a possible way of enhancing Safeguards against Cross-border Insider Dealing.

The object of is subsection is to consolidate the case for a RCF. A further case for RCF here consists in an argument that such a fund could serve as an alternative to extra-territorial criminalization of securities market misconduct.

It is noted in Chapter 6 that the legal, regulatory and institutional framework does not provide sufficient incentives for effective regulation of cross-border insider dealing. As a possible way of enhancing safeguards against cross-border insider dealing, it has been proposed there that extra-territorial securities market misconduct be criminalized. However, success of this measure would depend on the existence of other legislative and regulatory measures such as:

i) Inclusion of securities market misconduct in the schedule to the Extradition Act which stipulates extraditable offences in each COMESA jurisdiction;
ii) Harmonization of securities laws;
iii) The signing of extradition treaties for the extradition of securities market offenders;

[420] Kenneth K. Mwenda, 'Redefining Insider Dealing Law for Emerging Markets: A Comparative Legal Study' (1997) 14 Zimbabwe Law Review 29, at 30-35.
[421] See, Rogers W.V.H. (ed), *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010), at 387-395, (Hereinafter, 'Rogers (2010)').

iv) Clothing all COMESA DSECs with power to take civil recovery action on behalf of market participants;

v) Clothing all COMESA DSECs with a power to act in support of foreign DSECs and the supranational regulator—the RSEC; and

vi) Creation of a supranational regulator—the RSEC.

The author argues here that since most of the legislative and regulatory measures highlighted above are not yet in place in the region, losses occasioned by cross-border insider dealing could be compensated out of the RCF.

There are also cases falling outside the scope of the current insider trading regime. Such a constraint is illustrated by the following scenario:

> A cyber hacker hacks into the information system (saver) of XCo an issuer listed on the LuSE and cross-listed on the regional stock exchange. The hacker passes the financial information relating to XCo to A (an emerging market investor looking to the COMESA side of the African frontier universe for international portfolio diversification). On the faith of the information received from the hacker, A buys XCo securities from B. Twelve hours later, the price of XCo securities trebles. What civil recovery remedy has B?

The shortcomings in the current Zambian law.

The current law confines the scope of the anti-insider trading regime to traditional common law categories of 'insider' or those with a previous relationship with the issuer.[422] From the scenario presented above, it is clear that neither the cyber hacker nor A have a previous connection with the issuer—Xco. They have also not received the price-sensitive information from the traditional insiders or those connected with the issuer in professional capacity. As such, they are not 'insiders' for purposes of the Zambian Securities Act 2016. They are also in possession of the price sensitive

[422] Zambian Securities Act 2016, s 2 (definition of 'insider' and 'insider dealing')

information without a previous connection. Therefore, not only do they both fall outside the scope of the anti-insider-dealing regime but also lack the requisite previous connection or relationship with the issuer—XCo. Thus, A's trading cannot, for all legislative intent and purposes, be regarded as insider trading for disgorgement purposes or criminal liability.[423]

Constraints relating to lack of Civil Remedies for Insider Dealing.

The repeal of the Securities Act 1993,[424] and the provision for criminal sanctions, administrative penalties and disgorgement in the Securities Act 2016 seem to point to Parliament intendment to exclude the right to civil recovery for pecuniary loss occasioned by insider dealing.[425] Absent civil remedies, losses occasioned by insider dealing could be compensated out of the RCF. Deliberate reference is made to 'compensation' as opposed to 'damages' because the former is a better safeguard. In this very light, Mwenda observes that whereas damages are subject to limitations such as causation, remoteness and mitigation, compensation is not so limited.[426]

[423] Since 'insider dealing' is 'trading by an insider': See, Zambian Securities Act 2016, ss 140, 141, 2 (Definition of 'insider trading')

[424] Section 54 of the repealed the Zambian Securities Act 1993 provided a right to an action for civil recovery after the insider is convicted of the criminal offence. Thus, where no conviction had been secured against the accused, no action could be commenced for civil recovery. This, as Mwenda observes, compromised investor protection: See generally, Kenneth Kaoma Mwenda, 'Redefining Insider Dealing Law for Emerging Markets: a Comparative Legal Study' (1997) 14 Zimbabwe Law Review 29, at 35-36.

[425] See generally, Rogers (2010), at 387-395, *op.cit*; Samamba Lennox Trivedi, 'Civil Remedies for Breach of Continuous Disclosure Obligation of Issuers of Securities in the COMESA Region—a Regional Comparative Analysis' (2020) SSRN Electronic Journal, http://ssrn.com/abstract=3497961. In Kenya, damages are available for loss occasioned by insider dealing besides criminal sanctions: See, Capital Markets Act 2000, ss 32K, 32L.

[426] Kenneth Kaoma Mwenda, 'Redefining Insider Dealing Law for Emerging Markets: A Comparative Legal Study' (1997) 14 Zimbabwe Law Review 29, at 34.

Constraints relating to non-Distribution of Disgorged Funds and Administrative Penalties to Investors.

Although the Zambian SEC has power to disgorge insider dealing gains, and impose administrative penalties,[427] the resources realised from such regulatory measures are not distributable to investors.[428] Thus, the said regulatory measures do not vitiate the effect of lack of civil remedies for insider dealing. The author argues that non-distribution of disgorged funds and administrative penalties to investor underscores the need for a RCF in the region. As an alternative to the RCF, the Zambian legislator and policy makers could introduce distribution of disgorged funds and administrative penalties to investor who suffer pecuniary loss as a result of insider dealing as South Africa has done.[429]

Considering the quite heavy criminal sanctions for insider dealing, the lack of civil remedies and the non-distribution of disgorged funds in insider dealing cases, an impression emerges that the objective of the Zambia regulatory framework is the punishment of offenders as opposed to securing investor protection. To this very effect, Mwenda observes that if the insider dealing regime is designed to punish offenders, as is the case under the Zambian regulatory framework, investor protection is unlikely to be addressed.[430] Thus, the author argues that such a regulatory approach is unlikely to ensure effective investor protection. In particular, such a shortcoming in

[427] See, Zambian Securities Act 2016, ss 140, 141, 218
[428] *ibid*
[429] In South Africa, a person convicted of insider dealing is liable to pay a sanction equivalent to profits made or losses avoided, an amount equal to three times the amount of profit made or losses avoided, an adjustable amount of R 1million to reflect he consumer price index, interest and cost of the suit, investigation and enforcement. The Financial Markets Board has the first charge on the monies recovered. After paying all the expenses on investigation, litigation and enforcement, the claims for civil recovery of loss suffered by investors are paid out of the Board's Trust Account for all administrative sanctions and disgorged amounts: South African Financial Markets Act 2012, s 82(1)(2)(3)(4)(5).
[430] Kenneth K. Mwenda, *Understanding Securities Law and Regulation in Zambia* (Juta Law 2015) at 68 (hereinafter, 'Kenneth K. Mwenda, BOOK III').

the regulatory framework is likely to discourage participation of risk-averse and less wealthy investors.[431] As a possible way overcoming such shortcomings in the regulatory framework, the following proposals are made:

1) Introduce civil remedies for insider trading;
2) Provide for the distribution of disgorged funds to market participants who are injured by insider dealing (taking into account any civil remedies already obtained);
3) Amend the current definition of 'insider' as follows:

   'Insider' "includes any person in possession of inside information relating to the issuer, its business or its securities, however the information was acquired, which information is not generally available and which if it were generally available is likely to cause a material change in the value or price of the securities of the issuer";
4) 'Inside information' is information possessed by an insider.

Under such a regime, both the hacker and A would be insiders for criminal and civil liability purposes. As Mwenda argues, "such a broad-based approach to regulating insider dealing is key to the development of competitive stock markets in the COMESA Region".[432] However, given the current challenge of enforcing extra-territorial criminal law, it is proposed that such losses be compensated out of the RCF.

[431] In an earlier study by Mwenda, the efficacy of the anti-insider dealing regime under repealed Securities Act 1993 is examined. Mwenda establishes also that under the old regime, a shareholder or any other person for that matter who engaged in insider dealing in any other capacity than primary or secondary insider could not be liable for insider dealing. Also, financial intermediaries could not be liable since they did not provide their services as 'professionals' but rather as business persons: Kenneth Kaoma Mwenda, 'Can Insider Trading Predicate the offence of Money Laundering? (2006) 6(2) Michigan University J. BUS. & SEC. L. `127, at 139-140. These shortcomings in the legal and regulatory framework have been remedied by the Securities Act 2016. However, the Securities Act 2016 also needs to be amended so as to seal the loophole identified above.

[432] Kenneth Kaoma Mwenda, 'Insider Trading Law in Zambia: A Flawed Concept' (1996-1999) 20 U. Ghana L. J. 137, at 138.

As a possible way of enhancing investor protection on the RSE, it is proposed that the proposed definition of 'insider', forms part of the regulatory framework for the RSE. This proposed standard of securities market regulation should also form part of the regulatory framework for DSEs.[433] This way, the protection provided by the RCF and the proposed anti-insider trading regime is likely to encourage cross-border issuer and investor participation.

The following subsection discusses the possible sources of the financial resources that would ensure success of the RCF.

Possible Sources of funding for the Regional Compensation Fund.

The RCF could be funded and sustained by:

a) monies paid to or deposited into the Fund by licensed persons, as may be prescribed.[434] A portion of monies deposited into DCFs should go to the RCF;
b) monies recovered by, or on behalf of the Fund in the exercise of the right of subrogation;
c) contributions from DSEs whose mandate is to ensure issuer and investor protection;
d) contributions from DCFs;
e) interests and profits accruing from the investment made; and
f) monies lawfully paid into the Fund. This could include:
(i) grants from COMESA Member States and foreign governments;
(ii) grants from the World Bank and similar international organisations.

[433] In Section 6.2 of Chapter 6 of the thesis, the threat posed by insider dealing and other forms of securities market misconduct on investor and issuer participation in international securities markets is examined in detail.
[434] Persons licensed to participate on the regional stock exchange.

Administration of the Regional Compensation Fund (RCF).

In terms of infrastructure, the RCF could be established under the umbrella of COMESA. Legally, the RCF could be established by a "COMESA Protocol on the Regional Compensation Fund for Securities Markets". Such a Protocol should also make rules for:

(i) The jurisdiction of the RCF;

(ii) The composition of the RCF;

(iii) The procedure for making claims from the RCF;

(iv) Appeals; and

(v) Other matters connected to or incidental to the aspects stated above.

As a possible way of ensuring checks on the power of the RCF, it is proposed that the DCF or the claimant be clothed with a right of appeal against the decisions of the RCF. Such appeals could lie to the COMESA Court of Justice (COMESA CoJ). Under the current framework, the jurisdiction of the COMESA CoJ extends to 'claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties'.[435]An argument is made by the author that claims by DCFs or claimants against the RCF could properly be regarded as 'claims by persons against COMESA or at least against an institution of COMESA for decisions of the servants of that institution.[436] Be as it may, it is recommended that a protocol be passed as proposed above.

Possible Method of Making Claims into the Regional Compensation Fund.

Domestic Securities Acts should provide that:

[435] COMESA Treaty 1993, Art 27(2)
[436] This view is rationalized by the position that the RCF would be established as an institution of COMESA.

a) The DCF shall provide prompt, adequate and effective compensation for loss suffered by any person on account of default or fault of a licensed person;

b) In the event that the DCF is unable to make prompt, adequate and effective compensation, the Fund shall apply to the RCF for assistance. Provided that the RCF shall stand subrogated to all the rights that the DCF or any person may be entitled to after the loss is fully satisfied;

c) In the event that the DCF neglects or fails to make an application to the RCF in accordance with paragraph (b) above, the person entitled to compensation shall have the right to apply directly to the RCF proving his/its case as the DCF is mandated. Provided that in the event that there is no DCF in the jurisdiction of the person who is entitled to compensation, that person shall have direct recourse to the RCF as stipulated above;

d) For the purpose of facilitating receipt of compensatory assistance from the RCF, the DCF shall be affiliated to the former;

e) The DCF shall make annual contributions to the RCF and ensure that a portion of contributions by licensed persons is relayed to the regional fund.

Thus, compensation from the RCF could be sought by the DCF on behalf of any person who suffers pecuniary loss as stated above. The DCF will have to prove the following, namely:

(i) That the person on whose behalf a claim is being made has a genuine claim for compensation; and

(ii) That the DCF is unable to promptly or adequately compensate any such person.[437]

The following section explores the possibility of further integrating DSEs by introducing a RSE.

[437] These two requirements should also be satisfied by a claimant to whom the right to claim from the regional compensation fund has accrued

3.4.4. A REGIONAL STOCK EXCHANGE AS POSSIBLE WAY OF INCREASING LISTING OPPORTUNITIES AND CROSS-BORDER TRADE.

The preceding subsection has examined the possibility of complementing the regulatory efforts of DCFs with a RCF. It was noted that a RCF could serve as a Fund of last resort. The subsection demonstrated that DCFs are inadequate to cover all claims that could possibly arise under the current legal, regulatory and institutional framework. In this subsection, we examine the possibility of integrating COMESA securities markets through a RSE.[438]

Bundoo argues that the fragmentation of the many poorly capitalized stock exchanges in the SADC Region makes the region unattractive to FPI.[439] Bundoo proposes a reduction in the number of stock markets in the region as a possible way of improving their visibility, capitalization and liquidity.[440] Given the central thesis of this study, the author argues that the introduction of a RSE and promotion of cross-listings between DSEs and the RSE are likely to enhance the visibility of COMESA FSMs.[441] It is also likely to increase listing opportunities for issuers and serve as an additional platform for secondary securities trading. The author further argues that these positive features (of a RSE) are likely to increase cross-border trade in securities, and ease the liquidity challenges faced by DSEs in the region.[442]

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[438] The RSE would serve as a cheaper source of capital for issuers by providing further listing/cross-listing opportunities. Also, the RSE could serve as an additional trading platform—as a secondary market—for investors. This is likely to increase cross-border trade and investment in securities in the region.

[439] Sunil K. Bundoo, 'Stock Market Development and Integration in Southern Africa Development Community' (2017) 7(1) Review of Development Finance 64-72

[440] *ibid*

[441] Numbers may be necessary as a way of encouraging competition among the exchanges, improving the quality of service delivery, encouraging innovation and regulatory enforcement.

[442] Gerry Muuka and Kenneth Kaoma Mwenda, Prospects and Constrains to Capital Market Integration in Eastern and Southern Africa' (2001) 2(1) Journal of African Business 47-73; Gerry N. Muuka and Kenneth K. Mwenda, 'Integration of Capital Markets in Eastern and Southern Africa', in Henry Kyambalesa and Mathurin C. Houngnikpo (eds), *Economic Integration and Development in Africa* (1st edn, Routledge 2016). The author arguing elsewhere: Samamba Lennox Trivedi, 'Legal Constraints on the growth of Cross-border Cross-listings in COMESA region—The Case of Zambia' (2018) 6 African Law Journal; Mwenda, PhD Thesis (2001), 131, *op.cit*

The Bi-Directional Positive Effects of Cross-border Cross-Listings

Cross-border demand and supply of securities in the COMESA region could be increased by promoting cross-listings on the RSE. This may be realised by exposing the cross-listed securities—securities which are primarily listed on DSEs—to the larger, deeper and more liquid market—the RSE.[443] Such a possibility is inherent in the bi-directional effect of cross-border cross-listings. By bi-directional effect of cross-listings, we mean, "cross-listings are beneficial to issuers and investors".[444] The following are some of the potential benefits that would accrue to issuers as they cross-list on the RSE:[445]

a) Greater access to lower cost of equity finance from a wider investor base;
b) Enhanced reputation due to stringent disclosure and enforcement standards.

Cross-listings also benefit investors in the following way, namely:[446]

a) Reducing transaction costs by trading in foreign assets as though they are domestic ones; and
b) Facilitating access to better markets and surmounting barriers caused by market segmentation.

Thus, apart from serving as an additional trading platform for investors, a RSE would also benefit the issuers considerably by facilitating cross-listings.

[443] *ibid*
[444] *ibid*
[445] Claessens, S., D. Klingebiel, and S. Schmukler, 'Explaining the Migration of Stocks from Exchanges in Emerging Economies to International Centers' (2002) Center for Economic Policy Research Working Paper No. 3301 https://globalpoverty.stanford.edu/sites/default/files/publications/168wp.pdf accessed 7 December 2018.
[446] *ibid*

3.4.4.1. DEFINING A REGIONAL STOCK EXCHANGE.

The term `regional stock exchange' refers to a stock exchange which would promote not only cross-border cross-listing within the region, but also attract securities investment from abroad.[447] The RSE would function as a domestic exchange except that, operating as a regional body, it would not have national affiliation.[448]

3.4.4.2. THE REGULATORY FRAMEWORK FOR THE REGIONAL STOCK EXCHANGE.

Since the RSE would have regional focus, it could be established under the COMESA Treaty scheme.[449] Whereas a domestic exchange is regulated by municipal law and its listing rules,[450] the regulatory code for the RSE would consist of the following instruments, namely:

i) The COMESA Treaty 1993;

ii) The COMESA Investment Agreement 2007;

iii) Protocols made under the COMESA Treaty and the Investment Agreement;

iv) Decisions of the Summit, and various organs of COMESA;

v) Decisions of the COMESA Court of Justice;

vi) Customary International Law;

vii) The law of States; and

viii) The Listing Rules of the Regional Stock Exchange.

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[447] See, Mwenda, PhD Thesis (2001), 131, *op.cit*

[448] *ibid*

[449] By way of a Protocol on the Regional Stock Exchange and Rules.

[450] International law forms part of municipal law to the extent which it is domesticated: Sara Mulwanda, 'A Historical perspective of Investment Policy and Legislative Framework on Expropriation: A Case of Zambia' (2017) International Journal of Multi-Disciplinary Research 1-12, 11

The following subsection introduces a regional regulatory authority as a possible way of enhancing the quality of regulation in ISMs in the region.

3.4.5. REGIONAL REGULATORY AUTHORITY AS A MEANS OF ENHANCING QUALITY OF REGULATION IN INTERNATIONAL SECURITIES MARKETS.

The subsection appearing immediately above has examined the possibility of promoting cross-border cross-listings and trade through a RSE. It was noted that a RSE could serve as an additional platform for cross-listing. It was also noted that a RSE could also serve as an additional platform for secondary trading by investors. In this subsection, we examine the possibility of enhancing issuer and investor protection in ISMs by introducing a regional regulator.[451]

Given the central thesis of this study, this subsection argues that a RSEC and regulatory cooperation among DSECs,[452] and between those DSECs and the RSEC, are likely to enhance the quality of regulation in ISMs.[453] As Akamiokhor observes that confidence and increase participation in African capital markets could be enhanced by establishing and managing effective regulatory institutions.[454]

[451] Hereinafter, for purposes of brevity, The Regional Securities, and Exchange Commission will simply be referred to as 'the RSEC' or 'the regional regulator'.
[452] Domestic Securities and Exchange Commissions
[453] See, Coffee C, John, 'Racing Towards the Top? The Impact of Cross-listings and Stock Market Competition on International Corporate Governance' (2010) COLUM. L. R. 1757, 1770 (hereinafter 'Coffee (2010)'); The superior regulatory role of the RSEC coupled with the high quality of regulation coming from cooperation is likely enhance issuer and investor protection on the RSE and increase participation.

[454] George A. Akamiokhor, 'Building Capital Markets Regulatory Institutions in Developing Countries—The Nigerian Experience' (1996) 45(2)/(3) Social and Economic Studies 249-278

Defining an International Securities Market (ISM).

DSMs are built upon a listing securities exchange.[455] Their reach is delimited to the jurisdiction in which the listing exchange is established.[456] Once, a listed issuer makes multiple cross-border cross-listings, there is an extension of the breadth of the DSM.[457] As the market stretches across international borders, it becomes internationalized.[458] Consequently, in an ideal ISM, issuers will be able of raise capital from investors in their own country as well as those in foreign countries.[459] Similarly, domestic investors will be able to purchase comparable securities from foreign counterparties as they do domestic issuers.[460] An international securities market is therefore one that facilitates both these ideals.[461]

The following segment introduces the regional regulatory authority.

Introducing a Regional Regulatory Authority.

The RSE would be set up as a regional body within the COMESA regulatory framework. Thus, it is proposed that the RSEC be introduced under the said framework for purposes of regulating participants on the RSE. However, given the low level of regional integration of stock markets in the region,[462] full regulatory centralization is not advisable.[463] Thus, in the meantime, it would be

[455] Samamba Lennox Trivedi, *Principles of Securities Law and Capital Markets Regulation* (Ndola: Mission Press 2020) 1 fn 4 (Hereinafter 'Samamba Lennox Trivedi BOOK II') *(forthcoming)*
[456] *ibid*
[457] *ibid*
[458] *ibid*
[459] See, David E Van Zandt, 'Regulatory and Institutional Conditions for an International Securities Market,' (1991) 32 Va J Int"l L 47, 52
[460] *ibid*
[461] Samamba Lennox Trivedi BOOK II, *op.cit*
[462] See, Table 13 in this Chapter (Chapter 3)
[463] Under an ideal centralization model for regulation of international securities markets, States agree to devolve their regulatory power in those areas of the securities markets which are transnational to a single regulatory body: See, Eric C Chaffee, 'Finishing the Race to the Bottom: An Argument for the Harmonization and Centralization of International Securities Law' (2010) 40 Seton Hall L Rev 1581 at 1595, 1600

prudent to have the RSEC operate alongside DSECs until such a time that markets are considerably integrated. The author argues that, a single regional regulatory body, by analogy to a unified domestic regulator for financial services, is likely to ensure economies of scale and scope, and efficiency in the allocation of regulatory resources. It is also argued that, a single regional regulator is also likely to ensure speedy and effective enforcement by relying on a single set of regulatory rules and approach. This is likely to avoid the collective action problem and increase regulatory and supervisory transparency, accountability and efficiency in securities markets in the COMESA Region.[464]

A Brief Case for a Single COMESA Securities Markets Regulator.

As a possible way of overcoming the constraints on cost-effective enforcement on the proposed RSE, such as legal diversity, Mwenda and Muuka have proposed enactment of the COMESA Common Investment Code.[465] They further propose that such a Code provides that market abuses committed on the RSE be heard and determined by the domestic courts of the home state of the offender if:

i) the offence is committed on the RSE;
ii) the offence is not extraditable;
iii) the offence also constitutes an offence in the offender's home state; and
iv) the home state of the offender declines to surrender the offender on grounds of public interest.

[464] See, Kenneth K. Mwenda, *Legal Aspects of Financial Services Regulation and the Concept of Unified Regulator* (The World Bank 2006)
[465] Kenneth K. Mwenda and Gerry N. Muuka, 'Integration of Capital Markets in Eastern and Southern Africa', in Henry Kyambalesa and Mathurin C. Houngnikpo (eds), *Economic Integration and Development in Africa* (1st edn, Routlegde 2016) at 109-111.

Under the Muuka and Mwenda framework, the assumption of jurisdiction by the courts of the home state of the offender to try and punish the offender would import enforcement jurisdiction of the home state's securities market regulator. Also, investigation, prosecution and enforcement of punishment by the home state's regulator would essentially constitute "positive comity without any guarantee of 'good-quality' enforcement". The author argues that, in such cases, the quality of enforcement by the home state of the offender may be compromised if the misconduct has minor or no effect at all on the domestic markets of that state. The more adverse the effects of the misconduct on the domestic markets of the home state, the greater their interest in investigating the offence, prosecuting it and enforcing the judgement is likely to be. Usually, in the context of cross-border securities enforcement, there are two or more jurisdictions connected to the cross-border securities market misconduct. Usually, cross-border securities market misconduct has varying degrees of actual or potential or perceived adverse effects on the domestic securities markets. This background raises the question as to why the home state of the offender or any other affected COMESA state should solely enforce such misconduct when the outcome would benefit many other connected jurisdictions. Such a scenario is likely to cause the free riding problem. Thus, it could be argued that unless the other affected jurisdictions contribute to the cost of enforcement, solo enforcement is likely to be discourage—a condition that is likely to make the COMESA region a barbary coast for securities pirates. Thus, the proposed RSEC has been mooted against such a background. A neutral central regional regulator such as the one we have proposed above, is likely to take advantage of the resources contributed by COMESA member states and ensure effective and efficient enforcement. And, by taking over enforcement activities from DSECs, such a supranational regulator would also overcome the potential enforcement jurisdiction conflict, and the regulatory challenges that are associated with legal diversity.

In Chapter 5, proposals have been made for the harmonization of regulatory rules. It is also proposed in that chapter that the minimum regulatory standard that would come from harmonization forms the minimum regulatory standard for the RSE. The author argues here that such a minimum standard could also serve as the threshold for entitlement to mutual recognition of prospectuses and other disclosure documents.[466] It is proposed here that the regulatory framework for the RSE builds upon the minimum standard that would come from harmonization. This proposal is rationalized by the position that migration of issuers from DSEs to the RSE would require a higher regulatory standard and better enforcement culture on the latter exchange.[467]

In Chapter 4, proposals have been made for the introduction of a power on the part of DSECs to act in support of foreign DSECs. Such a power has been proposed as a possible way of enhancing the quality of regulation in securities markets in the COMESA Region. In this section, it is proposed that such a power be exercised in support of the RSEC also. In order to ensure reciprocity, it is proposed that the RSEC be clothed with a power to request such support.[468]

The RSEC must have power to institute investigations against any market participants participating on the RSE or in ISMs. As a possible way of ensuring regulatory effectiveness in cases of investigative conflict,[469] it is proposed that the RSEC be clothed with power to take over the investigatory activities of DSECs. Further, the yielding DSEC should remain under an obligation

[466] See, Chapter 5 of the thesis.
[467] See, Coffee (2010), *op.cit*
[468] Reciprocity is a precondition to the effectiveness of such a power: See, Samamba Lennox Trivedi, 'Walking the Self-Regulatory Organization Route: The Need for Caution' (2018) 5(5) Afri. L. J. 69-93, 83-87.
[469] Here, 'investigative conflict' refers to a situation where a market participant is being investigated by the Domestic Securities, and Exchange Commission (the DSEC) and the RSEC.

to cooperate with the RSEC whenever called upon to provide specific support. The jurisdiction section,[470] of the RSEC could be couched in the following terms:

> The Commission—Regional Securities and Exchange Commission—shall have jurisdiction to investigate and take necessary measures as prescribed in respect of securities market misconduct committed within the Common Market for Eastern and Southern Africa in relation to securities or securities business whether or not the issuer is primarily listed or cross-listed in the Regional Stock Exchange provided the misconduct has a cross-border dimension.

Thus, subject to the provision above, where the misconduct is committed in an ISM, the jurisdiction of the RSEC should be attracted. Securities market misconduct committed wholly in one jurisdiction but having harmful effects in other COMESA jurisdictions should attract jurisdiction of the RSEC as well as that of DSEs. In such a case, where there is actual or potential conflict of interest, the RSEC should exercise its power to exclusively investigate and enforce. The RSEC should also be able to take over investigations commenced by a DSEC in such cases. The author argues here that enhanced regulatory cooperation amongst DSEC, and between those DSECs and the RSEC is likely to enhance the quality of regulation in securities markets. Silvers observes that enhanced cross-border cooperation among securities regulators improves cross-border enforcement.[471] Such regulatory measures also reduce the cost of liquidity provision in capital markets.[472] The author also argues that the enhanced regulatory quality that would result from such a mechanism is likely to increase issuer and investor participation. Quality securities markets regulation is also likely to increase cross-border trade in securities in the region.[473]

[470] The section defining jurisdiction of the RSEC.
[471] Roger Silvers, 'Cross-border Cooperation between Securities Regulators' (2019) SSRN Online Journal 1 (*The World Bank Staff Papers*)
[472] *ibid*
[473] Van Houtte H., *The Law of Cross-border Securities Transactions* (Sweet and Maxwell 1999)

The following sub-section examines the level of cross-listings in the COMESA Region.

3.4.6. CONSTRAINTS RELATING TO THE LOW LEVEL OF CROSS-BORDER CROSS-LISTINGS IN THE REGION.

This subsection introduces empirical evidence on the level of cross-border cross-listings in the region. This exercise puts the legal arguments which we have made in this section and the rest of the thesis in proper socio-economic context.

Despite the potential benefits of cross-border cross-listings, the level of cross-listings in the COMESA Region remains low.[474] In Sub-section 3.3.4.1**,** possible ways of promoting cross-listings in the region have been suggested.

Table 10: Regional Cross-Listings of Stocks in Eastern and Southern Africa.

Country	No. of Listed Co.s	Countries cross-listed with	Yr of 1st Cross-listing	Cross-listed?	No. Cross-listed	Total
Botswana	34	South Africa and Namibia	1997	YES	4	4
Kenya	65	Tanzania and Uganda	2001	YES	12	12
Malawi	13			NO		
Mauritius	98			NO		
Namibia	39	Botswana and South Africa	1992	YES	35	35[475]
Seychelles	4			NO		
South Africa	472	Botswana	1997	YES	4	
		Namibia	1992	YES	31	

[474] See, Table 13 above.
[475] The Namibian Stock Exchange is fully integrated with the Johannesburg Stock Exchange, since 2000. Thus, most stocks listed on the NSE are also listed on the JSE.

		Zambia	2003	YES	4	39
Swaziland	11			NO		
Tanzania	24	Kenya	2004	YES	5	
		Uganda	2004	YES	2	7
Uganda	17	Kenya	2001	YES	7	7
Zambia	22	South Africa	2003	YES	1	1[476]
Zimbabwe	63			NO		
TOTAL	**862**					**105**

Source: Author; information collected from Listings and Trading Managers of various Stock Markets through Questionnaires.

Generally, all countries under consideration have recorded steady increases in the number of cross-border cross-listings.[477] Botswana has recorded an increase in regionally cross-listed securities from 2 in 2009 to 4 in 2016.[478] Kenya boasts a giant leap from just 3 regionally cross-listed securities in 2009 to 12 in 2016.[479] Namibia too, has recorded quite a considerable increase from 25 regionally cross-listed securities in 2009 to 35 in 2016.[480] South Africa has also recorded quite remarkable increase in the number of regionally cross-listed securities from 27 in 2009 to 39 in 2016.[481] Tanzania and Uganda have also recorded increases in regionally cross-listed securities from just 3 in 2009 to 7 in 2016.[482]

[476]Shoprite Checkers Zambia Limited is dual-listed on the Lusaka Stock Exchange and the Johannesburg Stock Exchange.
[477]With the exception of Zambia which has maintained the number at 1 since 2009, being the year of the International Monetary Fund Study on the levels of cross-listings in Sub-Saharan Africa by Adelegan: Adelegan (2008) 11, *op cit*
[478] This represents a 100 per cent increase.
[479] This represents a 400 per cent and a yearly average of about 67 per cent.
[480] This represents 140 per cent increase over the period.
[481] This represents a 144 per cent increase.
[482] This represents about 230 per cent increase over the period.

However, the total number of cross-listed securities represents only a tiny fraction of the total number of listed securities in the region.[483] This could be attributed to the poor performance of COMESA securities markets which discourages issuers from cross-listing in these markets. This view is rationalized by the position that the state and performance of the destination market is crucial to market (investor) reaction to cross-listings.[484] The author argues here that the low level of cross-border cross-listings in the region only serves as a constraint on regional integration of stock markets.[485] The author also argues that such a low level of cross-listings also serves as a constraint on the efficacy of the legal, regulatory and institutional framework in promoting cross-border trade in securities.

The following subsection makes proposal for legislative measures that could promote cross-border cross-listings in the COMESA Region.

3.4.6.1. PROPOSALS FOR MEASURES AIMED AT PROMOTING CROSS-BORDER CROSS-LISTINGS IN THE REGION.

The preceding subsection has examined the level of cross-listing in the COMESA Region. It was noted that most exchanges in the region have few cross-listings. The empirical evidence provided in the said subsection, supports the argument that an effective legal, regulatory and institutional

[483] The total number of cross-listed securities represents only a paltry 12.2 per cent of the aggregate number of listed securities. Thus, when one views the total of this seemingly attractive picture of steady increases in the number of regionally cross-listed securities against the aggregate number of listed securities, one realises that the overall picture of cross-border cross-listings in the region is still unattractive. Another factor that serves to highlight this unattractive picture is the total absence of cross-listings on most stock markets in Southern African countries. These two factors serve to rationalize proposals for measures aimed at increasing cross-border cross-listings in the COMESA region.
[484] Peter Roosenboom and Mathijs A. van Dijk, 'the Market Reaction to Cross-listing: Does the Destination Market Matter? (2009) Journal of Banking and Finance 1.
[485] Chisadza argues that increasing cross-listings amongst DSEs would play an increasingly big role in the success of the RSE which we have proposed herein above: Moses Wisdom Chisadza, *the Role of Cross-listings in Establishing a Southern African Development Community Regional Stock Exchange* (GRIN 2013).

framework is essential for growth of cross-listings. In this subsection, we make proposals for legal, regulatory, institutional and policy reform that could promote growth cross-listings in the region. The following measures are proposed, namely:

i) Enlightening central governments on the importance of developing their stock markets through cross-listings. Political will is likely to increase the pace of legal, regulatory and institutional reform that would create an enabling environment for regional cross-listings;

ii) Formation of a single economic cooperation body in Eastern and Southern Africa. With aims and objectives of a single regional integration body running in one direction, regional integration of stock markets through cross-listings is likely to be implemented successfully.

iii) Harmonization of listing rules among DSEs.

iv) Enacting a Protocol on Cross-border Offerings and Listings of Securities. Such a Protocol would provide an 'international passport' for issuers to list on other securities exchanges within the region using a single prospectus.

v) Educating issuers on the potential benefits of cross-listing their stocks into deeper stock markets such as the JSE.[486]

vi) Educating investors on the IPD benefits of holding and trading in foreign securities.

vii) Reducing transaction costs for cross-border cross-listings. This could be achieved by implementing an international passport to multi-jurisdiction cross-listing.

[486] Such as increased stock liquidity, access to larger and more efficient markets and more diversified and shared risk, and lower cost of capital: *ibid*

viii) Enhancing issuer and investor protection in ISMs. This could be achieved by introducing a RCF and a RSEC. Investor protection could further be enhanced by extra-territorial criminalization of securities market misconduct.

ix) Increase listing opportunities for issuers and investment opportunities for investors by introducing a RSE.

The following section examines the effect of dual membership of COMESA/SADC of most COMESA countries on regional efforts to integrate stock exchanges in the region.

3.5. CONSTRAINTS RELATING TO DUAL MEMBERSHIP OF COMESA AND SADC OR EAC.

The preceding section has examined the efficacy of the legal, regulatory and institutional framework in promoting cross-border cross-listings. It was noted that most exchanges in the region have extremely few cross-listings. The section demonstrated that an effective legal, regulatory and institutional framework is critical to growth of cross-listings. In this section, we turn to examine the effect of dual-membership of most COMESA States on their commitment to implementing the regional integration agenda. Given the central thesis of this study, this section argues that a single regional economic body for eastern and southern Africa is likely to accelerate implementation of regional integration efforts by COMESA Member States.

There is more than one regional economic cooperation body in Eastern and Southern Africa. These bodies are, COMESA, East African Community (EAC), and SADC. Of the current (twenty (20))

members of COMESA, eight (8) are also members of SADC.[487] Three COMESA members, while not assuming SADC membership, are also members of the EAC.[488]

The author argues that the existence of three regional economic cooperation bodies in the region polarises the collective efforts of member countries in implementing the regional integration agenda. Given the varying breadth and depth of each regional integration body's aims and objectives, it is difficult to see how the progress that has been attained in any of the three bodies could be reconciled with the progress obtaining in the other two bodies. Owing to the inherent inconsistencies in the aims and objectives of the three regional economic cooperation and integration bodies, collective action problems are likely to increase.[489] Therefore, the divergent objectives of each regional body, increases the likelihood of disagreement among COMESA States, in respect of certain regional agenda.[490] For example, if SADC members are currently benefiting by the regional integration efforts under the SADC Treaty 1980, they are unlikely to be attracted to, let alone commit to new efforts under COMESA unless the latter offers better incentives. Similarly, since regionalism is a compromise between the municipal and international order,[491] the regional agenda may be resisted on account of national sovereignty.[492] Also, sheer lack of commitment to regional integration by central governments is an impediment to regional integration of stock markets in the COMESA Region. For example, the African Stock Exchange Association,[493] had to call off an

[487] These countries are, Democratic Republic of Congo (DRC), Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia, and Zimbabwe.

[488] These countries are, Kenya, Tanzania and Uganda.

[489] See, Article 3 of the COMESA Treaty 1993 for the aims and objectives of COMESA; Article 5 of the SADC Treaty 1980 for the aims and objectives of SADC, and Article 5 of the EAC Treaty 1999, for the aims and objectives of the EAC.

[490] Adelegan (2008), *op.cit*

[491] *ibid*

[492] *ibid*

[493] African Stock Exchange Association was formed in 1993 with the objective of promoting development and cooperation among African securities exchanges.

annual conference in 2001.[494] The cancellation of the conference was attributed to inadequate confirmations of attendance.[495] Although harmonization of regulatory rules is likely to promote cross-listings in the region,[496] harmonization of listing rules under one regional body is likely to hinder growth of cross-listings between COMESA members who have different dual membership.[497] In 2000, SADC members fully harmonized their listing rules.[498] The author argues here that, by minimizing differences between their listing rules, SADC members are more likely to cross-list with each other than non-SADC members. Thus, the author also argues that this state of affairs is likely to promote growth of south—south cross-listings in the region. The adoption of similar rules removes the burden and cost of further compliance. Although a prospectus approved for listing purposes in one country may not automatically be accepted for listing purposes in other SADC countries, at least with minor modifications it would satisfy the listing requirements. This is likely to reduce transaction costs of cross-border listings for issuers and reduce the cost of

African Securities Exchanges Association, http://www.african-exchanges.org/members>. There are twenty-three stock exchange members of the African Stock Exchange Association.

[494] The Conference was scheduled for Johannesburg in South Africa.

[495] Even the very few confirmations which came in were reluctantly made: Moses W Chasazda, *Regional Financial Integration in Africa: Cross-listings as a form of Regional Financial Integration'* (Anchor Academic Publishing 2014) 36-37. The vision of ASEA is to enable African securities exchanges to be key drivers of economic and societal transformation in Africa. Its mission is to provide a forum for mutual communication, exchange of information, cooperation and technical assistance among its members, facilitate the process of regional financial integration and mobilization of capital to in order to accelerate economic development in Africa: ibid.

[496] See, Chisadza M.W., *The Role of Cross-listings in establishing a Southern African Development Community Regional Stock Exchange* (Grin 2013).

[497] Samamba Lennox Trivedi XVIII

[498] Cherles A Yartley and Charles K Adjasi, *Stock Market development in Sub-Saharan Africa: Critical Issues* (International Monetary Fund 2007). Harmonization basically involves changing domestic laws or rules of different states that are dissimilar in order to make them coherent and updated. In this sense, it may be referred to as 'modernization' of laws: See Joseph Issa-Sayegh, 'Quelques aspects technique de l'integration juridique: I 'exemple des actesuniformes (1999) de I'OHADA, 4 UNIF L REV 5 <http://www.unidroit.org/french/publications/review/artiles/1999-1.htm> accessed 5 August 2016. While respecting the particularities of the various national legal systems, harmonization aims at reducing their underlying differences in selected areas so as to enhance cooperation between the jurisdictions concerned: *ibid*

capital. This view is rationalized by the position that divergent listing rules imply more money and time on further compliance.[499]

The following section examines the effect of lack of an international passport on growth of cross-border cross-listing in the COMESA Region.

3.6. CONSTRAINTS RELATING TO LACK OF AN 'INTERNATIONAL PASSPORT' TO MULTI-JURISDICTION CROSS-LISTING.

The section appearing immediately above has examined the effect of dual-membership of most COMESA states on their commitment to implementing the regional integration agenda. It was noted that dual membership of COMESA States, serves as a constraint on regional integration of securities markets in the region. In this section, we turn to examine the possibility of promoting regional integration of COMESA securities markets through an international passport to multi-jurisdiction cross-listing. Given the central thesis of this study, the author argues that an international passport to multi-jurisdiction cross-listing is likely to reduce the cost of listing, and promote cross-border cross-listings and trade.[500]

[499] Chisadza (2013), *op.cit*; Samamba Lennox Trivedi BOOK I, Vol. I, *op.cit*

[500] Onyuma, Mugo and Karuiya (2012), 92-109, *op.cit;* See generally, Mark I. Steinberg, *International Securities Law: Contemporary and Comparative Analysis* (Kluwer Law International 1999); Fidelis Otidah (ed), *the Future for Global Securities Markets: Legal and Regulatory Aspects* (OUP 1996); Samamba Lennox Trivedi, 'Legal Constraints on Growth of cross-border cross-listings in COMESA Region—The Case of Zambia' (2018) 4(4) African Law Journal 72-102, (hereinafter 'Samamba Lennox Trivedi VIII').

The current state of the legal framework for public distribution of securities across International Borders.

The current regulatory framework for cross-border securities offerings is unfavourable for the growth of cross-listings in the region.[501] This view is rationalized by the fact that, currently, there is no body of international securities law which regulates cross-border cross-listings and offerings.[502] The negative effect of this inadequacy on the growth of cross-listings is mirrored in the following question(s):

> Would a foreign issuer established within Eastern and Southern Africa, who has complied with disclosure requirements in their home country and seeking cross-listing on the LuSE, be required to strictly comply with LuSE Listing Rules 2012? In the event that a multi-jurisdictional cross-listing is sought, would such foreign issuer be required to comply with disclosure requirements of each jurisdiction in which they seek to cross-list their securities?

Currently, in the COMESA region, there is no rule of international securities law or private international law that could be applied to exempt an issuer who complies with disclosure requirements of a particular COMESA jurisdiction for listing purposes from complying with the requirements of other COMESA states for cross-listing purposes.[503]

A classic case of lack of provision for mutual recognition of disclosure documents is found in the LuSE Listing Rules 2012. Under the LuSE Listing Rules, LuSE has power to grant listing permission, suspend listings, or terminate listings.[504] LuSE has also power to review listing requirements for listed issuers.[505] Further, LuSE has power to prescribe listing requirements for

[501] Samamba Lennox Trivedi VIII, 72-102, *op.cit*
[502] *ibid*
[503] See, Hick's general observation to this very effect: William J Hicks, 'Harmonization of Disclosure Standards for Cross-border Share Offerings: Approaching an 'International Passport' to Capital Markets' (2002) 9(2) Indiana Journal of Global Studies 366
[504] LuSE Listing Rules 2012, s 1.1(a)-(f)
[505] *ibid*

new applicants.[506] However, LuSE has no express or implied power to exempt an issuer, who has complies with the primary listing requirements of other COMESA states, from complying with LuSE Listing requirements for cross-listing purposes.

Modes of Cross-listing on the LuSE.

New applicants are required to [strictly] comply with all listing requirements.[507] Also, new applicant must comply with further requirements in case of conditional listing permission.[508] LuSE reserves the right to require compliance, by a foreign issuer, with specific provisions of its listing rules on primary listing.[509] Thus, where primary listing is in the home country of an issuer or a third state, compliance with LuSE secondary listing requirements is necessary.[510] The author argues that such a shortcoming in the regulatory and institutional framework is likely to hinder growth of cross-border cross-listings.

The following subsection examines how such a shortcoming in the legal, regulatory and institutional framework has been avoided in the European Union.

Drawing lessons from the European Union International Passport System.

The preceding subsection has examined the possibility of promoting cross-listings through an international passport. It was noted that an international passport could reduce transaction costs for cross-listing issuers. The subsection demonstrated that an international passport could promote multi-jurisdiction cross-listings in the region. In this section, we examine the efficacy of the

[506] *ibid*
[507] LuSE Listing Rules 2012, ss 1.2, 1.6, 1.11, 1.20, 1.24
[508] It does not matter that the new applicants seeking to cross-list has satisfied disclosure requirements in their home country: *ibid*
[509] This is in addition to complying with LuSE's secondary Listing Rules: LuSE Listing Rules, rr 1.20, 1.24
[510] LuSE Listing Rules 2012, r 18.1

European Union (EU) international passport system in reducing the cost of multi-jurisdiction cross-listing. We also propose the adoption of the EU system as a possible way of promoting multi-jurisdiction cross-listing in the COMESA region.[511]

Mutual recognition of public-offer prospectuses in the EU, was initially provided in the European Commission Directive No. 80/390/EEC.[512] Under the said Directive, subject to further country-specific information—such as information relating to income tax, once an issuer complied with the regulatory requirements of a EU member state, it would cross-list in other EU states without any further compliance.[513] Consequently, issuers were able to apply for subsequent cross-border cross-listings in other EU Member States without having to produce duplicative sets of documentation.[514] A prospectus approved by a home country or other EU state for listing purposes, was considered valid for cross-listing purposes in other jurisdictions within the EU.[515] On 31st December, 2003, European Commission Directive No. 80/390/EEC was repealed. It was replaced with European Union Directive No. 2003/71/EC. Under Directive 2003/71/EC, an issuer seeking a cross-border listing must publish a prospectus in the prescribed form.[516] Once a prospectus is prepared by an issuer, it must be approved by the Competent Authority in the Home State of the issuer. Once approved, the competent authority in the Home State must refer its approval to the Competent Authority/ies in another/other EU State(s) where a cross-listing is sought.[517] Thus, approval of the Competent Authority in the home state serves as an international passport to multi-

[511] For the danger of legal transplants, see section 3.7.1 below. In order to avoid the failures that are often associated with legal transplants, there would be need to modify the EU system and tailor it to the peculiar needs, culture, preferences and practices of individual COMESA stock markets.
[512] Council Directive of 17 March 1980 (Being a Directive coordinating the requirements of drawing up, scrutiny and distribution of prospectuses to be published when transferable securities are offered to the public). Was subsequently replaced with Directive 89/298/EEC.
[513] European Commission Directive No. 80/390/EEC, Art 24(b)(1).
[514] Or respond to numerous additional listing requirements: *ibid*
[515] *ibid*
[516] European Commission Directive 2003/71/EC, Art 13(1)
[517] European Commission Directive 2003/71/EC, Art 13(2)(3).

jurisdiction cross-listing within the EU.[518] Thus, where the competent authority of the host Member State finds that irregularities have been committed by the issuer or by the financial institutions in charge of the public offer or that the issuer has breached its obligations by reason of the fact that securities are admitted to trading on a regulated market, it must refer those findings to the competent authority of the home Member State and to ESMA.[519] Further, where significant new factors such as material mistakes or inaccuracies are discovered after the approval of the competent authority, the Competent Authority of the Home State [must] order publication of a supplement in accordance with Article 13(1) of Directive 2003/71/EC.[520]

The provisions of European Commission Directive 2003/71/EC are supplemented by the provisions of the International Organization for Securities Exchanges (IOSCO).[521] As a possible way of increasing cross-border cross-listings in the COMESA region, proposals are made for the introduction of an EU-like international passport.

The following section examines the effect of cross-border cross-listings on liquidity and performance of securities exchanges.

[518] Subject to notification of the Competent Authority in the Host State within the EU: European Commission Directive 2003/71/EC appears to have done away with the requirement of complying with country-specific information which was imposed by the repealed European Commission Directive 80/390/EEC. This move is quite likely to increase the efficacy of the EU international passport system: European Commission Directive 2003/71/EC, Art 17(1).

[519] European Commission Directive 2003/71/EC, Art 23(1).

[520] Art 17(1)(2) European Commission Directive 2003/71/EC.

[521] See, International Disclosure Standards for Cross-border Offerings and Listings for Equities 1998, and the IOSCO International Disclosure Standards for Cross-border Offerings and Listings of Debt Securities 2007. Under these IOSCO international disclosure standards, an offering or listing is considered 'cross-border' when it is directed to one or more countries other than the company's home country (whether or not the offerings or listing is also made concurrently in the company's home country): See introductory part of Part I of the IOSCO International Disclosure Standards for Cross-border Offerings and Listings of Equities 1998; also Glossary of Defined Terms under the Introductory Part of the IOSCO International Disclosure Standards for Cross-border Offerings and Listings of Debt Securities 2007.

3.6.1. RELATIONSHIP BETWEEN CROSS-LISTINGS AND SECURITIES MARKET PERFORMANCE.

This section introduces empirical evidence on the effect of cross-listings on securities market liquidity, deepening and development. An IMF study by Adelegan[522], analyses the impact of cross-listings on the liquidity, depth and performance of the primary stock markets. The study analyses data from 1990—2007 for a panel of 22 Sub-Saharan stock exchanges.

The study seeks to provide answers to the following questions:

i) Can a regional approach promote stock market development?
ii) Can regional cross-listings improve liquidity and facilitate stock market deepening? and
iii) Whether regionally integrated stock markets are more successful than those which are not?

Using an event study methodology, the study posts positive effects on stock market depth around cross-listing events. The results indicate that regional cross-listings enhance stock market performance and liquidity. The result also show that cross-listings accelerate stock market development.[523] In particular, the results of the study show that capitalization of stock markets with cross-listings (32.5%) is higher than the capitalization of stock markets without cross-listings (23.8%). Liquidity of stock markets with cross-listings was far much higher than the liquidity of stock markets without cross-listings. than those without such initiatives. In particular, the value of stock traded and domestic credit as a share of GDP in stock markets was 16.7% for stock markets with cross-listings and 6.5% for those without cross-listings. Finally, the value of stock traded in stock markets with cross-listings was about five (5) times higher than the value of stock traded in

[522] Adelegan (2008), *op cit*
[523] *ibid*

stock markets without cross-listings. The positive effect of cross-listings on stock market liquidity and deepening has been confirmed by recent empirical studies on EAC stock markets.[524] Given the results of the aforesaid studies, it is submitted that COMESA securities markets are likely to benefit from cross-border cross-listings.[525]

3.7. AN APPROPRIATE THEORY FOR SECURITIES MARKET DEVELOPMENT IN EASTERN AND SOUTHERN AFRICA.

Preceding sections have examined constraints on regional integration of stock markets in the COMESA Region. It was noted that the legal, regulatory and institutional framework is inward focused and as such, is unlikely to promote cross-border cross-listings. It was also noted that in most COMESA jurisdictions, the enactment of the said framework was not a response to the real needs, culture and preferences of the domestic markets. Rather, the said framework was tailored to the World Bank/IMF Structural Adjustment Programme. Consequently, it was argued that such a framework is unlikely to promote growth of cross-listings let alone cross-border trade in securities. It was also argued that cross-border cross-listings and trade in securities could be promoted by establishing key regional institutions. This section examines how effective supranational regulatory institutions could be established in the COMESA region. This section argues that unless the enactment of the enabling legal and regulatory framework for the proposed supranational institutions is preceded by a careful study of the real needs, culture, practices and

[524] Onyuma, Mugo and Karuiya (2012), *op.cit*; S.M. Makau, S.O. Onyuma and A.N. Okumu, 'Impact of Cross-border Listing on Stock Liquidity: Evidence from East African Community' (2015) 3(1) Journal of Finance and Accounting 10-18 (hereinafter 'Makau, Onyuma and Okumu (2015)').

[525] As proposed above. Also, empirical evidence shows that internationalization of listings enhances liquidity of securities and the destination markets provided the market is in good state: Kudakwesha J. Chipunza and Kerry McCollough, 'the Impact of Internationalization on Stock Liquidity: Evidence from the Johannesburg Stock Exchange' (2018)11(1) Economics and Financial Studies Journal; Peter Roosenboom and Mathijs A. van Dijk, 'the Market Reaction to Cross-listing: Does the Destination Market Matter? (2009) Journal of Banking and Finance 1.

preferences of COMESA stock markets, the institutions are likely to have limited success in promoting cross-border cross-listings and trade in securities. The section also argues that the remedial legal and regulatory reforms which have been proposed in this chapter and elsewhere in the thesis—such as the international passport—should also be informed by such a study if they are to be successful in promoting cross-border trade in securities in the COMESA Region.

Eastern and Southern African Stock Markets: A Brief Overview.

It is well-over two decades since most securities markets in eastern and southern Africa were formed. Since the formation of securities markets in some COMESA jurisdictions, successive legal, regulatory and institutional reforms have been undertaken. However, most of these markets, with the notable exception of the JSE, are still characterized by small size, low capitalization and inadequate liquidity. Chimpango attributes the poor state of African stock markets—particularly those in southern Africa—to the foreign policies, theories and models upon which these markets and their legal, regulatory and institutional frameworks are founded.[526] Chimpango argues in his work that in order to develop vibrant and competitive stock markets in the region, there is need to build laws and institutions on the cultures, practices, customs and beliefs which are prevailing in SADC countries.[527] Given the central thesis of this study, this section argues that the efficacy of the legal, regulatory and institutional framework in promoting competitive stock markets could be enhanced by basing the proposed supranational regulatory institutions and their underpinning frameworks on the culture, practices, customs and beliefs which are prevailing in COMESA countries.

[526] Boniface K. Chimpango, 'The Development of African Capital Markets: A Legal and Institutional Approach (Nottingham Trent University, PhD Thesis 2014), (hereinafter, 'Chimpango, PhD Thesis (2014)')
[527] *ibid*

The following subsection examines constraints relating to the transplantation of foreign models, concepts and theories.

3.7.1. CONSTRAINTS RELATING TO LEGAL TRANSPLANTATION.

Legal transplantation involves the transfer of a legal rule or system from one country to another.[528] Chimpango observes that "legal transplants refer to the transfer of rules, systems of law, institutions, doctrines, ideas, and methods, from one country, body, organisation or jurisdiction to another".[529] This thesis adopts Chimpango's view of legal transplantation.

3.7.1.1. THE DEBATE ON THE EFFECTIVENESS OF LEGAL TRANSPLANTS.

The debate on the effectiveness and suitability of legal transplants for foreign jurisdictions has been precipitated by two schools of thought, namely the transferists and the culturists.[530] Transferists argue that legal rules and systems may be borrowed from a donor system and successfully implemented in a donee system notwithstanding the difference in the relevant social, economic, geographical and political circumstances between the two systems.[531] According to the transferists, the peculiar needs, culture and preferences of the donee system are not necessary for successful transplantation. On the contrary, Khan-Freund, a culturalist, argues that a foreign rule or system may be transplanted successfully if, and only if, two conditions are met, namely:[532]

i) Close linkage between the donor system and the donee system; and

[528] Allan Watson, *Legal Transplants: An Approach to Comparative Law*, (Scottish Academic Press 1974) at 21.
[529] Chimpango, PhD Thesis (2014), at 47, *op.cit*
[530] Maria P.R. Gaitan, 'The Challenges of Legal Transplants in a globalized context: A Case Study on 'working' examples (Warwick University, Master of Laws Thesis 2014), at 15-18, (hereinafter, 'Gaitan, Masters' Thesis (2014)')
[531] See, Allan Watson, 'Legal Transplants and Law Reform' (1976) 79 Law Quarterly Review at 80.
[532] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law', 37 Morden Law Review (1974) 1.

ii) An understanding of the law of the donor system, and the social and political context within which the foreign rule was developed.

Khan-Freund's view has been supported by other culturalists such as Siedman[533] and Legrand[534]. However, both Siedman and Legrand argue further that the success of a legal transplant depends on the similarity between the culture of the donor and donee system.[535] A third school of thought called 'the comparatists' has emerged.[536] The comparatists base the efficacy of legal transplants on the success of some mixed legal systems. They argue that since legal rules and legal culture are not genetic, and as such learnable, they could be successfully transplanted.[537] Their effectiveness could be guaranteed by the subsequent acquisition of the foreign culture.[538] Thus, the comparatists concede the arguments of both streams—the transferist and the culturalists. The author observes that both the culturalists and the comparatists concede that culture is a crucial determinant of the success or failure of legal transplants. Therefore, it is submitted that the prevailing culture, practices, and beliefs, whether indigenous or borrowed from a donor system, is critical to the success of a legal transplant. Consequently, the author argues that to the extent that a legal transplant reflects the prevailing culture, practices, and beliefs and customs of a COMESA market, it is likely to promote vibrant and competitive stock markets. This view is supported by the position that effective legal and regulatory rules, and institutions are a product of the culture, customs and beliefs prevailing in a particular society.[539] Thus, the author recommends that COMESA securities

[533] Siedman A. and Siedman R.B., *State and Law in the Development Process: Problem Solving and Institutional Change in the Third World* (MacMillan 1994) 44-46.
[534] Legrand, P., 'The Impossibility of Legal Transplants' (1997) 4 Maastritch Journal of European and Comparative Law at 111.
[535] *ibid*
[536] See, Chimpango, PhD Thesis (2014), at 48
[537]Du Plessis, J. 'Comparative Law and the Study of the Mixed Legal System' in Reimann and Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 478 - 510.
[538] *ibid*
[539] Lawrence M. Friedman, 'Legal Culture and Social Development' (1969) 4(1) Law & Society Review 29-44

markets regulators, legislators and policy makers undertake a study of the peculiar needs, cultures, preferences, practices and customs of their domestic markets. This view is rationalized by the position that transplanted legal rules, concepts and systems are likely to have limited success in promoting successful stock markets in the donee jurisdiction on account of the unforeseen adverse effects.[540] The unforeseen adverse effects (irritations, as Teubner refers to them as) are often triggered by the difference in the institutional structure between the donor and donee system.[541]

After aligning the needs of their domestic markets with their obligations under the COMESA Treaty, COMESA jurisdictions may enact legal, regulatory and institutional frameworks for their markets.[542] The author argues that such a legal, regulatory and institutional framework is likely to ensure vibrant and competitive stock markets in the region, and contribute to domestic and regional economic growth.

Constraints relating to imposition of International Standards for Securities Markets with little or no input from COMESA Securities Markets.

Related to the problem of legal transplants is the imposition, on African securities markets, of international standards for securities by transnational global governance standard setting organizations like the International Organization for Securities Commissions (IOSCO). McLaughlin observes that currently, Africa is underrepresented in global economic policy making fora.[543] McLaughlin argues that unless representation of African emerging securities markets in

[540] Gaitan, Masters' Thesis (2014), *op.cit*
[541] Teubner G., 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review at 12.
[542] The call for indigenous laws and institutions for the COMESA Region is also underscored by the argument that the necessary foreign culture, practices, beliefs and customs may take quite a while to be assimilated into the donee system. In the meantime, the legal transplant would remain ineffective for as long as it takes the foreign pre-requisites to be assimilated into the donee system.
[543] June McLaughlin, 'Emerging African Capital Markets and Global Financial Standard-Setting: Permitting all voices to be heard' (2017) 23 Journal of Law, Business & Ethics 101-106, at 101, 106.

global economic dialogue is increased, African markets will remain undeveloped and donor dependent.[544] The author argues that the international standards for securities markets which have little or no input from COMESA markets do not provide necessary incentives for growth of these markets. The author argues further that, in order to consolidate the reforms which we have proposed in this chapter, and accelerate the development of a competitive regional securities market, there is also need to increase COMESA representation in global economic-policy-making fora.[545] This way, the preferences, culture, beliefs and peculiar needs of COMESA securities markets are likely to be incorporated into international standards for securities markets.

3.7.2. THEORIES OF LEGAL CHANGE.

The preceding subsection has examined the suitability of legal, regulatory and institutional transplants for COMESA stock markets. It was noted that the peculiar needs of COMESA markets make legal transplants unsuitable for these markets. The said subsection demonstrated that the efficacy of the legal, regulatory and institutional framework could be enhanced by basing it on the culture, practices, preferences and customs COMESA stock markets. In this subsection, we turn to examine some theories of legal change. These are theories that explain how law changes society. The following theories are examined, namely the evolutionist theory, the social change theory, the intentionalist theory, and the Utilitarian theory. These theories are briefly examined below, in turn.

[544] *ibid*

[545] COMESA could be represented by the Association for African Securities Exchanges (ASEA) on the International Organisation of Securities Commission (IOSCO) deliberations for international standard-setting for securities markets. However, the author argues that an organization for COMESA Securities Market Regulators could more-effectively represent the interests of COMESA stock markets. It is therefore, proposed that an organization for COMESA Securities Market Regulators be formed for this purpose.

The Evolutionist Theory.

The evolutionary theory holds that law evolves automatically as societies advance from one stage to another. Having its origin in Manne's work,[546] the theory holds that societies transition from archaic, to tribal and finally, to a territorial state.[547] However, law in the sense of abstract rules is only found in the territorial state.[548] The hallmark of the evolutionary principle is the absence of human agents in the evolutionary process of the law. And, the role of the legislature is unnecessary especially if it involves the domestication of legal transplants. Thus, the evolutionary theory is not compatible with the transferist approach. It is compatible with the culturalist approach to the extent that is states that law evolves on the basis of the prevailing social conditions. However, the removal of human agents in the evolutionary process makes it incompatible with the new institutional economics theory upon which this work has been developed.

The Social Change Theory.

This theory contends that law is the reflection of social structures and views of a particular society.[549] According to this theory, law changes as these factors change.[550] The theory holds that, as the social structures change societal attitudes, a gap is created between what the law is on the books and the social behaviour it is designed to regulate.[551] The said gap, the theory contends, forces legislators, lawyers and judges to make law that responds to the needs of society.[552] It is submitted that this theory accords with the culturalist approach and the new institutional economics

[546] See, Henry S. Maine, *Ancient Law* (John Murray, 1861).
[547] *ibid*
[548] *ibid.* The territorial state is subdivided into family states (stationary states) and progressive states. In family states family rules and obligation are the basis of legal order. On the contrary, in progressive states, family rules and obligations are replaced with civil rules and individual obligations such as contractual obligations: *ibid*
[549] Epstein R.A., 'A Static Conception of the Common Law' (1980) 9 Journal of Legal Studies 253, at 269.
[550] *ibid*, at 269-75
[551] *ibid*
[552] *ibid*

theory to the extent that is recognizes the prevailing social and cultural conditions, and human agents as an integral part of an effective law-making process.

The Utilitarian Theory.

The utilitarian theory holds that legal change is a response to a demonstrable socio-economic need.[553] This theory contends that the essence of legal change is efficient legal rules.[554] Clark observes that the process of enacting efficient legal rules (rule that ensure efficient economic outcomes and reduce costs) involves the following five steps, namely:

i) Socio-economic change that create the need for efficient legal rules;

ii) emergence of efficient legal rules;

iii) new costs for commercial transactions;

iv) new cost-reduction rules; and

v) new rules for the regulation of the distribution of cost savings.[555]

On the strength of items (i) and (ii) above, it is observed that the utilitarian theory incorporates the social change theory. In this thesis, our call for the legal, regulatory and institutional framework that reduces transaction costs for cross-border securities disposition, is founded in the social change theory and the utilitarian theory of legal change. Such a framework, this thesis contends, can only be produced by the new institutional economics theory which accommodates the utilitarian, the intentionalist, and the social change theory.

[553] Donald Horowtz, 'The Quran and Common Law: Islamic Reform and the Theory of Legal Change' (1994) 42 American Journal of Comparative Law 244.
[554] *ibid*
[555] Robert Clark, 'The Interdisciplinary Study of Legal Evolution' (1981) 90 Yale Law Journal 1238, at 1241-1242

The Intentionalist Theory.

Proponents of this theory criticize the evolutionist theory by arguing that legal change needs legal innovators.[556] The intentionalists also argue that legal change is influenced by the desires of the elite and the prevailing culture.[557] Watson seems to imply that the desires of the elite curtail the role of culture in legal change since the elite determine what sort of culture is incorporated in the law. Similarly, Halliday and Caruthers argue that the elite seek the cooperation of professionals such as lawyers in getting their desires and interests incorporated into the law.[558] And, as a result, the law tends to reflect political and professional interests and preferences as opposed to those of the larger society. Consequently, our call for a democratic and inclusive process of legal change which takes stock of prevailing cultures, needs and preferences of stock markets, has been mooted against such a danger, among other concerns.

The New Institutional Economics Theory—The North Institutional Approach.

The paradigm of new institutional economics is captured by North when he states that:

> [T]he new institutional economics builds on, modifies, and extends neoclassical theory to permit it to come to grips and deal with an entire range of issues heretofore beyond its kin. What it retains and builds on is the fundamental assumption of scarcity and hence competition—the basis of the choice theoretic approach that underlies micro-economics. What it abandons is instrumental rationality—the assumption of neoclassical economics that has made it an institution-free theory.[559]

[556] Donald Horowtz, 'The Quran and Common Law: Islamic Reform and the Theory of Legal Change' (1994) 42 American Journal of Comparative Law 244, at 251

[557] Allan Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 U. Pa. Law Review 1121, at 1153

[558] Terence C. Halliday and Bruce G. Carruthers, 'The State, Professions, and Legal Change: Reform of the English Insolvency Act, 1977-1986' (1990), American Foundation Working Paper, WP/9019/1990.

[559] Douglass North, 'The New Institutional Economics and Development' in Harris J., Hunter J., and Lewis C.M., *The New Institutional Economics and Third World Development* (Routledge, 1995) at 17-26.

Thus, the new institutional economics theory is an extension of the economic theory that considers mental models, ideas and ideologies as an integral part of effective legal change. These are aspects that traditional economic theory does not take into account. The new institutional economics theory contends that institutions and organizations are key factors in the implementation of legal/economic change.[560] The new institutional economics theorists contend that institutions are not a material or physical phenomenon but socially constructed belief systems about the way things are and the way things ought to be.[561] Consequently, institutions are prevalent patterns of thought that impact the structure, operation and consequences of all processes in societies, including its economic and financial processes.[562] Organisations, on the other hand, are groups of individual bound by common purposes and objectives.[563] Organizations therefore include:[564]

a) political bodies such as:
    i) political parties;
    ii) the legislature;
    iii) a city council; and
    iv) a regulatory agency.
b) economic bodies such as:
    i) firms;
    ii) trade unions;
    iii) family farms; and
    iv) co-operatives.

[560] *ibid*
[561] Chaimpango, PhD Thesis (2014), at 64
[562] Charles R.P. Pouncy, 'The Rational Rogue: Neoclassical Economic Ideology in the Regulation of the Financial Professional' (2000) 26 VT. L. REV. 263, in Chimpango, PhD Thesis (2014), at 64, fn 200
[563] *ibid*
[564] *ibid*

c) social bodies such as:

   i) churches;

   ii) clubs; and

   iii) athletic associations; and

d) educational bodies such as:

   i) schools;

   ii) universities and colleges; and

   iii) vocational training centres.

In the legal sense, institutions could encompass formal rules—such as legislation, the common law, equity and customs, informal rules—such as conventions, usages, and self-regulatory codes of conduct, and the mechanism for enforcing both rules. Consequently, legal rules and legal infrastructure (regulatory institutions in ordinary sense) may be regarded as institutions within the new institutional economics framework. Coase—one of the founding proponents of this theory—argues that transaction costs depend on the cost of information and the asymmetries of information.[565] Consequently, new institutional economics argues that improved economic performance could be achieved by institutions that lower transaction costs.[566] In this respect, North argues that effective institutions (institutions that reduce transaction costs) could be achieved if and only if they are based on culture, beliefs, preferences and practices which are prevailing in the society for which they are made.[567]

[565] Coarse R., 'The New Institutional Economics' (1998) 88(2) American Economic Review 72
[566] *ibid*
[567] Douglas North, *Institutions, Institutional Change and Economic Performance* (CUP 1990) 8-18. On the contrary, neo-classical economic theory holds that market forces will bring about economic change on their own by generating the most Pareto-efficient outcomes possible in a static framework, and in the long-run causing and adaptation of institutions that favour Pareto-efficiency while abandoning those that do not. Toye J., 'The New Institutions Economics and its Implication for Development Theory, in Harris J., Hunter J., and Lewis C.M. (eds), *The New*

This thesis, is mainly based on the new institutional economics theory. However, as stated above, theories of legal change such as the social change theory, the utilitarian theory and the intentionalist theory, also play a complementary foundational role. Therefore, this thesis proposes an integrated approach to legal change. Consequently, the author recommends that COMESA regulators, legislators and policy makers take this integrated approach in implementing the remedial reforms which we have proposed in this thesis.

3.8. CONCLUSION.

This Chapter has examined the legal, regulatory and institutional framework so as to establish whether or not it provides adequate incentives for the growth of cross-listings in the COMESA Region. The conclusion reached in this chapter is that the said framework does not provide sufficient incentives for the growth of cross-border cross-listings in the region. It was noted that although the LuSE Listing Rules 2012 recognize a wide range of entities as listable, the Zambian Securities Act 2016 restricts listing/cross-listing to companies. The author argued that such a shortcoming in the legal, regulatory and institutional framework is likely to hinder the growth of cross-listings in the region. It was further noted that DCFs in most COMESA states restrict their cover to investors while others provide no cover at all. The author argued in this respect that such a shortcoming in the legal, regulatory and institutional framework is likely to discourage issuer participation in foreign markets. It was further noted that an issuer that seeks a multi-jurisdiction cross-listing is required to comply with the regulatory requirements of each and every target jurisdiction. The author argued that such a shortcoming in the legal, regulatory and institutional

Institution Economics and Third World Development (Routledge 1995) at 49-68. New Institution Economic Theory rejects the neo-classical theory of economic change for being inconsistent with conscious motivation, deliberate decision-making and choice. The new institution economic theorists argue that, on this score, neo-classical economic theory of economic change is inconsistent with socio-economic settings that require active human intervention: *ibid*.

framework is likely to increase transaction costs for multi-jurisdiction cross-listing and hinder the growth of cross-listings in the region. As a possible way of accelerating regional integration of securities markets, proposals were made for the introduction of a RSE. Further proposals were made for the introduction of a RSEC as a possible way of enhancing issuer and investor protection in ISMs in the region. The author argued that regulatory cooperation among DSECs and, between those DSECs and the RSEC is likely to enhance the quality of regulation in ISMs in the region. The chapter has also examined constraints on securities market development. It was noted that legal transplants are a major constraint on securities market development in the COMESA Region. The chapter demonstrated that institutions that are based on the real needs, culture, practices, beliefs and preferences of securities markets are likely to promote stock market development, and promote cross-border trade in securities in the region. The following chapter examines the legal, regulatory and institutional framework so as to establish whether or not it facilitates effective cross-border disposition of securities in the COMESA Region.

PART III

CHAPTER 4

CONSTRAINTS ON EFFECTIVE CROSS-BORDER DISPOSITION OF SECURITIES IN THE COMESA REGION.

4.0. INTRODUCTION.

Chapter 3 has examined constraints on regional integration of securities markets in the COMESA Region. It was noted that lack of key regional institutions and an effective framework for cross-border cross-listings, and dual membership of COMESA Member States act as constraints on regional integration of securities markets in the region. The chapter demonstrated that regional integration of securities markets could be promoted by establishing key regional institutions and an international passport to multi-jurisdiction cross-listing. In this Chapter, we turn to examine the efficacy of the legal, regulatory and institutional framework in facilitating effective cross-border disposition of securities in the region. Given the central thesis of this study, the author argues that an effective legal, regulatory and institutional framework for cross-border disposition of securities is likely to increase cross-border trade in the COMESA Region. The author also argues that such a framework is also likely to increase liquidity of COMESA securities markets.

4.1. AN OUTLINE OF CHAPTER 4.

Chapter 4 of the thesis is divided into four sections. The first section gives the general introduction to the chapter.[568] The second section outlines the chapter.[569] The third section examines constraints

[568] See, section 4.0 of chapter 4 of the thesis.
[569] See, section 4.1 of chapter 4 of the thesis.

relating to lack of an effective legal, regulatory and institutional framework for cross-border disposition of securities.[570] The third section is divided into five subsections. The first subsection examines constraints relating to lack of rules that should govern the ranking of competing collateral interests in un-certificated securities.[571] The author argues that lack of such rules is likely to discourage lending against collateral interests in such securities. The author also argues that the lack of such priority rules is likely to hinder growth of cross-border trade in securities in the COMESA Region. The second subsection examines constraints relating to the application of *lex situs* as a device for determining the substantive property law in cross-border dispositions of securities.[572] The second subsection is divided into three segments. The first segment examines the common law position on the conflict of laws rule that governs the identification of the substantive property law.[573] The second segment examines constraints relating to the introduction of foreign branch registers under the Zambian Companies Act 2017.[574] The author argues that cross-border disposition of securities which are registered in a branch register of the Zambian issuer is likely to present the application of two or more substantive property laws. The author also argues that, in the absence of private international law rules for determining the exclusively property law, the transferee will be compelled to comply with the perfection requirements of each applicable jurisdiction. The third segment examines constraints pointing to the adoption and implementation of the HSC 2006 in the COMESA Region as a possible solution for the ineffectiveness of *lex situs*.[575] The author argues that the manner in which dematerialized securities are transferred and pledged, makes them unsuitable for classification as 'registered' or 'bearer'

[570] See, section 4.2 of chapter 4 of the thesis.
[571] See, section 4.2.1 of chapter 4 of the thesis.
[572] See, subsection 4.2.2 of chapter 4 of the thesis.
[573] See, subsection 4.2.2.1 of chapter 4 of the thesis.
[574] See, subsection 4.2.2.2 of chapter 4 of the thesis.
[575] See, subsection 4.2.2.3 of chapter 4 of the thesis.

securities.[576] The author argues further that the objective legal uncertainty resulting from failure to classify un-certificated as such is likely to discourage cross-border trade in un-certificated securities in the region. The third subsection goes on to make a case for region-wide adoption and implementation of the HSC 2006.[577] This segment also demonstrates that the HSC PRIMA rule is more effective than *lex situs* in identifying the substantive property law.[578] Finally, the segment explores salient provisions of the HSC 2006. The third subsection examines constraints relating to fragmented domestic payment systems.[579] The author argues that the lengthy transfer of the money consideration for securities is likely to delay the settlement of trades. The third subsection also examines constraints relating to the narrow scope of the COMESA Clearing House.[580] The author argues that, Article 73 of the COMESA Treaty 1993 restricts the role of the COMESA Clearing House to cross-border transactions in [goods and services].

The fourth subsection of the second section examines constraints relating to exchange controls.[581] The author argues that exchange controls violate the freedom of movement of capital that is enshrined the COMESA Treaty 1993. The fourth subsection is divided into two segments. The first segment gives empirical evidence on the geographical distribution of exchange controls in the region.[582] The second segment examines constraints relating to 'exchange control-induced' equity home bias.[583] This segment provides empirical evidence which indicates that exchange controls cause equity home bias. The author argues that exchange-control-induced equity home bias serves

[576] And as such, outside the scope of the rule in the *Bishopsgate case*.
[577] See, subsection 4.2.2.3.1 of chapter 4 of the thesis.
[578] The Place of the Relevant Intermediary Approach (PRIMA): See, HSC 2006, Arts 4, 5.
[579] See, subsection 4.2.3 of chapter 4 of the thesis.
[580] See, subsection 4.2.3.1 of chapter 4 of the thesis.
[581] See, subsection 4.2.4 of chapter 4 of the thesis.
[582] See, subsection 4.2.4.1 of chapter 4 of the thesis.
[583] See, subsection 4.2.4.4 of chapter 4 of the thesis.

as a constraint on the efficacy of the legal, regulatory and institutional framework in promoting cross-border trade in securities in the COMESA Region.

The fifth section draws together inferences and conclusions made in various sections of this Chapter.[584]

The following sections examine constraints relating to lack of an effective legal, regulatory and institutional framework for cross-border disposition of securities.

4.2. CONSTRAINTS RELATING TO LACK OF AN EFFECTIVE LEGAL, REGULATORY AND INSTITUTIONAL FRAMEWORK.

This section examines the legal, regulatory and institutional framework so as to establish whether or not it provides adequate incentives for effective cross-border securities disposition. The central premise of this section is that legal rules,[585] regulatory rule,[586] and institutions,[587] impose costs on economic exchanges. High transaction costs are likely to act as a non-tariff barrier to trade,[588] while inadequate legal rules are likely to obstruct trade.[589] Thus, given the central thesis of this study, this subsection argues that the establishment of a framework that ensures speedy cross-border economic exchanges and reduces transaction costs is likely to promote cross-border trade

[584] See, subsection 4.1.5 of chapter 4 of the thesis
[585] Coase R.H., *The Problem of Social Cost* (CreateSpace Independent Publishing 2016).
[586] Hahn R. and Guasch J., 'The Costs and Benefits of Regulation: Implications for Developing Countries' (1999) 14(1) The World Bank Research Observer 137-158; Korutaro B. and Biekpe N., 'Effect of Business Regulation on Investment in Emerging Market Economies' (2013) 3(1) Review of Development Finance 41-50.
[587] Douglas North, *Institutions, Institutional Change and Economic Performance* (CUP 1990) 8-18.
[588] See, Amelung T., 'The Impact of Transaction Costs on the Direction of Trade: Empirical Evidence from Asia Pacific' (1991) 147(4) Journal of Institutional and Theoretical Economics 716-732.
[589] See, van Jaarsveld I. and van Jaarsveld I., 'Legal Barriers to International Trade in Services' (2001) 34(1) The Comparative and International Law Journal of Southern Africa 109-131.

in securities in the region.[590] Such a framework is also crucial to growth of liquidity of stock markets.[591]

Meaning of 'Effective, Legal, Regulatory and Institutional Framework' for Cross-border Trade in Securities.

From a regulatory perspective, using compliance, enforcement and outcomes as determinants, a rule or an institution is effective when its regulatory objective has been achieved without dysfunctional consequences.[592] By dysfunctional consequences, de Benedetto implies negative externalities or adverse effects that the regulated socio-economic behaviour has in the market. For example, when ineffective rules and institutions regulate disclosure and the benefit of disclosure is lower than the cost generated by disclosure, issuers and investors are likely to engage in nuanced forms of disclosure such as sub-optimal disclosure and insider trading. The foregoing view is anchored on the hydraulic theory of disclosure.[593] Thus, an effective legal or regulatory rule, or institution must ensure that the benefit of compliance is greater than the cost of compliance. In this sense, an effective legal, regulatory and institutional framework is one that:[594]

(i) facilitates high supply of different types of securities to securities exchanges;

(ii) facilitates high demand for securities supplied to securities exchanges;

(iii) facilitates speedy cross-border disposition of securities at minimum cost;

(iv) also expedites efficient cross-border transfer of funds for purchased securities;

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[590] Susan W. Jenah, 'Commentary on A Cross-border Access to U.S. Investors: A New International Framework' (2007) 48(1) Havard International Trade Law Journal 75

[591] *ibid*

[592] Maria de Benedetto, 'Effective Law from a Regulatory and Administrative Law Perspective' (2018) 9(3) Symposium on Effective Law and Regulation 391-415.

[593] See, Manne G.A., 'The Hydraulic Theory of Disclosure Regulation and other Costs of Disclosure' (2007) 58(3) Alabama Law Review 473.

[594] *ibid*

(v) expedites effective allocation of contractual and proprietary rights and duties;

(vi) provides rules for the perfection of title or interests in the securities so acquired, at minimum transaction costs; and

(vii) creates an enabling environment for cross-border trade in securities; and

(viii) safeguards the interests of market participants—particularly, ensures issuer and investor protection.

Possible ways of increasing demand and supply of securities to securities exchanges were tackled in Chapters 2 and 3 of the thesis. This Chapter examines the efficacy of the legal, regulatory and institutional framework in promoting items (iii), (iv), (v), (vi) and (vii) as listed above. The following have been identified as constraints on effective cross-border disposition of securities, namely:

a) application of *lex situs* as a conflict of laws rule for determining the substantive property law;
b) inapplicability of the doctrine of proper law of the contract to the proprietary component of a cross-border securities deal;
c) fragmented domestic payment systems in the region;
d) presence of exchange controls in most COMESA countries.

The following subsection examines the effectiveness of the legal, regulatory and institutional framework in governing the ranking of competing collateral interests in the same securities.

4.2.1. CONSTRAINTS RELATING TO INADEQUATE PROVISIONS FOR THE RANKING OF COLLATERAL INTERESTS IN SECURITIES.

The preceding subsection has defined an effective legal, regulatory and institutional framework. It was noted that there are a number of constraints on effective cross-border securities disposition of in the COMESA Region. In this subsection, we turn to examine constraints relating to inadequate provisions for the ranking of competing collateral interests in the same securities. The central premise of this subsection is that certainty and predictability of the priority of competing collateral interests in a security is critical to the lender's decision to advance a collateralized loan.[595] To the extent that rules for the ranking of competing collateral interests in the same securities facilitate the consumption of securities in form of mortgages, pledges and charges, and ensure orderly administration of the estate of an insolvent investor,[596] the rules may be regarded as effective. Consequently, an effective legal, regulatory and institutional framework will expressly provide rules for the ranking of competing collateral interests in the same securities. Thus, given the central thesis of this study, the author argues that the introduction of rules for the ranking of competing collateral interests in the same securities is likely to ensure certainty in the priority of such interests. The author also argues that certainty of priority of security interests in the same securities is likely to encourage lending against such collateral interests. The author further argues that such certainty is also likely to increase cross-border trade in securities in pledges, charges and mortgages.[597]

[595] *ibid*
[596] *ibid* 307; On the role of the Insolvency Code, see, *Re Polly Peck International Plc (in administration) (No. 2). Marangos Hotel Co. Ltd and Others vs Stone and Others* [1998] 3 ALL ER 812.
[597] Samamba Lennox Trivedi II, 308, *op.cit*

The Ranking of Security Interests in Securities under the Zambian Legal Framework.

Part IX of the Zambian Securities Act 2016 governs the central management of securities by Clearing and Settlement Agencies (CSAs). This Part also governs the transfer and pledge of dematerialized securities.[598] However, the said part does not provide rules that should govern the ranking of competing collateral interests in the same dematerialized securities.

Legal Character of Securities.

Securities in an issuer are personal and transferable property of the holder of securities.[599] Thus, the security holder can sell or pledge a security as collateral for a loan. Where the holder is a company, the holder may create a charge over its shares in favour of a lender.[600] Such a charge is registrable with the Patents and Companies Registration Agency (PACRA).[601] Registrable charges enjoy priority in relation to each other in accordance with the time at which they were lodged with PACRA.[602] However, where a contrary intention is collected from the conduct of the party who should otherwise enjoy priority, subsequent security interest may have priority.[603]

A charge over shares includes a mortgage over such shares.[604] However, Part IX of the Zambian Securities Act 2016 does not make reference to charges or mortgages over securities but pledges. In this regard, a question may be asked, 'could a pledge of securities be treated as a charge so that

[598]Zambian Securities Act 2016, ss 100, 101, 103 and 107
[599]See, the Zambian Companies Act 2017, s 141(1). 'Share' includes 'stock' but does not include 'equity share': See, definition of 'share' and 'equity share' in section 3 of the Zambian Companies Act 2017
[600]Zambian Companies Act 2017, s 238(1)(a)(b)(c)(2)(a)(b); Zambian Movable Property (Security Interest) Act 2016, s 33(1)
[601]Zambian Movable Property (Security Interest) Act 2016, ss 33, 7, 11, 13
[602] Zambian Moveable Property (Security Interest) Act 2016, ss 15, 52(a)(b)(i)
[603] *ibid*
[604]See, Zambian Companies Act 2017, s 3 (definition of the term)

the priority provisions under the Zambian Movable Property (Security Interest) Act should govern priority of pledges under the Securities Act?'

The Legal Character of a Charge at Common Law.

In an attempt to explain the legal character of a charge at common law, Lord Atkin, in *National Provincial and Union Bank of England v Charnley*.[605]observes that a charge exists when parties to a transaction for value agree that present or future property shall be available as security for a debt at the call of the lender.[606] And it does not matter that the present legal right which is contemplated by the parties can only be enforced at some future date.[607] Neither does it matter that the creditor gets no legal right in the property, either absolute or special, or indeed any legal right to possession.[608] The author argues that a 'pledge' could be classified as a 'charge' to the extent that it makes the property of the debtor available as security for payment of the debt, and confers a right of sale on the lender. Thus, it is submitted that priority of competing pledges of the same unlisted and listed securities may be determined by the Movable Property (Security Interest) Act (MPSIA 2016) priority regime.

The Scope of the Zambian Movable Property (Security Interest) Act 2016.

Under the Zambian MPSIA 2016, securities held by companies as well as those held by non-company investors could be classified as 'movable property'.[609] Movable Property" includes goods, intangibles, securities, money, negotiable instruments and negotiable documents.[610] Under the repealed Companies Act 1994, the perfection and priority of security interests created in the

[605] [1924] 1KB 431
[606] *ibid* 449-450.
[607] *ibid*
[608] *ibid*
[609] See, the Zambian MPSIA 2016, s 2 (Definition of the term).
[610] Zambian MPSIA 2016, s 2 (Definition of the term).

same collateral—immovable property and movable property (including intangibles like securities)—were governed by the same regime.[611] The MPSIA 2016 now exclusively governs perfection and priority of movable property including securities whether those interests are created by natural persons or bodies corporate.[612] Security interests in movable property are registrable with the Collateral Registry of the Patents and Company Registration Agency (PACRA).[613] Security interests in immovable property of a company are governed by the Companies Act 2017 and are registrable in the main registry of PACRA.[614] Although the MPSIA 2016 applies to pledges of securities,[615] it does not apply to securities held through a CSA.[616] The author argues that the MPSIA 2016 applies only to certificated securities issued before the commencement of the Zambian Securities Act 2016. This view is rationalized by the position that, in Zambia, new issues of securities to be traded on a securities exchange are required to be in dematerialized form and held through a CSA.[617] Thus, priority of competing collateral interests in the same certificated securities is determined as follows:

a) A perfected security interest has priority over an unperfected security interest;
b) As between two or more competing perfected security interests, priority is determined by the order of the following actions, whichever first occurs:
    i) The registration of a financing statement;

[611] Zambian Companies Act 1994, s 99 (repealed).
[612] Zambian MPSIA 2016, s 3(3)(a).
[613] Zambian MPSIA 2016, ss 33(1)(2)(3), 7(1)(2), 11(1)(2).
[614] Zambian Companies Act 2017, ss 138(1)(a), 240(1)(a), (definition of term); Zambian Securities Act 2016, s 82(4).
[615] Securities are moveable property: See, Zambian MPSIA 2016, ss 3(1)(a), 2 *(definition of 'movable property' and 'intangible assets')*
[616] Zambian MPSIA 2016, s 3(3)(c).
[617] Zambian Securities Act 2016, s 82(1)(a)(b)(c).

ii) The secured creditor, or another person acting on the secured creditor's behalf, taking possession of the collateral; or

iii) The secured creditor, or another person acting on the secured creditor's behalf, acquires control of the collateral.

c) As between unperfected security interests in the same collateral, priority shall be determined by the order in the date of creation of the security interest.[618]

Thus, the author argues further that the MPSIA does not apply to dematerialized securities since these securities are held through a CSA. Dematerialized securities are more attractive than certificated ones on account of the following features:[619]

i) Eliminated risk of loss of certificates;

ii) Eliminated custody and insurance costs for certificates

iii) Easy and speedy transfer;

iv) Lower transaction costs since the cost of transporting the certificates across international borders is eliminated;

v) Efficient trading owing to speedy transfer; and

vi) Higher transfer volumes.

The author argues that since securities are not subject to the law of diminishing marginal utility,[620] dematerialized securities are likely to be consumed in high quantities. However, the author argues, the lack of priority rules for collateral interests in dematerialized securities, is likely to hinder

[618] Zambian MPSIA 2016, s 52(a)(b)(i)(ii)(iii)(c).
[619] See, Schwartz S.L., 'Intermediary Risk in Indirect Holding Systems for Securities' (2002) 12(309) Duke J. Comp. Int'l L. 309-330; Thevenoz L., 'Intermediated Securities, Legal Risk, and International Harmonization of Commercial Law' (2007) Stan. J. L. Bus, & Fin 1.
[620] Georgakopoulos N., 'Frauds, Markets and Fraud-on-the-market: The Tortured Transition of Justifiable Reliance from Deceit to Securities Fraud' (1995) 49(671) University of Miami Law Review 671.

growth of lending against collateral interests in such securities. And, erratic pledging, charging and mortgaging of dematerialized securities is likely to hinder growth of cross-border trade in securities. This view is rationalized by the position that pledging, charging and mortgaging of securities is a prominent feature of cross-border trade in securities.[621] It is therefore submitted that the legal, regulatory and institutional framework does not promote consumption of dematerialized securities. As a possible way of overcoming this shortcoming in the said framework, proposals are made for the enactment of rules that should govern the ranking of competing collateral interests in dematerialized securities.

4.2.1.1. SOME INSIGHT FROM THE GENEVA SECURITIES CONVENTION 2009.

The subsection appearing immediately above has examined constraints relating to inadequate provisions for the ranking of competing security interests in the same securities. It was noted that there are no priority rules for the raking of competing collateral interests in the same dematerialized securities. The subsection demonstrated that such priority rules could encourage cross-border consumption of dematerialized securities. In this subsection, we turn to examine the possibility of encouraging consumption of dematerialized securities by adopting the GSC 2009 priority rules. Although both the HSC and the GSC deal with the same subject matter, they serve two distinct but complementary purposes. While the HSC identifies the substantive property law, the GSC provides the substantive rules that govern the proprietary aspects of a cross-border securities deal.[622] Whether an investor gets an equitable interest or a securities entitlement in the acquired

[621] See, NortonRose, 'Minimizing Legal Uncertainty in Cross-border Collateral Transactions' (2020), www.nortonrose.com; Smedresman P.S. and Kenny M.A, 'Solving the Puzzle of Cross-border Securities Pledges' (1996) 15 Int'l Fin. L. Rev. 15; Samamba Lennox Trivedi II, 311, *op.cit*

[622] See, Christophe Bernasconi and Thomas Keijser, 'The Hague and Geneva Securities Conventions: A Modern and Global Regime for Intermediated Securities' (2009) *Unif. L. Rev.*, NS—Vol. XVII, at 450; GSC 2009, Art 2(a).

securities depends on the substantive law.[623] This implies that the substantive domestic property law should apply side-by-side with the GSC 2009. It also implies that the optimal level of the transaction will partly depend on the effectiveness of the domestic securities and property law. This necessitates the modernization of domestic securities and property laws in the COMESA region. This is what Muller implies by stating that the implementation of the HSC will not overcome the conflict problems in intermediated cross-border securities systems unless domestic securities laws are also modernized.[624]

4.2.1.2. PERFECTION OF INTERMADIATED SECURITIES UNDER THE GENEVA SECURITIES CONVENTION 2009.

The transfer of securities from the account of the seller/pledgor to the account of the buyer/pledgee, effectively perfects the acquired interest under the GSC.[625] Thus, no further step is necessary to render the acquired interest effective against third parties.[626]

4.2.1.2.1. DETERMING PRIORITY OF COMPETING COLLATERAL INTERESTS IN INTERMEDIATED SECURITIES UNDER THE GSC 2009.

The priority rules of the GSC govern the ranking of competing perfected security interests in intermediated securities regardless of legal character of the holder.[627] Thus, perfected security interests rank among themselves according to the time at which the electronic disposition was

[623] See, Rogers S.J., 'Conflict of Laws for Transactions in Securities Held Through Intermediaries' (2006) Cornell Int'l L. J. 285-327.
[624] Muller F.M., 'Approaches to the law applicable to proprietary effects of transactions in securities taken in uniform law: a lesson for the EU' (2019) 24(4) Uni. L. Rev. 711-723.
[625] See, the Geneva Securities Convention 2009, Art 11(1)
[626] No further step may be required by the non-Convention law or any other rule of law applicable in an insolvency proceeding: See, the GSC 2009, Art 11(2)
[627] *ibid*

made.[628] A second or subsequent security interest in the same securities may be created by entry of the name of the second mortgagee/pledgee/charge in the mortgage securities account.[629] As a possible way of complementing the proposed priority rules for dematerialized securities, proposals are made for the adoption and implementation of the GSC regime referred to above. It is also proposed that domestic securities and property laws be modernized. The author recommends that legislators, regulators and policy makers collaborate in the modernization process taking into account the peculiar needs of COMESA securities markets.

The following subsection examines the effectiveness of *lex situs* as a conflict of laws rule for determining the substantive property law in cross-border securities dispositions.

4.2.2. CONSTRAINTS RELATING TO APPLICATION OF *LEX SITUS* TO PROPRIETARY ASPECTS OF CROSS-BORDER SECURITIES DISPOSITIONS.

The preceding subsection has examined constraints relating to inadequate provisions for the ranking of competing collateral interests in the same securities. It was noted that there are no priority rules for competing collateral interests in the same dematerialized securities. The subsection demonstrated that such priority rules are likely to promote cross-border trade in dematerialized securities in the COMESA Region. In this subsection, we turn to examine the effectiveness of *lex situs* in ascertaining the substantive property law in cross-border securities dispositions.

[628] GSC 2009, Art 11(4)(1)(2).
[629] The mortgage account initially maintained in the name of the first mortgagee/pledgee/charge.

The central premise of this subsection is that, transaction costs determine the level of cross-border flow of securities.[630] High transaction costs stifle cross-border flow of securities.[631] Conversely, lower transaction costs for cross-border securities deals promote cross-border trade in securities.[632] Thus, given the central thesis of this study, the author argues that replacing *lex situs* with a more effective conflict of laws rule is likely to reduce transaction costs for cross-border securities dispositions, and encourage cross-border trade in securities in the region.

Lex Situs and Legal Uncertainty in Brief.

Guynn argues that *[lex situs]* is unlikely to serve as an efficient conflict of laws rule for determining the substantive property law in modern intermediated securities systems.[633] This view is rationalized by the position that, when applied to modern intermediated cross-border securities system, *lex situs* points to more than one legal system.[634] This problem is underpinned by the lack of rules of international securities law or private international law that could be used to ascertain which one of the applicable substantive laws should exclusively govern the proprietary issues of a cross-border securities deal. This in effect causes legal uncertainty.[635] Since investors will need to comply with the legal, regulatory and institutional requirements of each and every applicable jurisdiction, the author argues that legal uncertainty is likely to delay the settlement of trades, and increases transaction costs of cross-border securities transactions. This, in turn, is likely to compromise the time, cost and volume dimensions of liquidity. Legal uncertainty would also bring

[630] Portes R. and Rey H., 'The Determinants of Cross-border Equity Flows' (2005) 65 J. Int'l Econ. 269-296.
[631] *ibid*
[632] *ibid*
[633] Guynn R.D., 'Modernizing Securities Ownership, Transfer and Pledging Laws: A Discussion Paper on the Need for International Harmonization' (1996), (Hereinafter, 'Guynn R.D. (1996)).
[634] *ibid*
[635] *ibid*

along legal risk and the risks associated with the latter.[636] The end of these risks is increased transaction costs for cross-border dispositions of securities.[637] Thus, the author argues here that legal uncertainty in cross-border securities transactions is likely to hinder growth of cross-border trade in the COMESA Region.

The following subsection examines the common law conflict of laws rule for determining the substantive property law.

4.2.2.1. THE COMMON LAW ON THE LAW APPLICABLE TO PROPRIETARY ASPECTS OF CROSS-BORDER SECURITIES DISPOSITIONS.

The subsection appearing immediately above has examined the theoretical aspect of the ineffectiveness of *lex situs* as a conflict of laws rule for ascertaining the substantive property law. It was noted that when applied to modern securities systems, *lex situs* points to two or more jurisdictions. In this subsection, we examine the common law conflict of laws rule for ascertaining the substantive property law. This subsection also examines the effectiveness of the said common law rule in determining the substantive property law.

The common law conflict of laws rule for determining the substantive property law in cross-border securities disposition was settled in the English case of *Macmillan Inc. vs Bishopsgate Investment Trust & Others (No. 3).*[638] *Bishopsgate* was decided by the English Court of Appeal. The decision in this case turned on the question as to which principle of law governs the determination of the

[636] Risks associated with legal risk are credit risk, operational risk and systemic risk: Thevenoz L., 'Intermediated Securities, Legal Risk and International Harmonization of Commercial Law' (2007) 13 Stan. JL Bus. & Fin. 384.
[637] *ibid*. This aspect is discussed in detail in Chapter 5 of the thesis. Proposals have been made in Chapter for harmonization of laws as a possible way of reducing legal uncertainty and attendant risks in intermediated cross-border securities deals.
[638][1996] 1 WLR 387. Hereinafter *'Bishopsgate'.*

substantive property law in cross-border securities dispositions. It was held that *lex situs* was the correct principle for that purpose. It was held as follows:

a) Where the securities were registered securities, either:
    (i) the law of the place of the issuer's incorporation or establishment; or
    (ii) the law of the place where the securities register is maintained at the time of transfer, applies.
b) Where the securities are bearer securities, the law of the place where the certificates representing the underlying securities are located at the time of the transfer, applies.[639]

The ratio for this decision was that the application of *lex situs* provided certainty. However, Auld LJ observed, in delivering judgment, that such an approach could prove cumbersome and ineffective when applied to complicated multi-jurisdiction securities transactions.[640] To the like effect, the United Kingdom Financial Markets Law Committee also observes that, the *lex situs* approach was sensible and practical when securities were held in certificated form by their owners and transferred by physical delivery of the certificates. Thus, the introduction of dematerialized securities whose existence and transfer are independent of physical certificates is likely to

[639]The United States has moved away from applying the old form of *lex situs*. They have introduced a new form of *lex situs* which applies with reference to the location of the relevant intermediary. The new *lex situs* was introduced by the Uniform Commercial Code: Uniform Commercial Code, Revised Arts 8 and 9. The case of *Fidelity Partners vs First Trust Company of New York*, 58 F Supp 2d. 55 (SYDNY 1999), affd 216 F 3d 1072 (2d Cir 2000), by way of restating and reaffirming the position of Revised Articles 8 and 9, held that the applicable law governing proprietary issues in a cross-border intermediated securities is determined with reference to the place where an intermediary maintains the securities account. The position in England applies to Zambia by reason of Section 2(a) and (b) of the English Law Extent of Application Act, Chapter 11 of the Laws of Zambia.

[640]*Bishopsgate* 412 a-b

compromise the effectiveness of *lex situs*.[641] Consequently, on this theoretical score, it is submitted that *lex situs* is not suitable for modern securities systems.[642]

The following subsection examines constraints relating to provisions for the maintenance of branch registers under the Zambian legal, regulatory and institutional framework.

4.2.2.2. CONSTRAINTS RELATING TO PROVISION FOR BRANCH REGISTERS.

The preceding subsection has examined the common law rule for determining the substantive property law. It was noted that *lex situs*, as laid down in *Bishopsgate*, serves that purpose. In this subsection, we turn to examine the effectiveness of the rule in *Bishopsgate* in determining the substantive property law.

In Zambia, like in many other COMESA states, issuers are allowed to keep a branch register.[643] A branch register is also referred to as the share and beneficial ownership register.[644] Any transfer of securities which are registered in a share and beneficial ownership register is deemed a transfer of property situated outside Zambia.[645] Thus, this position is an accommodation of the first limb of the rule in *Bishopsgate*.

In order to put the inquiry into context, let us consider the following hypothetical scenario:

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[641]The Financial Markets Law Committee of the United Kingdom, 'The Hague Convention on the Law Applicable Certain Rights in Respect of Securities Held with an Intermediary' (2005), para 2.3 www.fmlc.org/uploads/2/6/5/8/26584807/58.pdf accessed 23 August 2016

[642] The latter parts of this section give practical shortcomings associated with the application of *lex situs* in modern intermediated securities systems—dematerialized systems.

[643] An issuer with a share capital, may, if so permitted by its articles, keep a part of the register of its securities holders at any foreign branch for purposes of facilitating registration of transfers of securities by securities-holders resident in foreign countries: Zambian Companies Act 2017, s 196(1)(2).

[644] Zambian Companies Act 2017, s 195(1).

[645] *Situs* established by location of the register in line with the traditional *lex situs* rule. See, Zambian Companies Act 1994, s 52 *(repealed)* which reflected the spirit of the second limb of the rule in the *Bishopsgate* case.

> Let us suppose that XCo Ltd a Zambian issuer having its registered office at Lusaka is listed on the LuSE. Three fifths of its members or generally securities holders are resident in Zimbabwe in respect of which a branch register has been maintained in Harare. A member/securities holder resident in Zimbabwe transfers its securities to a Kenyan investor. In turn, the Kenyan investor pledges those securities to a Zambian lender as security for a loan.

Which law would govern the proprietary aspects of the dispositions made in our scenario above? Applying the first limb of the rule in *Bishopsgate*, the transfer from the Zimbabwean resident to the Kenyan investor would possibly be governed by the law of Zambia,[646] or the law of Zimbabwe.[647] The pledge by the Kenyan investor to the Zambian lender would be governed by the law of Zambia,[648] or the law of Zimbabwe.[649]

It is noted that there is the possibility of two domestic property laws applying to each cross-border securities disposition. How do we determine the law that should prevail over the other in either case? Are there domestic or private international law rules for settling such a conflict? Currently there are no rules for such purposes. Should we then apply the doctrine of proper law of the contract as a fall-back? With regard to this question, it is submitted that the doctrine of the proper law of the contract does not apply to the proprietary component of a cross-border securities disposition. Since it would be difficult to settle the attendant subjective legal uncertainty without such rules, it would be prudent for the Kenyan investor and the Zambian lender to comply with the perfection rules of both applicable jurisdictions. However, the author argues that such an undertaking is likely to increase transaction costs, delay the settlement of trades and compromise stock market liquidity as the cost and time dimensions of liquidity get negatively affected. As a possible solution to the

[646] Being the country of incorporation of XCo Ltd.

[647] Being the jurisdiction in which the register of members/securities holders was located at the time of the transfer.

[648] Being the country of incorporation of the issuer—Xco Ltd.

[649] Being the jurisdiction where the register of the pledged securities is located at the time of the creation of the pledge.

shortcoming identified above, proposals are made for the amendment of the Zambian Companies Act 2017 as follows:

> s. 196(4) The branch register and any duplicate or part of it shall for all intent and purposes be regarded as part and parcel of the principal share and beneficial ownership register.
>
> s. 196(5). An instrument of transfer of any share registered in a branch register or any duplicate or part of it shall be deemed to transfer property within Zambia.

The purpose of this proposed amendment is to ensure that the location of the branch register is tied to the jurisdiction of the issuer's incorporation or establishment. That way, the proposed provisions are likely to facilitate effective application of the first limb of the rule in *Bishopsgate*. There is also need to provide in the Companies Act 2017 that, for purposes of securities regulation, 'company' means "any entity that issues, has issued or proposed to issue securities wherever and however constituted". Such a provision would allow foreign issuers, whatever their style, to maintain foreign branch registers. It is submitted that the implementation of such measures is likely to reduce transaction costs for cross-border securities deals and promote cross-border trade in securities.

Avoiding Conflict of Laws Issues under Overseas Branch Registers in the United Kingdom.

In the United Kingdom, the overseas branch register together with its duplicates are part and parcel of the main register of members.[650] Any transfer of shares that are registered in the overseas branch register is treated as a transfer of property within the United Kingdom.[651] This extinguishes any transactional connection with other jurisdictions, and the application of *lex situs*.

[650] United Kingdom Companies Act 2006, ss 131(1) and 132(2).
[651] Similarly, in India, for the purpose of avoiding conflict of laws issues, a foreign register is treated as part of the issuer's main register of members so that all the provisions relating to the main register apply to it: see, Indian Companies Act 1956, s 158(2).

The following subsection examines constraints relating to the introduction of share transfer agents under the Zambian legal, regulatory and institutional framework.

4.2.2.2.1. CONSTRAINTS RELATING TO THE INTRODUCTION OF SHARE TRANSFER AGENTS.

The preceding subsection has examined the effectiveness of the rule in *Bishopsgate* in determining the substantive property law. It was noted that branch registers are likely to present multiple *situses* for cross-border dispositions of securities. The subsection demonstrated that branch registers are likely to increase transaction costs for cross-border securities dispositions. In this subsection, we examine the effect of share transfer agents and the rule in *Bishopsgate* on transaction costs for cross-border securities dispositions.

Introducing Share Transfer Agents under the Zambian Legal Framework.

Securities transfer agency is a new feature in the Zambian securities institutional framework.[652] It was not included in the repealed Securities Act of 1993.[653] Under the current Zambian legal and regulatory framework, any person who intends to do business as a share transfer agent, may apply to SEC for share transfer agent license.[654] The Zambian Securities Act 2016 in section 2 defines 'share transfer agent' as—

(a) a person who, on behalf of an issuer—

(i) creates and maintains the records of holders of securities issued by an issuer;

[652] Samamba Lennox Trivedi, 'The Role of Securities Transfer Agents in Promoting Cross-border Trade and Issue of Securities' (2020) 28(1) African Journal of International and Comparative Law (forthcoming) (hereinafter 'Samamba Lennox Trivedi XXVII').

[653] *ibid*

[654] The applicant must also have the necessary infrastructure, such as adequate office space, equipment and man-power for the prompt and accurate clearance and settlement of securities transactions has capacity to ensure the safeguarding of securities and monies: Zambian Securities Act 2016, s 34(1); Zambian Companies Act 2017, ss 188(1)(2)(b), 194(3)

(ii) deals with all matters connected with the transfer, issue, cancellation and redemption of its securities;

(iii) safeguards securities and funds; and

(iv) distributes dividends; or

(b) a department or division, by whatever name called, of a listed company performing the activities referred to in paragraph *(a)*, if at any time the total number of the holders of the company's securities exceed a prescribed amount;

Reference to 'person' in the definition of 'share transfer agent' as opposed to 'company' embraces natural persons, associations of natural persons (firms), trusts and juristic persons (companies and other bodies corporate).[655] Thus, the Zambian legal and regulatory framework extends share transfer agency to foreign entities of different styles.[656] Consequently, the author argues here that such a broad provision is likely to increase the number of foreign agents who would facilitate transfer of securities across international borders in the COMESA Region. Recalling that one of the major constraints on the growth of cross-border trade in securities in the region is higher transaction costs, the author also argues that the introduction of share transfer agents is likely to reduce transaction costs for cross-border securities deals. Lower transaction costs for cross-border securities dispositions are likely to promote cross-border trade. This view is rationalized by the fact that the cost of maintaining and operating a foreign branch is passed on to the foreign transfer agent.[657] Thus, securities transfer agents are likely to facilitate multiple securities issues or multi-

[655] See. The Zambian Securities Act 2016, s 2 (Definition of 'company'); Zambian Companies Act 2017, s 3 (Definition of 'company').

[656] See, reference to 'person' in the definition of 'share transfer agent' as opposed to 'company'—a term which would suggest exclusion of foreign entities from eligibility; 'person' embraces natural person, associations of natural persons (firms), trusts and juristic person (companies and other bodies corporate): see definition of 'company' in the Securities Act 2016, s 2 and the Companies Act 2017, s 3, respectively.

[657] Transaction costs, the cost of office accommodation, local directors and support staff, and taxes are assumed by the transfer agent.

jurisdiction cross-listings at a much lower cost on account of their better understanding of the business climate in their home country. This is likely to lower the cost of capital for foreign issuers. And, as investors in the region trade in foreign assets as though they were domestic assets, cross-border trade in securities is likely to grow. However, it should be recalled that under the traditional conflict of laws rule—*lex situs*—the substantive property law is determined by the location of the issuer or the securities transfer agent.[658] Thus, the introduction of securities transfer agents also suffers from the application of the first limb of the rule in *Bishopsgate*. Applying the first limb of the rule in *Bishopsgate*, the register kept by a foreign share transfer agent only attracts the application of an additional jurisdiction to an already complicated cross-border securities disposition. Thus, the author argues that share transfer agency and the rule in *Bishopsgate* are likely to increase transaction costs for cross-border securities dispositions. The author also argues that such additional costs are likely to discourage cross-border disposition of securities through share transfer agents. Such costs are also likely to hinder growth of cross-border trade in securities in the region.[659] As a possible way of overcoming such shortcomings in the legal, regulatory and institutional framework, the introduction of the following subsection in section 34 of the Zambian Securities Act 2016 is proposed:

> s. 34(5)(a). The securities register and any duplicate or part of it maintained by a securities transfer agent shall for all intent and purposes be regarded as part and parcel of the main share and beneficial ownership register of the issuer of securities.
>
> (b)An instrument of transfer or an electronic transfer of any security registered in a share and beneficial ownership register maintained by a securities transfer agent shall be deemed to transfer property within Zambia.

[658] See, Collins L. (ed), *Dicey and Morris on the Conflict of Laws* (Sweet & Maxwell 2000) at 930-931.
[659] See, Portes R. and Rey H., 'The Determinants of Cross-border Equity Flows' (2005) 65 J. Int'l Econ. 269-296.

Such an amendment is likely to ensure that the register maintained by the Share Transfer Agent is part and parcel of the principal register of securities holders that is kept by the issuer.

4.2.2.3. CONSTRAINTS POINTING TO ADOPTION AND IMPLEMENTATION OF THE HAGUE SECURITIES CONVENTION IN THE COMESA REGION.

The two subsections appearing immediately above have examined the effect of branch registers and share transfer agents on the effectiveness of the rule in *Bishopsgate*. It was noted that these infrastructural features are likely to aggravate the ineffectiveness of the rule in Bishopsgate in cross-border securities systems. It was also noted that the said infrastructural features tend to increase transaction costs for cross-border securities dispositions. In this subsection, we examine the possibility of reducing transaction costs for cross-border securities dispositions by adopting and implementing the HSC 2006.[660] Given the central thesis of this study, this subsection argues that the replacement of *lex situs* with an effective conflict of laws rule is likely to reduce transaction costs for cross-border securities dispositions. The subsection also argues that such a measure is likely to speed up the settlement of cross-border trades and increase cross-border trade in securities in the region.

Hypothetical Situation in Modern Intermediated Securities Holding Systems.

The scenario appearing below is the basis of the following analysis:

> XCo. Pty Ltd is a Company incorporated according to the laws of Namibia. Its shares are dual-listed on the Namibian Stock Exchange (NSX) and the Johannesburg Stock Exchange (JSE). The Zambian investor holds interests in XCo shares (XCo securities) through entries made in the books of its intermediary the Lusaka Stock Exchange (LuSE) broker licensed to operate on the JSE. The LuSE broker, in turn, maintains its

[660] This subsection examines the practical constraints relating to application of *lex situs* in modern intermediated securities systems.

> position in respect of the XCo securities through entries made on the books of XCo's external sub-custodian in Harare, Zimbabwe. The Zimbabwean sub-custodian holds its position in XCo securities through entries made in XCo's external custodian in Nairobi, Kenya. The Kenyan custodian, in turn, holds its position in XCo securities through entries made in the books of XCo's external central securities depository (CSD) in Johannesburg, South Africa.

Sub-Scenario One:

If the Zambian investor purchases securities on the JSE through its LuSE broker, which law would govern proprietary aspects of such a disposition? The answer to this question depends on the application of *lex situs* and the nature of securities that are being transferred/acquired. Thus:

a) If XCo securities are bearer securities, *lex situs* points to the law of South Africa, Kenya, and Zimbabwe.[661] Thus, there is the possibility of three domestic property laws applying to the said disposition. Such a situation causes legal uncertainty in the subjective sense.
b) If XCo securities are registered securities, *lex situs* points to Namibian law,[662] South African law,[663] Kenyan law,[664] and Zimbabwean law.[665] This presents the possibility of four domestic property laws applying to the cross-border disposition of XCo securities. In the absence of private international law rules for ascertaining the exclusive property law, legal uncertainty in the subjective sense is likely to increases.[666]

If XCo's securities are immobilized, their transfer is made by merely debiting the securities account of the transferor and crediting the account of the transferee. As far as the issuer or its agent is concerned, no corresponding entry is made in the principal or branch register of securities

[661] Where the bearer certificates representing the underlying XCo securities are located at the time of the transfer.
[662] As the place of incorporation of the issuer, and location of the securities register.
[663] Where the register of the external CSD is located at the time of the transfer.
[664] Where the register of the external custodian is located at the time of the transfer.
[665] Where the register of the external sub-custodian is located at the time of the transfer of XCo securities.
[666] See, chapter 5 for a discussion of the cost of legal uncertainty in cross-border dispositions of securities.

holders.[667] For this reason, immobilized securities cannot be classified as 'registered securities' or 'bearer securities'. Thus, immobilized securities are outside the scope of the rule in *Bishopsgate*.[668] Securities are called 'registered securities' on account of the mode of their transfer. Registered securities are transferable by delivery of the transfer instrument and the securities certificate, and entry of the name of the transferee in the register of securities holders. Securities are called 'bearer or negotiable securities' on account of their mode of transfer. Bearer securities are transferred by mere delivery, to the transferee, of the certificate or negotiable instrument representing the underlying securities. Benjamin argues that *lex situs* does not apply to intangible assets.[669] Although immobilized securities have underlying certificates, they may well be deemed as 'intangibles' on account of the method of transfer—transfer by book entry. Consequently, it is argued that *lex situs* does not apply to cross-border disposition of immobilized securities, on account of the following:

(i) the inadequacy of the rule in the *Bishopsgate;*

(ii) Diffusion of their corporeal manifestation by immobilization of the securities certificates; and

(iii) Transfer by book entry.

It must be recalled here that freedom of contract does not apply to proprietary aspects of a cross-border securities disposition. Thus, the transferor cannot agree with the transferee which domestic property law should apply for purposes of legal certainty. Consequently, parties to a cross-border disposition of immobilized securities cannot possibly know the domestic property law which

[667] *ibid*
[668] *ibid.*
[669] Benjamin J., Determining the Situs of Interests in Immobilized Securities' (1998) 47(4) The Int'l and Comp. L. Quarterly 923-934.

should govern the proprietary aspects of their bargain. This is likely to cause legal uncertainty in the objective sense on account of the inapplicability of the rule in *Bishopsgate*.[670]

c) If XCo securities are dematerialized, the position in (c) above prevails.[671] In dematerialized securities systems, there are no certificates involved at all.[672] Cross-border disposition of dematerialized securities is made by simply debiting and crediting electronic securities accounts of the transferor and the transferee.[673] No written transfer instruments are required. This makes it conceptually difficult to classify dematerialized securities as 'bearer' or 'registered' securities in terms of the rule in *Bishopsgate*.[674] It is therefore, difficult to apply *lex situs* to cross-border dispositions of dematerialized securities on account of the following:

(iv) the inadequacy of the rule in the *Bishopsgate;*

(v) lack of corporeal manifestation of securities. Their purely intangible nature make it difficult to assign a *locale* to them.[675] And

(vi) transfer by book entry.

[670] See, Chapter 5 of the thesis for a detailed discussion of legal uncertainty and its effect on cross-border trade in securities

[671] No certificates are issued at all in dematerialized or un-certificated securities systems.

[672] Securities Act 2016, *Zam*, s 2 (definition of 'dematerialized').

[673] See, GSC 2009, Art 11(1)(2).

[674] *ibid*

[675] *ibid*. In traditional securities holding, transfer and pledging systems, the application of *lex situs* turns on the relationship between the issuer and the investor. By contrast, the application of the PRIMA Rule as laid down in Article 4 of the HSC 2006 turns on the relationship between the relevant intermediary and the securities-account holder—the investor. This shift in focus seems to justify the application of the law of the place where the intermediary is located—and has an office.

The author argues that the inapplicability of *lex situs* to cross-border dematerialized securities systems is likely to cause legal uncertainty in the objective sense and obstruct cross-border dispositions of securities in the region.

Sub-Scenario Two:

The Zambian investor provides his interests in respect of XCo Securities to Zimbabwean lender as collateral for a margin loan. The Zimbabwean investor later purports to provide whatever interest is left in respect of XCo Securities as collateral to third party. Which law governs the proprietary aspects of such a disposition?

Applying the rule in *Bishopsgate*, the positions established in paragraphs (a), (b), (c) and (d) of under Question One above should apply to Question Two.

As a possible solution to this shortcoming in the law, proposals are made for the replacement of *lex situs* with a conflict of laws rule which is consistent with modern methods of holding, transferring and pledging securities.[676] Sono observes that *lex situs*, the 19th century rule of the atom world is not suitable for hypersphere dependent systems.[677] By this statement, Sono implies that *lex situs* is a rule for direct securities holding systems as opposed to indirect (intermediated) securities holding systems.

The following segment sets out the three components of a cross-border securities deal.

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[676] In Subsection 4.1.2.3.2 of this Chapter—Chapter 4—a case is made for replacement of *lex situs* with the Place of the Relevant Intermediary Approach as provided in Article 4 of the Hague Securities Convention 2006.

[677] K Sono, 'The Extent of Possible Adaptation of Domestic Laws to Modern Securities Holding and Transfer System' in GD Randall, JS Rogers, K sono and J Than, 'Modernizing Securities Ownership, Transfer and Pledging Laws: The Need for International Harmonization' (1996) 5-7 <www.davispolk.com/files/files/Publication/0da3a245-26b8-436b-b935-0c8ea6de773f/Preview/PublicationAttachment/b6f7e950-a5a4-4462-91bd-12a49ed316ab/modernizing%2520securities%2520ownership.pdf > accessed 10 August 2018.

4.2.2.3.1. THE TRICHOTOMY OF A CROSS-BORDER SECURITIES DEAL.

The subsection appearing immediately above has examined the possibility of reducing transaction costs for cross-border securities deals by adopting and implementing the HSC 2006. It was noted that *lex situs* causes legal uncertainty when applied to modern cross-border securities holding and transfer systems. The subsection highlighted the need for a more effective conflict of laws rule that would bring legal certainty and reduce transaction costs for cross-border securities deals.[678] In this subsection, we examine the basic components of a cross-border securities deal. This exercise puts the legal arguments and proposals for reform which have been made in this thesis in proper socio-economic context.

The author argues that unless all the components of a cross-border securities deal are examined, and the shortcomings in the legal, regulatory and institutional framework remedied, the said framework is likely to have limited influence in promoting cross-border trade in securities.

A cross-border securities deal has three (3) components.[679] These components are:

i) The contractual component;

ii) The proprietary component; and

iii) The financial component.[680]

[678] An argument has been made by the author, in this respect, that such a rule is likely to encourage cross-border trade in securities.
[679] Samamba Lennox Trivedi IX, at 103, *op.cit*
[680] *ibid*

The contractual component is governed by the law of contract while the proprietary component is governed by property law.[681] The financial component is governed by commercial law—principles of banking and finance.[682]

The following section makes a case for the adoption and implementation of the HSC 2006 in the region as a possible way of overcoming the ineffectiveness of *lex situs*.

4.2.2.3.2. THE CASE FOR REGIONAL ADOPTION AND IMPLEMENTATION OF THE HAGUE SECURITIES CONVENTION 2006.

This section makes a case for the adoption and implementation of the HSC 2006 in the region as a possible way of remedying the ineffectiveness of *lex situs*. The case for regional adoption and implementation of the HSC 2006 consists in the following positions, namely:[683]

a) ineffectiveness of *lex situs* when applied to modern cross-border securities systems;
b) inapplicability of the doctrine of the proper law of the contract to the proprietary component of a cross-border securities disposition; and
c) the effectiveness of PRIMA when applied in place of *lex situs*.[684]

Paragraph (a) and (b) have been tackled above. In this sub-section 4.3.2 below, only the effectiveness of the PRIMA when applied to the same set of facts as we did *lex situs* above will be considered. The following subsection examines the general status of the HSC 2006.

[681] *ibid*
[682] *ibid*
[683] *ibid* 122-123.
[684] 'The Place of the Relevant Intermediary Approach' or PRIMA for short, as introduced by the HSC 2006: See, HSC 2005, Arts 4, 5.

4.2.2.3.2.1. THE HAGUE SECURITIES CONVENTION 2006.

This subsection gives empirical evidence on the general status of the HSC 2006.[685] This exercise puts the legal arguments which we have made in this chapter and elsewhere in the thesis in proper socio-economic context.

Global efforts to resolve legal uncertainty in intermediated cross-border securities holding and transfer systems have been expressed in the writing and adoption of the HSC 2006.[686] The HSC 2006 was adopted by the Hague Conference on 5th July, 2006.[687] Its text is supplemented by the GSC 2009. While the HSC 2006 provides the conflict of laws rule for intermediated securities, the GSC 2009 sets out the text (substantive rules) of the applicable law. Thus, the two Conventions are complementary.[688] However, the HSC 2006 remains open for ratification by the sixty two Member States of the Hague Conference.[689] The Convention has not entered into force yet, since only Switzerland and Mauritius have ratified it.[690] Other COMESA members which are members of the Hague Conference are Egypt and Zambia.[691] However, Egypt and Zambia have not taken steps to sign or ratify or accede to the HSC 2006.

The following subsection discusses the Conventional rule for determining the substantive property law.

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[685] It establishes how many countries in Eastern and Southern Africa have ratified or acceded to the HSC 2006.
[686] HSC Explanatory Report 2017, *op.cit*
[687] At the Hague Conference on Private International Law. Hereinafter, for purposes of brevity, 'the Hague Conference on Private International Law' will simply be referred to as 'the HCPIL'.
[688] See, subsection 4.1.1 of chapter 4 of the thesis above.
[689] This includes any State that wishes to accede to it, so as to trigger it into force by the requisite threshold of three instruments of ratification, acceptance, approval or accession: Hague Securities Convention 2006, Art 19(1)
[690] Switzerland signed the Convention on 5th July, 2006 and ratified it on 14th September, 2009; Mauritius signed the Convention on 28th April, 2008 and ratified it on 15th October, 2009; the United States of America signed the Convention on 5th July, 2006 but has never taken a further step to ratify it since.
[691] From SADC we have South Africa and Zambia.

4.2.2.3.2.1.1. THE CONVENTIONAL RULES FOR DETERMINING THE SUBSTANTIVE PROPERTY LAW.

The subsection appearing immediately above has examined the general status of the HSC 2006. It was noted that only three COMESA states are members of the Hague Conference. It was also noted that, of the three COMESA Member States which are members of the Hague Conference, only one has ratified the HSC 2006. In this subsection, we examine the Conventional rules for determining the substantive property law.[692] Further, this section demonstrates the superiority of the Conventional rule to *lex situs*.

(A) PRIMARY RULE FOR DETERMINING THE APPLICABLE PROPERTY LAW.

Article 4(1) of the HSC sets out the primary rule for determining those issues referred to in Article 2(1) of the Convention.[693] The Convention introduces party autonomy in the choice of the substantive property law.[694] Thus, the law that is expressly agreed by the intermediary and an account holder as the governing law of the account agreement,[695] applies. The law so designated applies on condition that 'the relevant intermediary has, at the time of the agreement, an office in that State whose law has been designated as the governing law.[696] Such an office should, either alone or together with other offices of the relevant intermediary or with agents of the relevant intermediary in that or another State, be responsible for:

i. Effecting or monitoring entries in securities accounts;

[692] The Conventional rule for determining the substantive property law as laid down in articles 4 and 5 of the HSC 2006 is referred to as "the Place of the Relevant Intermediary Approach or PRIMA for short".
[693] HSC 2006, Art 4(1).
[694] See, HSC 2006, Arts 4, 5.
[695] Or such other law or laws agreed upon as governing various issues stipulated in Article 2(1) in relation to the securities held with an intermediary.
[696] HSC 2006, Art 4(1)(2).

ii. Administering payments or corporate actions relating to securities held with the intermediary; or

iii. Business or other regular activity of maintaining securities, or is identified by an account number, bank code, or other specific indication that they maintain securities accounts in that State'.[697]

It is worth noting here that the relevant intermediary must be situated in the State whose law has been designated as governing law of the account agreement. This is the source of the acronym Place of Relevant Intermediary Approach (PRIMA) and the name PRIMA Convention as the tag for the Hague Securities Convention 2006. It is also worth noting from the tenor and spirit of Article 4(1) of the Hague Securities Convention, the Article 2(1) issues may be governed by different domestic property laws.

(B) FALL-BACK RULES FOR DETERMINING THE APPLICABLE PROPERTY LAW.

Article 5 provides fall-back rules for determining the substantive property law. The fall-back rules will apply where there is no express stipulation of the governing law of the account agreement.[698] Thus, if the applicable law is not determined under Article 4, the law of the state in which the office of the relevant intermediary is, applies.[699] The law so identified applies with proviso that there is express or unambiguous statement in a written account agreement that the relevant intermediary entered into the account agreement through that office. 'State' here includes a territorial unit of a Multi-Unit State, in which that office was then located.[700] The is also an

[697] Hague Securities Convention 2006, Art 4(1)(a)(b).
[698] HSC 2006, Art 5(1)(2).
[699] HSC 2006, Art 2.
[700] *ibid*

additional requirement that such a law satisfies the conditions laid down in Article 4(1).[701] If the first fall-back rule does not work, the substantive property law may be ascertained by reference to the place of incorporation or business of the relevant intermediary at the time of the account agreement. If the relevant intermediary has more than one place of business, it is the principal place of business that counts.[702]

The following subsection illustrates the superiority of PRIMA to *lex situs* by applying the former rule to the same hypothetical scenario as we did the latter rule.

4.2.2.3.2.1.2. DETERMINING THE APPLICABLE PROPERTY LAW USING THE PRIMA RULE.

This subsection establishes the superiority of PRIMA to *lex situs* by applying PRIMA to the same hypothetical scenario as we did *lex situs*.

Applying the PRIMA Rule to Scenario One.

The transfer of securities by the Zimbabwean investor to the Kenyan investor would be governed by a single law. This would be the law of the jurisdiction in which the relevant intermediary has a place of business.[703] This jurisdiction is likely to be Zambia being the place where the Clearing and Settlement Agency (CSA) is located.[704] Thus, Zambian property law would singly apply. As a fall-back, the law of incorporation of the CSA—Zambia—would apply.[705] Yet again, Zambian

[701] *ibid.*
[702] HSC 2006, Art 5(2)(3).
[703] HSC 2006, Art 4(1).
[704] Hague Securities Convention 2006, Art 4(1).
[705] In Zambia, only a company incorporated under Zambian law can operate a CSA for a domestic stock exchange: See, HSC 2006, Art 5(2); Zambian Securities Act 2016, ss 21(1)(b), 2 (definition of 'clearing and settlement agency' and 'company'; Zambian Companies Act 2017, s 3 (definition of 'company'.

law would singly apply.[706] Similarly, the pledge of the position of the Kenyan investor to the Zambian lender would be governed by Zambian property law only.[707] The author argues that by extinguishing the applicability of multiple substantive property laws, the HSC is likely to increase legal certainty in cross-border securities transactions, reduce transaction costs and speed up the settlement of trades. The author argues that PRIMA is likely to eliminate the trouble of complying with perfection requirements of each and every applicable jurisdiction.[708] The author also argues that the elimination of such trouble is likely to reduce transaction costs for cross-border securities dispositions. It further argued that such a positive feature is likely to speed up settlement of cross-border trades. Furthermore, it is argued that these two positive features are likely to improve the cost and time dimensions of liquidity and enhance liquidity of the securities markets in the COMESA Region.[709] Also, cross-border trade in securities is likely to increase. It is highly recommended that COMESA Members States accede to and implement the HSC 2006. The following segment discusses some practical and interpretative issues that would aid the interpretation of the Convention once it is adopted and domesticated.

Some Interpretative and Practical Issues: The So-Called Page 37 Problem.

As far as interpretative aspects of the HSC 2006 are concerned, the so-called page 37 problem is very helpful.[710] Articles 4 and 5 of the HSC emphasise the account agreement between a securities

[706] See, Hague Securities Convention 2006, Arts 4(2), 5

[707] HSC 2006, Art 4(1). The law governing the account agreement between the Zambian lender and their relevant intermediary applies as opposed to the law governing the agreement between the Kenyan investor and their intermediary: See, some interpretative issues below for the rationalization of this view.

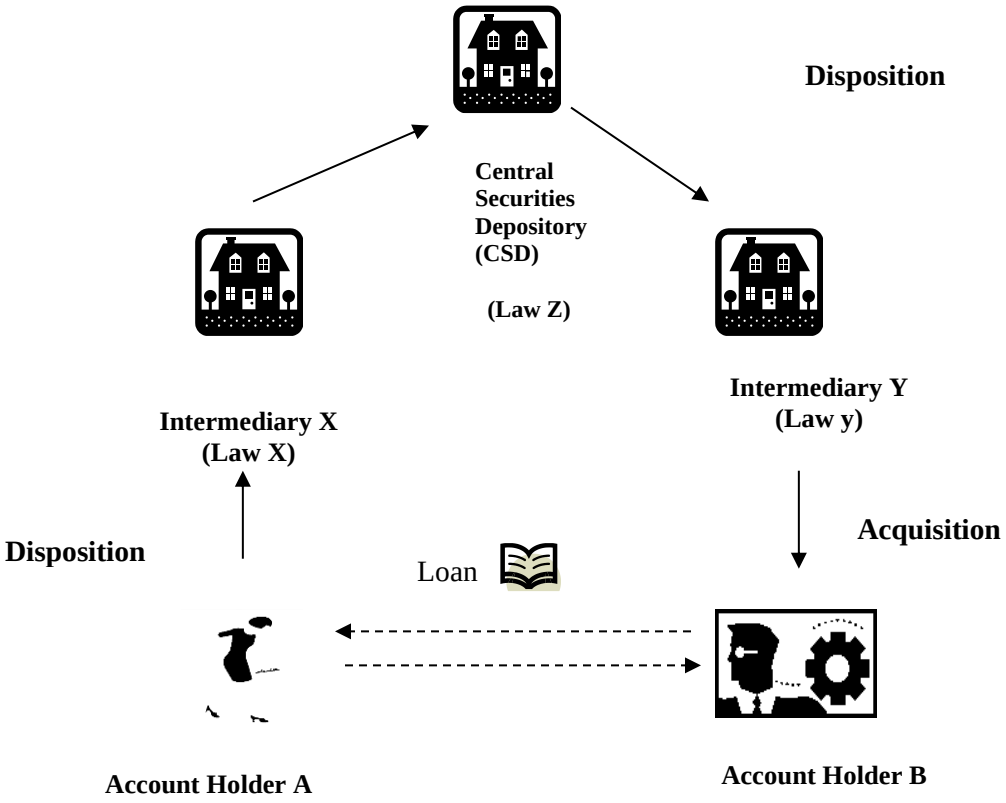
[708] Freedom from such trouble is also likely to enhance the time-dimension of liquidity. Speedy settlement of trades—owing to time saved by avoiding such trouble—implies high liquidity for stock markets in the region: Kenneth K. Mwenda (1999), at 492, fn 1

[709] *ibid*;

[710]This nomenclature comes from an illustration of securities dispositions involving two or more intermediaries and appearing at page 37 of the Bernasconi Report presented to the Nineteenth Session of the Hague Conference on Private International Law : Roy Goode, Hideki Kanda, and Karl Kreuzer ; with the assistance of Christophe Bernasconi, *Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held*

account holder and the relevant intermediary or its jurisdiction. This assumes the existence of a single intermediary in intermediated cross-border securities systems. However, usually, there are two or more intermediaries involved in modern intermediated securities systems. Thus, it is possible to have as many account agreements as there are intermediaries. How then, in such a case, do we determine which of the connecting factor(s) is/are conclusive? This question is settled by the account-by-account approach to identifying the substantive property law.[711] The existence of multiple connecting factors is what has been styled 'the Page 37 Problem' or 'Problem of Double Interests'.[712]

Figure 1: A Practical illustration of the Page 37 Problem—The Problem of Double Interests.



with an Intermediary 2005: Hague Securities Convention (Koninklijke Brill NV 2005) 37 <www.library.yorku.ca/find/Record/1972548 > accessed 25 August 2018.

[711] *ibid*
[712] *ibid*

Account Holder A borrows funds from Account Holder B by giving her intermediated securities as collateral. The loan contract is governed by law Y. The account agreements of account holders A and B are governed by laws X and law Y, respectively. It is worth noting that under this very single hypothetical collateral transaction, there exists four distinct dispositions under the HSC, namely:

i) disposition between account holder A and Intermediary X;

ii) disposition between Intermediary X and CSD;

iii) disposition between CSD and Intermediary Y; and

iv) disposition between Intermediary Y and Account Holder B.

Additionally, each disposition listed above is governed by a different law, namely:

i) Law X for disposition (i) above;

ii) Law Z for dispositions (ii) and (iii) above; and

iii) Law Y for disposition (iv) above.

Let us assume that Account Holder B does not transfer the funds after receiving the securities. As a result, Account holder A brings an action for recovery of the same. In this scenario questions arise as to which connecting factor(s) is/are relevant to the securities deal. Is it Account Holder A's account agreement or Account Holder B's account agreement which is relevant? Further, it may be possible for the forum court for A's action to identify the interest of Account Holder A as valid by law X. Similarly, Account Holder B's interest may be valid under law Y by the forum court. This may pose the so-called Page 37 Problem or 'Problem of Double Interests.[713]

[713] Proponents of 'unitary solution" or "Super PRIMA" were of a view that stage-by-stage or account-by-account analysis could cause double-interests problem in such an event: *ibid* 5

The HSC avoids the problem of double-interests by looking to private international law rules which govern the transfer of tangible movables.[714] Thus, the HSC considers each recipient's securities account where the securities are credited.[715] It is a well-established rule of private international law that the new *situs* of movable tangible property governs the proprietary aspects of its assignment.[716] However, the application of this rule poses the risk of stripping the previous owner of their rights *in rem* in the event that the transferee acquires good title under the new *situs*.[717]

Let us go back to Figure 1. There, we see that the account agreement between B and Intermediary Y is an important connecting factor in a suit by A against B. That account agreement, under the Convention, points to law Y as the governing law for all issues that may arise in that suit.[718] As a matter of law and fact under law Y, B acquires good title to the intermediated securities. However, the crediting of his securities account extinguishes A's interests in those securities. Therefore, the problem of double-interests does not arise here.[719] In the event that B does not acquire title to the securities, the question of double interests does not arise either.[720] Applying this position to scenarios (ii) and (iii) scenario above, we have the following positions: Once B gets a good title from A, A's interest in the securities extinguishes. This makes the account agreement between A and intermediary X an immaterial connecting factor. That way, the account agreement between B and intermediary Y becomes a very important connecting factor in scenarios (ii) and (iii) above. It

[714] Goode R., Kanda H. and Kreuzer K., *Hague Securities Convention Explanatory Report* (2nd edn, Hague Conference on Private International Law Permanent Bureau 2017), (hereinafter, 'HSC Explanatory Report 2017').
[715] *ibid*
[716] *ibid*
[717] Collins L.(ed), *Dicey, Morris and Collins on the Conflict of Laws* (Vol. I, Sweet and Maxwell 2012) 1171-1179.
[718] Issues falling within the scope of Article 2(1) of the HSC 2006.
[719] See, Hague Securities Convention 2006, Art 2(1)(a)(b)(d).
[720] On account of total failure of consideration, property in the securities does not pass: See, *Rowland v Divall* [1923] 2 K.B. 500; S Shamimul and H Azmi, 'Failure of Consideration: An Appraisal of Rowland v Divall' (1984) 26(3) Journal of Indiana Law Institute 348-354

would, therefore, follow that the law agreed in the account agreement between B and intermediary Y governs the proprietary aspects of the disposition between A and B. Thus, such a law would singly govern the proprietary aspects of that disposition. The author submits that the implementation of the HSC 2006 is likely to bring legal certainty to intermediated cross-border securities holding and transfer systems in the COMESA region.[721]

4.2.2.3.2.2. *LEX CREATIONIS* AS A POSSIBLE ALTERNATIVE TO THE HAGUE SECURITIES CONVENTION 2006.

The main proponent of *lex creationis* as an alternative to the HSC PRIMA rule is Ooi.[722] Ooi argues that by applying the law of the jurisdiction creating the financial asset—*lex creationis*—legal uncertainty in intermediated cross-border securities systems may be avoided by apportioning the HSC Article 2.1 issues between the law of the transferor's jurisdiction and the law of the transferee's jurisdiction.[723] Ooi's observes that the rule in *Winkworth* is based on the traditional *lex situs* approach to determining the substantive property law which should govern the proprietary issues of transfers of tangible movable assets.[724] As such, Ooi argues that the rule in *Winkworth* is not suitable for transfers of intangible movables like intermediated securities.[725] Ooi's approach is a substantive law approach which looks to domestic securities and property law. Ooi argues that this sort of approach is likely to avoid the problem of double liability.[726] Ooi argues further that

[721] See, HSC 2006, Art 4(1). The problem relating to 'double liability', see, Hague Conference (HCCH) Permanent Bureau, 'Transfers Involving Several Intermediaries: An Explanatory Note on the Functioning of PRIMA within the Framework of the Preliminary Draft Convention on Securities' (2002) Pre. Doc No. 12, May 2002.
[722] Maisie Ooi, *Shares and Other Securities in the Conflict of Law* (OUP 2003) 302, (Hereinafter, 'Ooi (2003)').
[723] *ibid*
[724] *Winkworth vs Christie Manson & Woods Ltd* [1988] Ch 496; North P. and Fawcett J.J, *Cheshire and North's Private International Law* (13edn, Butterworths 1999) at 942-945; Dicey A.V. Morris J.H.C. and Collins L. (eds), Dicey, Morris and Collins on the Conflict of Laws (Sweet & Maxwell 2006) at 1171-1180.
[725] Ooi (2003), *op.cit*
[726] *ibid*

in the event that the transferee (B in Figure 1 herein above) gets a lesser title or interest than the transferor's under the HSC law, the HSC is incapable of resolving such a problem.[727] Ooi opines that, in order to rectify such a problem, the transferee (B in Figure 1above) will have to look to upper tiers in the holding chain until the point where the securities positions of the relevant account holders (A and B in Figure 1 above) cannot be traced to any previous owner.[728] The author argues here that since it is A's contractual obligation to deliver a specific number of securities to B, A incurs liability for failing to do so. Thus, under the HSC PRIMA rule, by a single civil recovery suit under Law Y, B is likely to recover the shortfall or its money's worth without having to look through multiple upper layers in the securities holding chain. On the contrary, it is difficult to see how the substantive approach could eliminate the risk of double liability. This concern has been necessitated by the fact that the risk of double liability is precipitated by the risk of double interests. By looking to a single domestic property law, *lex creationis* as proposed by Ooi assumes that the securities credited to A's account are the same as those credited to the account of CSD. It also assumes that the securities credited to the account of the CSD are the same as those credited to B's account. However, securities are without corporeal manifestation and as such their transfer by book entry method may be likened to electronic transfers of money. And as such, nothing is really transferred from one account to the other.[729] Thus the securities credited to the account of B are different from those that are credited to A's account or the account of the CSD. Consequently, there is the possibility that B's interest may be valid under Law X and Law Z thereby posing the challenge of double interests, and of double liability for that matter.[730] On the contrary, as

[727] *ibid*
[728] *ibid* at 482.
[729] See, Burnett R. and Bath V., *Law of International Business in Australasia* (The Federation Press 2009).
[730] Also note that the connecting factors under Law X and Law Z are likely to be different in the absence of harmonized securities and property laws as is the case in the COMESA Region.

demonstrated above, the HSC PRIMA rule is likely to extinguish the risk of double interests. Possible methods of eliminating the risk of double liability under the HSC scheme have also been suggested above.

Moreover, the substantive law approach suggested by Ooi could also be critiqued for suggesting that proprietary issues of cross-border securities transactions may be ascertained retrospectively by some law which is totally unknown by the CSD (CSD in Figure 1 above) on account of subjective legal uncertainty. It is for this very reason that Super PRIMA was rejected by the Permanent Bureau of the Hague Conference on Private International Law (HCCH).[731] It is therefore submitted that the HSC 2006 is likely to serve as a more-effective device.

The following section examines the effect of fragmented domestic payment systems on settlement of cross-border trades in the COMESA Region.

4.2.3. CONSTRAINTS RELATING TO SEGMENTED DOMESTIC PAYMENT SYSTEMS IN THE REGION.

The preceding section has examined the effectiveness of *lex situs* in determining the substantive property law. It was noted that *lex situs* increases transaction costs for cross-border securities disposition. The section demonstrated that the HSC PRIMA rule is likely to reduce transaction costs for cross-border securities disposition and speed up settlement of trades. In this section, we turn to examine the effect of the fragmented domestic payment systems on settlement of cross-

[731] See, Hague Conference on Private International Law, Permanent Bureau, 'Transfers Involving Several Intermediaries: An Explanatory Note on the Functioning of PRIMA within the Framework of the Preliminary Draft of the Convention on Securities' Pre. Doc. No. 3, at 5-6; Hague Conference on Private International Law, Permanent Bureau, 'Transfers Involving Several Intermediaries: An Explanatory Note on the Functioning of PRIMA within the Framework of the Preliminary Draft of the Convention on Securities' (2002) Pre. Doc. No. 12, May 2002.

border securities trades in the COMESA region. The central premise of this section is that an effective cross-border payment system is critical to effective settlement of cross-border securities trades.[732] Thus, given the central thesis of the study, the author argues that regional integration of domestic payment systems is likely reduce the cost cross-border payments, and increase the speed of cross-border transfer of funds. The author also argues that speedy cross-border transfer of funds is likely to increase the pace at which cross-border securities trades are settled. The author further argues that speedy settlement of trades is likely to increase cross-border trade in securities in the region.

The following segment introduces empirical evidence on the speed of cross-border transfer of funds in the COMESA Region.

Empirical Evidence on the pace of cross-border transfers of payments in Eastern and Southern Africa.

This segment gives empirical evidence on the pace at which cross-border payments are effected in the COMESA Region. This exercise puts the legal arguments which we have made in this section and elsewhere in the thesis in proper socio-economic context.

A study by the United Nations Economic Commission for Africa shows that the major challenge to the growth of intra-African trade is fragmented payment systems.[733] The study further shows that,[734] payment systems in the region are often inefficient in terms of cost, time, convenience,

[732] See, Zambian Securities Act 2016, ss 100, 101.

[733] This study shows that domestic payment systems in Africa are small, [fragmented] and lack competition adding to inefficiencies, high payment costs and exorbitant bank charges: The United Nations Economic Commission for Africa, 'Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade' (2010) 267 (hereinafter 'UNECA Report 2010' <www.uneca.org/sites/default/files/PublicationFiles/aria4full.pdf > accessed 15 August 2016

[734] In comparison to international best practice.

adaptability and finality.[735] The said study indicates that an international electronic fund transfer that takes just minutes to go around the globe can take two weeks to arrive at a beneficiary in some African countries.[736] And a cheque can take more than a month to clear in Sub-Saharan Africa.[737] The author argues that the long durations for the settlement of cross-border payments are likely to compromise the settlement of cross-border securities trades since transactions concluded on securities exchanges are executed and completed when a CSD transfers securities from the account of the vendor to the account of the purchaser while the central bank simultaneously debits and credits the accounts of the participating banks.[738]

The following subsection examines the effect of delayed arrivals of cross-border payments on investor protection and growth of cross-border trade in securities.

4.2.3.1. LEGAL CONSTRAINTS RELATING TO DELAYS IN ARRIVAL OF CROSS-BORDER PAYMENTS FOR SECURITIES.

The subsection appearing immediately above has examined the efficacy of domestic payment systems in transferring cross-border payments. It was noted that it takes an average of eighteen days for a cross-border payment to get cleared through domestic payment systems.[739] In this subsection, we turn to examine the effect of the slow pace of cross-border payments on investor

[735] UNECA Report 2010, *op.cit*
[736] *ibid*
[737] *ibid*
[738] See generally, Mario Guadamillas and Robert Keppler, *Securities Clearance and Settlement Systems: a Guide to Best Practices* (The World Bank 2001); Samamba Lennox Trivedi XI, 22-24, *op.cit*
[739] The evidence so provided served to put the legal arguments made in this subsection in proper socio-economic context.

protection and cross-border trade in securities.[740] As a way of conceptualizing the problems caused by delayed arrival of funds, let us consider the following hypothetical scenario:

> A and B are resident in different jurisdictions. They hold securities accounts with X (their common intermediary). B agrees to transfer some of his XCo securities to A for a money consideration. Transfer of securities and the attendant passing of property in the securities is to be done upon receipt of funds from A. Payment is made by way of electronic fund transfer. Two days after the wiring the funds to B, (ten days before funds can reach B), B with the knowledge of A, purports to sell the same position to C. A attempts to stop B from going ahead with the deal with C but to no avail. Four days later (a week before arrival of funds to B from A) C purports to pledge that position to X for a marginal loan advanced by X. Could A competently maintain an action in a court of law for (among other reliefs) an interim injunction to restrain B from disposing of the position in question until the funds from A reach B? Could a constructive trust of that position be declared in favour of A? Would the court award damages for any loss A might have suffered as a result of entering the deal with B?

The author argues that before the seller receives payment from the purchaser, their promise to transfer the securities is without valuable consideration from the buyer.[741] The consideration for B's promise[742]consists in the acceptance of the offer by A. Acceptance should be signified by performing what the offeror has asked for—make payment for the securities.[743] Once payment is made in accordance with the offer, an obligation on the part of B to transfer the securities arises.[744] The author argues that before an obligation on the part of B to transfer the securities can arise, B cannot competently be compelled to transfer the securities to A. The obligation to transfer XCo securities, it would appear, arises upon finality of payment for the securities.

[740] Other threats on investor protection in international securities markets have been thoroughly discussed in Chapter 6 of the thesis.
[741] Transfer of securities upon receipt of funds.
[742] Promise to transfer securities to A.
[743] See, JC Smith, 'The Law of Contract—Alive or Dead? (1979) 13 *The Law Teacher* 73, 77.
[744] Not before then.

The author argues further that before an obligation to transfer XCo securities to A arises, no action for anticipatory breach or actual breach can properly be maintained.[745] Could there be actual or anticipatory breach of a non-existent obligation? For this very reason, equity is unlikely to grant interim injunctions or declare constructive trusts in favour of A. Two reasons seem to lend support to this view. Firstly, equity follows the law. Thus, equity will not create new conditions or fix new rights, interests or obligations for parties to a contract.[746] Thus, equity will not grant any of its reliefs before finality of payment. Consequently, the grant of an injunction to A would presuppose finality of payment.[747] This view is rationalized by the fact that payment may never come through on account of exchange controls or insufficient funds, or any other reason for that matter?[748] This approach is also supported by the fact that presupposition is not part of the role of courts—the role of courts of law being the declaration of accrued rights and obligations of parties to contracts. Thirdly, equity will not aid A by treating him as a volunteer.[749] The author argues here that the lack of investor protection during the waiting period for the clearance of cross-border payments in the region is likely to discourage market participation.[750] As a possible way of lowering the cost of cross-border payments, and speeding up the transfer of cross-border payments, it is proposed

[745] Frederick Pollock observed that no legal action could competently be maintained against the offeror for failure to fulfil their promise unless the offeree has done an act or made a promise—which is of value in the eyes of the law—in response to the offeror's promise: Frederick Pollock, *Pollock's Principles of Contract* (13th Edn, Stevens & Sons Limited 1950)

[746] *De Beers Consolidated Mines Ltd vs British South Africa Co.* [1912] AC 52, at 65-66, per Atkinson LJ.

[747] That would amount to creating new conditions for parties to the securities contract.

[748] The maxim that 'equity regards as done that which ought to be done' will not "turn the conditional into the absolute, the optional into the obligatory, or make for the parties contracts different from the ones they have made for themselves*: De Beers Mines Ltd vs British South Africa Co*. [1912] AC 52, 65-66 (Atkinson LJ)

[749] A volunteer is a person who has not supplied consideration. No interim relief in the form of injunctions will be granted. In case of non-performance, specific performance will not be decreed either. See, *Cannon vs Hartley* [1949] Ch 213.

[750] At least for rational, risk-averse and less wealthy investors: See, Arup Kumar Sarkar, 'Analysis of Individual Investor Behaviour of Stock Markets' (2017) 1(5) International Journal of Trends in Scientific Research and Development 922-931; Kalluvelil J.A and S. Anuradah, 'Determinants of Investor Behaviour: An Analytical Review' (2015) 1 SSRN Electronic Journal 59-79, 10.2139/ssrn.2665301.

that regional integration of domestic payment systems be accelerated in the region. As argued above, speedy transfer of cross-border payment is likely to speed up the settlement of cross-border securities trades, and enhance investor protection in ISMs.

Regional Integration of Domestic Payment Systems under COMESA.

In an attempt to reduce the cost of cross-border transactions in the region, COMESA has started implementing the Regional Payment and Settlement System (REPESS). However, the project is far from being operational as a regional system since member states are at different levels of implementing REPESS. REPESS is a single linked regional payment system linking different domestic payment and settlement systems. The main aim of REPESS is to stimulate economic growth through an increase in intra-regional trade by enabling importers and exporters to pay for goods and services through an efficient and cost-effective platform.[751] Thus, REPESS has been dedicated to payments for trade in goods and services as opposed to trade in intangible assets like financial assets. This kind of approach is line with article 73 of the COMESA Treaty which restricts the mandate of the COMESA Clearing House to payments for trade in goods and services. The author argues that this sort of stance is unlikely to promote growth of cross-border trade in financial assets. It is also worth observing here that, as a single linked system, REPESS is radically different from the old COMESA Payment and Settlement System (COMPASS) which was a separate and distinct regional system especially dedicated to cross-border deals.[752] The author

[751] See, African Development Bank Group, *Financial Sector Integration in the Three Regions of Africa* (Africa Development Bank 2010), (ADB Group (2010)'); Mansour M., 'Facilitating Payments in Trade—Operationalization of REPESS', at 16, in Sindiso Ngwenya et al, *Key Issues in Regional Integration* (Vol. 2, Common Market for Eastern and Southern Africa 2019).
[752] *ibid*

argues that given the increasing intra-regional FDI and FDI flows to the region,[753] the combined volume of domestic and cross-border transactions pluming through a single system is likely to overwhelm the system and slow down the transfer of funds across international borders in the region. It could also be argued that the resulting ineffectiveness is likely to delay settlement of trades since, as established above, trades are settled against finality of payment. While recognizing the merits of REPESS, we propose the transformation of REPESS into a regional payment system especially dedicated to cross-border transactions in goods, services and financial assets.

The following subsection examines further bottlenecks on effective cross-border transfer of funds in the COMESA Region.

4.2.3.2. CONSTRAINTS RELATING TO THE NARROW SCOPE OF THE COMESA CLEARING HOUSE.

The preceding subsection has examined the effect of the slow pace of cross-border payments on investor protection. It was noted that before funds could reach the cross-border vendor of securities, the purchaser is without legal or equitable protection against third party adverse interests. The subsection demonstrated that regional integration of domestic payment systems could enhance investor protection in cross-border trade in securities in the region. In this subsection, we examine further constraints on effective cross-border transfer of funds in the region.

[753] For empirical evidence on increasing FPI flows to Sub-Saharan Africa, see chapter 3. For empirical evidence on increasing cross-border flows of goods and services, see United Nations Commission on Trade and Development, *Key Statistics and Trends in Regional Trade in Africa* (United Nations Commission on Trade and Development 2016).

The Scope of the COMESA Clearing House.

COMESA Members have undertaken, until a Common Central Bank is established, to settle through the Clearing House all payments in respect of all transactions [in goods and services] which are conducted within the Common Market.[754] This approach, as earlier observed, clearly leaves out transactions in securities and other financial assets. The author argues here that since facilitation of cross-border payment is critical to growth of cross-border securities dispositions, the high priority given to trade in goods and services does not provide sufficient incentives for growth of cross-border trade in securities in the region. This view is rationalized by the position that under the COMESA scheme, member states are under an obligation to cooperate in the creation of an enabling environment for cross-border trade in financial assets.[755] The author submits that the narrow scope of the COMESA CH only serves as an additional constraint on effective cross-border transfer of funds for cross-border purchases of securities. As a possible way of increasing the efficacy of the legal, regulatory and institutional framework in ensuring effective cross-border transfer of funds, proposals are made for the inclusion of transactions in securities in the mandate of the COMESA CH. This could be achieved by amending Article 73 of the COMESA Treaty 1993 as follows:

> Art 73(1).For purposes of sub-paragraph (a) of Article 72 of this Treaty, the Member States undertake, until a common central bank is established, to settle all payments in respect of all transactions in [goods, services, securities and other intangible financial assets] conducted within the Common Market through the Clearing House.

Alternatively, the same result may be achieved by introducing an interpretation clause couched in the following terms:

[754] COMESA Treaty 1993, Art 73.
[755] COMESA Treaty 1993, Arts 3, 81(a)(b)(c).

(2) In this Part, “goods” includes all chattels personal and *choses* in action.

It is submitted that the legal, regulatory and institutional framework does not provide adequate incentives for effective transfer of funds across international borders in the COMESA Region. It is also submitted that the said framework does not provide adequate incentives for speedy settlement of cross-border trades.

The following section examines the effect of the heavy presence of exchange controls in the COMESA Region on cross-border payments, and transfer of securities.

4.2.4. CONSTRAINTS RELATING TO EXCHANGE CONTROLS IN THE REGION.

The preceding section has examined the effect of fragmented domestic payment systems on cross-border disposition of securities in the COMESA Region. It was noted that cross-border payments in the region take quite long to be settled and cleared. The section demonstrated that fragmented domestic payment systems are likely to delay the settlement of cross-border trades and stall growth of cross-border trade in securities. In this section, we turn to examine the effect of the heavy presence of exchange controls in the region on cross-border payments, and transfer of securities. Given the central thesis of this study, the author argues that the removal of exchange controls is likely to increase the speed at which cross-border transfers of securities and payments are effected, and increase cross-border trade in securities in the region.

The following subsection gives empirical evidence on the geographical distribution of exchange controls in the COMESA Region.

4.2.4.1. THE GEOGRAPHICAL DISTRIBUTION OF EXCHANGE CONTROLS IN THE REGION.

Most of the COMESA member states have exchange controls in force.[756] The geographical distribution of exchange controls in the COMESA Region is as depicted in Table 14 below.

Table 11: Geographical Distribution of Exchange Controls in COMESA Region

COMESA Member	Exchange Controls	On Current a/c	On Capital a/c
Burundi	X		X
Egypt			
Eritrea	X		
Ethiopia	X	X	X
Madagascar	X		X
Malawi	X	X	X
Mauritius	X	X	X
Rwanda	X		X
Seychelles	X		
Sudan	X		X

[756] The International Monetary Fund, *The Cross-border Initiative in Eastern and Southern Africa* (The International Monetary Fund 1999).

Swaziland			
Uganda			
Zambia			
Zimbabwe	X	X	X

Source: Africa Development Bank (2010)

Key: X denotes existence of exchange controls

The author argues that the transaction costs which are imposed by exchange controls are likely to serve as a non-tariff barrier to cross-border trade. Similarly, by restricting the amount of capital and volume of securities that could be exported or imported, exchange controls constitute a non-tariff barrier to cross-border trade in financial assets. It is therefore submitted that exchange controls are contrary to the COMESA Treaty which guarantees freedom of movement of capital and financial assets across international borders within the region.[757] Against this backdrop, proposals are made for the removal of exchange controls in the region. The author argues here that the removal of exchange controls could serve as a possible way of increasing cross-border trade in securities in the region. Similarly, the International Monetary Fund observes that one way of promoting investments in regional equity markets is the improvement of the regulatory environment by removing exchange controls—that is, removing current account and capital account restrictions.[758]

[757] See, COMESA Treaty 1993, Art 81(a)(b)(c).
[758] The International Monetary Fund, *The Cross-border Initiative in Eastern and Southern Africa* (The International Monetary Fund 1999).

The following subsection examines constraints relating to exchange-control-induced equity home bias.

4.2.4.2. CONSTRAINTS RELATING TO 'EXCHANGE CONTROL-INDUCED' EQUITY HOME BIAS.

This subsection introduces empirical evidence on the positive relationship between exchange controls and equity home bias. This puts the legal arguments which we have made in this section, against exchange controls, in proper socio-economic context.

The diversification benefits of holding foreign securities put a premium on securities which are available to foreign investors.[759] Under such conditions,[760] foreign investors will try to substitute those assets with cheap domestic near-substitutes.[761] Thus, foreign asset premium implies home bias in portfolio selection.[762]

4.3. CONCLUSION.

This Chapter has examined the legal, regulatory and institutional framework so as to establish whether or not it provides enough incentives for effective cross-border securities disposition. The conclusion reached in this chapter is that the said framework does not provide adequate incentives

[759] Sohnke M Bartram and Gunter Dufey, 'International Portfolio Investment: Theory, Evidence and Institutional Framework' (2001) 47-48 (hereinafter 'Bartram and Dufey (2001)') http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.883.847&rep=rep1&type=pdf accessed 17 February 2019.
[760] As one would expect, domestic investors must pay a premium for foreign assets: *ibid*
[761] *ibid*
[762] In this context, home bias in portfolio selection or as it is succinctly called 'equity home bias'—the situation whereby investors prefer domestic securities or those close to home, to foreign securities—so created presents itself as a constraint on the growth of cross-border trade in securities in Eastern and Southern Africa given the prevalence of exchange controls in the region. For empirical evidence to this effect, see: C Bergstrom, K Rydqvist and P Sellin, 'Asset Pricing with In-and-Outflow Constraints: Theory and Empirical Evidence from Sweden' (1993) 20(6) Journal of Business Finance and Accounting 865-879

for effective cross-border disposition of securities in the region. In particular, it was noted that the said framework does not provide enough incentives for perfection of collateral interests in dematerialized securities. The author argued in that respect that although intangibles are not subject to the law of diminishing marginal utility, the very absence of such rules is likely to discourage consumption of these assets. It was noted that *lex situs* causes legal uncertainty, and increases transaction costs for cross-border dispositions in modern intermediated securities systems. It was also noted that the HSC PRIMA rule could bring legal certainty and reduce transaction costs for cross-border securities dispositions in the COMESA Region. The author argued that such legal certainty is also likely to speed up the settlement of trades and enhance the cost and time dimensions of liquidity. It was also noted that domestic payment systems in the COMESA Region are fragmented. It was further noted that the fragmented domestic payment systems slow down cross-border transfers of securities and payments. The author argued that the slow pace of cross-border payments is likely to delay the settlement of cross-border trades and hinder growth of cross-border trade in securities. Finally, it was noted that exchange controls are quite widespread in the COMESA Region. In this respect, the author argued that exchange controls are likely to restrict the amount of capital and securities that could be exported or imported for cross-border trade. In sum, the chapter demonstrated that effective disposition of securities across international borders in the COMESA Region could be achieved by enacting priority rules for the ranking of competing collateral interests in the same dematerialized securities, replacing *lex situs* with the HSC PRIMA rule, accelerating regional integration of domestic payment systems, and removing exchange controls in jurisdictions in which they exist in the region. The following chapter examines the possibility of increasing cross-border trade in securities through harmonization of regulatory rules.

CHAPTER 5

HARMONIZATION OF LAWS AS A POSSIBLE WAY OF INCREASING CROSS-BORDER TRADE IN SECURITIES.

5.0. INTRODUCTION.

Chapter 4 has examined the efficacy of the legal, regulatory and institutional framework in facilitating effective cross-border disposition of securities in the COMESA Region. It was noted that the application of *lex situs* to proprietary aspects of a cross-border securities deal increases transaction costs for traders. It was also noted that adoption of the HSC PRIMA rule is likely to reduce transaction costs for cross-border securities deals. The chapter demonstrated that the HSC 2006 is likely to increase cross-border trade in securities in the region. In this chapter, we turn to examine the possibility of increasing cross-border trade in securities in the region through harmonization of regulatory rules. The central premise of this chapter is that high transaction costs for cross-border securities deals increase the cost of foreign securities.[763] This makes domestic investors to turn to cheaper domestic near-substitutes.[764] This causes equity home bias.[765] Thus, given the central thesis of this study, the author argues that the harmonization model of securities regulation is likely to reduce regulatory gaps and costs in the region. The author also argues that the harmonization model is also likely to reduce transaction costs for cross-border securities deals and increase cross-border trade in securities.

[763] Sendi I. and Bellalah M., 'The Equity Home Bias: Explanations and Financial Anomalies' (2010) 2(2) Int'l J. Fin. & Econ. 78; Ardalan K., 'Equity Home Bias: A Review Essay' (2018) 33(3) Journal of Economic Survey 1; Portes (2005), *op.cit*; Riddick L. and Glassman D., 'What Causes Home Asset Bias and How Should it be Measured? (2001) 8(1) Journal of Empirical Finance 35-54.
[764] *ibid*
[765] *ibid*

5.1. AN OUTLINE OF CHAPTER 5.

Chapter 5 of the thesis consists of ten Sections. The first section gives the general introduction to the chapter.[766] The second section outlines the chapter.[767] The third section makes a case for substitution of the regulatory competition model with the harmonization model.[768] The fourth section looks at harmonization as a possible way of reducing transaction costs for cross-border securities deals.[769] This section also makes a case for region-wide harmonization of regulatory rules. The fourth section is divided into two subsections. The first subsection provides empirical evidence on the efficacy of the harmonization model in increasing cross-border trade in securities.[770] The evidence so provided shows that harmonization of regulatory rules has the effect of reducing transaction costs and increasing cross-border trade. The second subsection looks at legal diversity as a source of legal risk and high transaction costs.[771] The author argues that legal risk in cross-border securities deals is likely to increase with the application of *lex situs*.

The fifth section looks at harmonization as a possible way of enhancing the efficacy of the international passport to promote cross-listings in the COMESA Region.[772] The author argues that the minimum regulatory standard that would come from harmonization is likely to enhance investor protection in securities markets. The author also argues that harmonization is also likely to ensure that trade is not increased at the expense of investor protection.

[766] See, section 5.0 of chapter 5 of the thesis.
[767] See, section 5.1 of chapter 5 of the thesis.
[768] See, section 5.2 of chapter 5 of the thesis.
[769] See, section 5.3 of chapter 5 of the thesis.
[770] See, section 5.3.1 of chapter 5 of the thesis.
[771] See, subsection 5.3.2 of chapter 5 of the thesis.
[772] See, section 5.4 of chapter 5 of the thesis.

The sixth section explores the possibility of reducing legal uncertainty in cross-border securities systems in the region through harmonization of legal and regulatory rules.[773] The author argues that harmonization of securities laws and implementation of the HSC 2006, is likely to reduce legal uncertainty. The author also argues that such measures are likely to reduce transaction costs for cross-border securities deals and increase cross-border trade.

The seventh section explores the possibility of enhancing regulatory cooperation among DSECs through harmonization of legal and regulatory rules.[774] The author argues that regulatory cooperation among domestic regulators is likely to enhance issuer and investor protection in ISMs. The author also argues that enhanced issuer and investor protection in ISMs is likely to encourage cross-border trade in securities in the COMESA Region. This section also examines the possibility of using the harmonized regulatory standard as a prerequisite for admission to the RSE.

The eighth section looks at harmonization as a possible way of enhancing the efficacy of extra-territorial criminalization market misconduct in ensuring effective regulation of ISMs.[775] The author argues that harmonization is likely to fulfil the requirement of double criminality for extradition of offenders on equal footing in each COMESA jurisdiction.

The ninth section explores the possibility of increasing the pace at which cross-border payments are effected.[776] The author argues that harmonization of domestic payment system laws and regulations,[777] is likely to reduce the cost of payment and speed up the settlement of trades. The

[773] See, section 5.5 of chapter 5 of the thesis.
[774] See, section 5.6 of chapter 5 of the thesis
[775] See, section 5.7 of chapter 5 of the thesis
[776] See, section 5.8 of chapter 5 of the thesis.
[777] Insofar as it speeds up cross-border transfers of funds at minimum transaction cost.

author also argues that speedy settlement of trades is likely to increase cross-border trade in securities in the region.

The tenth section concludes the chapter.[778] The following section fleshes out some advantages and disadvantages of the regulatory competition model and the harmonization model.

5.2. MAKING A CHOICE BETWEEN THE REGULATORY COMPETITION MODEL AND THE HARMONIZATION MODEL.

The preceding section has given an outline of the chapter. In this section, we examine the merits and demerits of the regulatory competition model and the harmonization model.

It was noted in Chapter 3 that SADC Member States have harmonized listing rules for their securities exchanges. However, SADC Member States have not taken a further step to harmonize their domestic securities laws and property laws. SADC countries have not adopted harmonized regulatory rules at regional level either. Under the COMESA scheme, there is neither harmonized securities exchange listing rules nor securities laws. Besides, COMESA countries have not harmonized securities laws at regional level. Against this background, proposals were made in Chapter 3 for the introduction of an international passport to multi-jurisdiction cross-listings in the region. Similarly, proposals were made in Chapter 4 for region-wide adoption and implementation of the HSC 2006. Absent such proposed measures, the current regulatory framework is representative of the regulatory competition model for the regulation of ISMs.

[778] See, section 5.9 of chapter 5 of the thesis.

Regulatory competition thrives on regulatory fragmentation among jurisdictions.[779] The basic idea is that such fragmentation creates competition which allows issuers and investors to choose the optimal law that should govern their securities transactions.[780] Proponents of this model such as Romano, argue that regulatory competition tends to increase cross-border investment in securities by furthering the interests of investors.[781] It is thus, a benefit for investors.[782] The author argues that the bias towards the investor that is created by regulatory competition is unlikely to increase cross-border trade in securities. This view is rationalized by the position that growth in cross-border trade in securities requires a balance between investor and issuer incentives.[783]

The Flexibility of Regulatory Competition.

Regulatory competition also allows regulators to remedy shortcomings in their regulatory rules, policies and approaches.[784] Thus, in the event that regulators suffer a reduction in issuer and investor participation, they are at liberty to create better incentives to offset the loss.[785]

The following subsection makes a case for the introduction of the harmonization model as a substitute for the current regulatory competition model.

[779] Roberta Romano, 'The Need for Competition in International Securities Regulation' (2001) 2 Theoretical Inq L 388 (hereinafter 'Romano (2001)').
[780] *ibid*
[781] *ibid*
[782] *ibid* 393
[783] Irving (2005), *op.cit*; Samamba Lennox Trivedi BOOK I, Vol. I, *op.cit*
[784] *ibid*
[785] Romano (2001), 388, *op.cit*

5.2.1. MAKING A CASE FOR THE HARMONIZATION MODEL.

The harmonization model is a hybrid regulatory approach.[786] Harmonization combines the virtues of regulatory competition and regulatory cooperation.[787] It is a compromise between pure regulatory competition and pure regulatory cooperation.[788] It is basically this characteristic which makes harmonization attractive to the proponents of regulatory competition as well as the proponents of regulatory cooperation.[789] The harmonization model is preferred to the regulatory competition model on account of the absence of party autonomy in the proprietary component of a cross-border securities deal. The case for harmonization is also supported by the superior benefits associated with the harmonization model.

Unavailability of Freedom to choose the Substantive Property Law.

It was noted in chapter 4 that a cross-border securities deal has three components, namely:

i) the cross-border contractual component;

ii) the cross-border proprietary component; and

iii) the cross-border financial component.

It was also noted in Chapter 4 that party autonomy applies to the contractual component of a cross-border securities deal. It was also noted that there is no party autonomy in the proprietary component of a cross-border securities deal. It was noted further that *lex situs* is the compulsory conflict of laws rule for ascertaining the substantive property law. The author argues here that the dependence of the regulatory competition model on party autonomy, makes this model generally

[786] Sharma G.J., 'Harmonization of International Securities Regulation: A Trade Perspective (LLM Thesis, University of Toronto 2009), (hereinafter, Sharma, LLM Thesis (2009); Samamba Lennox Trivedi VI, 17, *op.cit*
[787] *ibid*
[788] *ibid*
[789] *ibid*

unsuitable for effective regulation cross-border dispositions of securities. This view is rationalized by the mandatory character of international property law.[790] The mandatory character of property law rejects the very idea of party autonomy.[791] Consequently, the author argues that the lack of party autonomy in the proprietary component of a cross-border securities deal makes regulatory competition unsuitable for the regulation of ISMs. On this very score, the author argues that regulatory competition is unlikely to ensure allocative effectiveness/efficiency in the proprietary component of a securities deal. And as far as COMESA ISMs are concerned, the situation is aggravated by the absence of effective international instruments such as the HSC 2006.[792] Thus, as a possible solution to this shortcoming in the legal, regulatory and institutional framework, the proposals which we have made in Chapter 4 for the adoption and implementation of the HSC 2006 are hereby re-enforced.

Superior Benefits of the Harmonization Model.

The superiority of the harmonization model to the regulatory competition model consists in the following empirically-proven propositions:[793]

(i) availability of a mechanism that addresses systemic risk by reducing negative externalities and preventing collective action problems;

[790] Westrik R. and van der Weide J., Party Autonomy in International Property Law (Sellier European Law Publishers 2011), (Westrik & Weide (2011); Horatia M Watt, 'Party Autonomy in International Contracts: From the Makings of a Myth to the Requirements of Global Governance' (2010) 1 European Review of Contract Law, 5; Liang W. and Qiao X., 'Party Autonomy in the Applicable Law' (2014) 9 Frontiers of Law in China, 452.
[791] Westrick & Weide (2011), *op.cit*
[792] See, Samamba Lennox Trivedi VI, 18, *op.cit*
[793] Trebilcock M.J., *National Securities Regulator Report 2010*, Vol I, 222, para 2 <www.valeursmobiliers.net.pdf/VolumeReferenceRecordAGCanada.pdf > accessed 3 July 2017, (Trebilcock (2010); White L.J., 'International Regulation of Securities Markets: Competition or Harmonization', in Lo A.W.(ed), *The Industrial Organization and Regulation of the Securities Industry* (University of Chicago Press 1996); Simmons B.A., 'The Politics International Politics of Harmonization: The Case of Capital Market Regulation' (2001) 55(3) International Organization 589-620; Chafee E.C., 'Finishing the Race to the Bottom: An argument for Harmonization and Centralization of Securities Market Regulation' (2010) 40 Seton Hall L. Rev. 1581.

(ii) enhanced investor protection which comes with a minimum regulatory standard;

(iii) economies of scale on cost of compliance;

(iv) enhancement of allocative efficiency;

(v) lower risk of regulatory gaps;

(vi) lower cost of information gathering (information costs); and

(vii) greater ease of comparability and analysis.

Besides the benefits enumerated above, the harmonization model is likely to increase the efficacy of some of the measures which have been proposed elsewhere in the thesis.[794] Therefore, the author submits that the benefits of implementing the harmonization model far outweigh the benefits of retaining the regulatory competition model. It is thus, recommended that regulatory authorities in the COMESA Region replace the current regulatory competition model with the harmonization model. However, by recommending the harmonization model we do not imply the model is without shortcomings.[795] As Trebilcock explains, 'recognizing the unavoidable nature of trade-offs between conflicting goals is an essential first step in identifying realistic policy options'.[796]

The following section explores the possibility of reducing transaction costs for cross-border securities deals through harmonization of regulatory rules.

[794] See, sections 5.2-5.8 of chapter 5 of the thesis.
[795] Harmonization is simply a better model for regulating international securities markets than regulatory competition.
[796] MJ Trebilcock, *National Securities Regulator Report 2010*, Vol I, 222, para 2 <www.valeursmobiliers.net.pdf/VolumeReferenceRecordAGCanada.pdf > accessed 3 July 2017.

5.2.2. HARMONIZATION OF LAWS AS A POSSIBLE WAY OF REDUCING TRANSACTION COSTS FOR CROSS-BORDER SECURITIES DEALS.

The preceding section has examined the merits and demerits of the regulatory competition model and the harmonization model. It was noted that while regulatory competition increases regulatory costs and compromises investor protection in ISMs, harmonization tends to reduce regulatory cost and enhance investor protection in those markets. The section demonstrated that harmonization could promote cross-border trade in securities in the region. In this section, we explore the possibility of reducing transactions costs for cross-border securities deals through harmonization of regulatory rules.

Defining Harmonization of Laws.

Although harmonization is frequently used interchangeably with 'uniformization', the two terms are basically different.[797] Harmonization is a less revolutionary term than the latter.[798] Harmonization basically involves changing domestic laws of different states that are dissimilar in order to make them coherent and updated.[799] In this sense, it is referred to as 'modernization' of laws.[800] While respecting the particularities of the various domestic legal systems, harmonization aims to reduce their underlying differences in selected areas.[801] This process is referred to as harmonization in the proper sense of the word. The resulting similarity in the laws enhances regulatory cooperation between the jurisdictions concerned.[802] In this regard, harmonization of

[797] See Joseph Issa-Sayegh, 'Quelques aspects technique de l'integration juridique: I exemple des actesuniformes de I'OHADA' (1999) 4 UNIF L REV 5 < http://www.unidroit.org/french/publications/review/artiles/1999-1.htm> accessed 5 August 2018.
[797] *ibid*
[798] *ibid*
[799] *ibid*
[800] *ibid*
[801] *ibid*
[802] *ibid*

laws is the opposite of legal diversity.[803] Uniformization in comparison to harmonization is a more radical term.[804] It is a legal technique whose aim is to eliminate underlying differences in domestic laws by repealing and replacing laws with a unique and identical text for all states related to the integration process.[805] Given the benefits of harmonization, it is humbly submitted that uniformization is likely to yield even more benefits. However, in this thesis, the two techniques will be used interchangeably.

The following segment defines transaction costs.

Defining Transaction Costs.

By defining transaction costs, this segment seeks to put in proper socio-economic context, the legal argument that 'harmonization is likely to reduce transaction costs for cross-border securities deals in the COMESA Region'. Transaction costs,[806] have not been satisfactorily defined.[807] However, transaction costs include the following costs, namely:

(i) the cost of locating an appropriate person to bargain with;

(ii) the cost of getting together;

(iii) the cost of negotiating a deal;

(iv) the cost of recording an agreement;

(v) the cost of enforcing that agreement;[808] and

(vi) the costs of collecting information;[809]

[803] Samamba Lennox Trivedi VI, 21, *op.cit*
[804] *ibid*
[805] Issa-Sayegh (1999), *op.cit*
[806] The costs associated with the whole process of contacting between the parties.
[807] Victor P Goldberg (ed.), *Reading into the Economics of Contract Law* (Cambridge University Press 1989) 21-23
[808] JG Starke, NC Sedon and MP Ellinghaus (1992) 29, *op cit*
[809] Lack of knowledge of foreign statutes may altogether hinder international transactions or lead to more or less expensive information collection.

(vii) the cost of setting incentives for pushing legal claims through;[810] and

(viii) the cost of registering and perfecting title and interests in securities which have been acquired; and

(ix) Other transaction costs.

Securities regulation, to the extent that it sets out permissible and impermissible transactions, has a bearing on transaction costs.[811] Thus, transaction costs will also depend on the quality of legal and regulatory rules and effective enforcement of those rules. Thus, effective or ineffective legal and regulatory rules and effective or ineffective enforcement of those rules are likely to affect transaction costs as well as the optimal level of the transaction.[812] If the rules for cross-border securities disposition increase transaction costs, such rules could be regarded as ineffective.[813] However, if such rules tend to reduce transaction costs, they may be regarded as effective.[814] It is submitted that, to the extent that harmonization of laws reduces transaction costs,[815] the measure is effective.

[810] This includes private attempts to speed up approval procedures and legal procedures in the broadest sense. As is known 'beneficial charges', which includes brides or pay-offs, represent an important cost factor for multi-national corporations: Helmut Wagner, 'Legal Uncertainty—Is Harmonization of Law the Right Answer? A Short Overview,' Discussion Paper No. 444, (2009) 4 <www.fernuni-hagen/wirtschaftswissenchaft/download/beitraege/db444.pdf > accessed 19 December 2017

[811] Almlof H. and Bjuggren P-O., 'A Regulation and Transaction Cost Perspective on the Design of Corporate Law' (2019) 47 European Journal of Law and Economics 407-433; Johnsen D.B., 'A Transaction Cost Assessment of SEC Regulation Best Interest' (2018) 3(695) Colum. Bus. L. Rev 695.

[812] *ibid*

[813] *ibid*

[814] See, Coase H.R., 'The Problem of Social Cost', in Gopalakrishnan C. (ed), *Classic Papers in Natural Resource Economics* (Palgrave Macmillan 2020), at 87-137.

[815] Lawrence J. White, 'International Regulation of Securities: Competition or Harmonization?, in Andrew W. Lo, *the Industrial Organization and Regulation of Securities Industry* (University of Chicago Press 1996), at 222.

5.3. MAKING A CASE FOR REGIONAL HARMONIZATION OF LAWS.

The case for harmonization of securities and property laws of COMESA Member States consists in three fundamental propositions, namely:[816]

(i) harmonization of laws in a region reduces transaction costs for cross-border deals;[817]

(ii) legal diversity exposes cross-border investors to legal risk and increases their costs;[818] and

(iii) harmonization of laws enhances the efficacy of the international passport and other proposed measures in promoting cross-border trade in securities.[819]

These propositions are considered in turn, in the order they appear above.

5.3.1. HARMONIZATION OF LAWS AND REDUCTION IN TRANSACTION COSTS FOR CROSS-BORDER SECURITIES DEALS.

Legal diversity for parties to a cross-border securities transaction implies:[820]

a) additional costs for acquiring the information that is required to write a particular contract in other legal areas;

b) higher cost of litigating issues under various contracts which may be governed by different legal regimes;

c) additional costs which are associated with the legal instability that is caused by unforeseen amendments to the laws which govern the agreement;

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[816] *ibid* 22-23
[817] Geiger U., 'Harmonization of Securities Disclosure Rules in the Global Market—A Proposal' (19989) 66 Fordham L. Rev 1785.
[818] *ibid*
[819] *ibid*
[820] Wagner (2009), *op.cit*

d) additional administrative costs which are introduced by laws and regulations regulating cross-border securities trade;[821] and

e) in the event that *lex situs* points to two or more jurisdictions, the cost of complying with the registration and perfection requirements of each and every applicable jurisdiction.

Since not all investors are willing to pay or can afford the costs referred to above, they have to act under increasing legal uncertainty if they are to trade cross-border.[822] The author argues that the legal uncertainty and frictional costs of trading under diverse legal and regulatory rules, are likely to act as non-tariff barriers to cross-border trade.[823] This argument is rationalized by the position that cross-border flows of financial assets depend on market size in source and destination, and trading costs.[824] Thus, the author also argues that the small size of COMESA FSMs and the high transaction costs for cross-border securities deals are likely to serve as constraints on the efficacy of the legal, regulatory and institutional framework in promoting cross-border trade in securities in the region.

[821] Helmut Wagner, 'Economic Analysis of Cross-Border Legal Uncertainty—The Example of the European Union' (2004) Discussion Paper No. 371, 20 <www.xn--fernuniversitt-hagen-nzb.de/hwagner/download/371-maastricht_181004_final_vers.pdf> accessed 20 December 2017.

[822] *ibid*.

[823] On the obstructive effect of *uncertainty* on international trade and finance, see, Elhan Helpmann, Karl Shell and Assaf Rasin, *a Theory of International Trade under Uncertainty* (Academic Press 2014)

[824] R Portes and H Rey, 'The Determinants of Cross-border Equity Flows' (2005) 65 Journal of International Economics 269-296

Empirical Evidence on the Relationship between Legal Diversity/Harmonization and Cross-border Trade.

Empirical evidence shows that there is greater trade in goods and financial assets between jurisdictions which have similar legal rules.[825] The said evidence also shows that there is lesser trade in financial assets between jurisdictions with diverse legal rules.[826]

5.3.2. LEGAL DIVERSITY AS A CAUSE OF LEGAL RISK.

Legal risk is a component of 'operational risk'.[827] Legal risk is defined as the risk of loss which would result from a defective transaction or the unexpected application of a law or regulation.[828]

Legal Risk Resulting from Applicability of two or more Property Laws.

Legal risk is intrinsic in the intangible nature of securities.[829] Since the law determines the existence, effect and value of securities, the state of a particular law could also pose legal risk.[830] Further, legal risk also flows from the application of two or more property laws to a cross-border securities deal.[831] The later source is imbedded in the subjective aspect of legal uncertainty.[832]

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[825] A Turrini and T van Ypersele, 'Legal Costs as Barriers to Trade' (2006) CEPR Discussion Paper No. 5751, London Centre for Economic Policy Research 16-20 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=924895> accessed 21 December 2017; D Butter and J Mosch, 'Trade, Trust and Transaction Costs' (2003) Tinbergen Institute Working Paper No. 2003-082/3, 37 <www.econstor.eu/bitstream/10419/85953/1/03082.pdf> accessed 23 November 2017

[826] *ibid*. see generally, Michael Trebilcock, Robert Howse and Antonia Elisian, *Regulating International Trade* (Routledge 2013).

[827] 'Operational risk' has been defined as the risk of loss resulting from the inadequate or failed internal processes, people or systems or from external events: Basel Committee on Banking Supervision, 'International Convergence of Capital Measurements and Capital Standards: A Framework,' (2004), para 644, 90n. Basel II requires that capital requirements not only reflect credit risk and market risks of a financial institution's assets but also its operational risk.

[828] Luc Thevenoz, 'Intermediated Securities, Legal Risk and the International Harmonization of Commercial Laws' (2008) 13 Stanford Journal of Law, Business and Finance 284.

[828] *ibid*

[829] *ibid*

[830] *ibid*

[831] Samamba Lennox Trivedi, 'Harmonization of Regulatory Rules as a Possible way of Promoting Cross-border Trade in Securities' (2018) 5 Afr. L. J. 38.

[832] *ibid*

Legal risk in the subjective sense of legal uncertainty has the potential of negatively impacting domestic and regional economic growth.[833] Firstly legal uncertainty impedes efficient use of the available capital owing to reduced marginal yields.[834] Secondly, cross-border exchanges are obstructed so that the knowledge incorporated into the financial assets does not spread rapidly.[835] As far as parties to a cross-border securities transaction are concerned, legal uncertainty poses the risk of an outcome which is out-of-touch with market reality.[836] There is also the possibility of a less favourable outcome or a void deal.[837] For example, there is a possibility that a financial asset which is distributed as a security and regarded as such in some COMESA jurisdiction may not be regarded as such in other COMESA jurisdictions.[838]

As a possible way of overcoming such constraints, proposals are made for the harmonization of domestic securities and property laws in the COMESA Region. Such measures could be complemented by adoption and implementation of the HSC 2006. However, the success of harmonization depends on the level of development of the markets and regulatory authorities.[839] Therefore, it is strongly recommended that the proposals which we have made in this study for capacity building and development of DSMs and DSECs, and the establishment of a RSE and a RSEC be implemented.

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[833] Hague Conference on Private International Law, 'Explanatory Notes to the Preliminary Draft Convention: UNIDROIT STUDY LXVIII Doc. 19' (Dec 2004) at 7 <www.unidroit.org > accessed 20 August 2017.
[834] Wagner (2009), at 5, *op.cit*
[835] *ibid*
[836] Hague Conference on Private International Law, 'Explanatory Notes to the Preliminary Draft Convention: UNIDROIT STUDY LXVIII Doc. 19' (Dec 2004) at 7 <www.unidroit.org > accessed 20 August 2017.
[837] Samamba Lennox Trivedi XXIX, *op.cit*
[838] See, Chapter 4.
[839] Organization for Economic Cooperation and Development, 'Supra-national Regulators: Arguments for a Supra-national Regulator' (2016).

The following section explores the possibility of enhancing the efficacy of some of the proposed reform measures through harmonization.

5.4. HARMONIZATION OF LAWS AS A WAY OF ENHANCING THE EFFICACY OF THE INTERNATIONAL PASSPORT.

The section appearing immediately above has looked at harmonization as a possible way of reducing transaction costs from cross-border securities deals. It was noted that legal diversity tends to increase transaction costs for cross-border securities deals. The section demonstrated that harmonization could reduce transaction costs for cross-border securities deals. In this section, we explore the possibility of enhancing the efficacy of the proposed international passport in promoting cross-border trade in securities, through harmonization of legal and regulatory rules. The central premise of this section is that divergent regulatory rules could serve as a non-tariff barrier to international trade.[840] This view is rationalized by the position that the costs which are imposed by divergent regulatory rules on market participants can obstruct access to better markets in the region.[841]

The Dynamics of the Hybrid Model for International Securities Markets Regulation.

In a mutual recognition scheme of cross-border securities regulation, jurisdictions agree on principles of deference or delegation.[842] Compliance with the regime of the home state is deemed compliance with the regulations of the host state within the region.[843] In line with this view,

[840] See, Michael Trebilcock and Robert L. Howse, 'Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics' (1998) 6(1) European Journal of Law and Economics 5-37.
[841] Niamh Moloney, *EC Securities Regulation* (2nd edn, OUP 2008) 7; Niam Moloney, *EU Securities Regulation and Financial Market Regulation* (3rd edn, OUP 2014).
[842] *ibid;*
[843] *ibid*

proposals have been made in Chapters 3 and 6 for mutual recognition of disclosure documents within the COMESA Region. The author argues here that, the implementation of such a mutual recognition scheme is likely to reduce transaction costs for issuers. Lower transaction costs for multi-jurisdiction cross-listing are likely to encourage multiple cross-listing.[844] However, the author counter-argues that embracing mutual recognition without a minimum regulatory standard for admission is likely to compromise investor protection.[845] The danger is that some exporting issuers' jurisdictions may have a much lower standard of investor protection. Thus, the unregulated import of foreign securities is likely to expose domestic investors to investment risk for which there is no compensation or other civil remedy in the exporting jurisdiction. As a possible way of ensuring protection of investors in the host state, proposals are made for the adoption and implementation of a minimum standard of admission to mutual recognition. The minimum standard for admission could be the minimum regulatory standard that is yielded by harmonization, or a higher standard that may be agreed by COMESA states. Thus, under this proposed arrangement, only COMESA countries which meet the minimum regulatory standard should be granted mutual recognition of disclosure documents and securities advertisement content. Trebilcock raises similar concerns by stating that:

> [T]he mutual recognition principle], if unqualified, creates the risk that exporting [home] countries may have incentives to adopt lax regulatory regimes that externalize the negative consequences of ineffective regulation to importing [host] countries, and may precipitate a race to the bottom. Hence, in practice, the Mutual Recognition Principle is typically accompanied, as it has been in the [European Union], with an ambitious agenda for setting minimum harmonized standards for cross-border trade.[846]

[844] Samamba Lennox Trivedi VIII, *op.cit*
[845] *ibid* 31
[846] Michael J Trebilcock, *Understanding Trade Law* (Edward Elgar 2011) 123; G Majone, 'International Regulatory Cooperation: A Neo-Institutionalist Approach,' in Bernamann GA et al (eds.) *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press 2000) 125; P Puri and A Sen, 'A Cost Benefit Analysis of the Multi-jurisdictional Disclosure System between Canada and U.S.' (2003) 3-7, *Report on Cost-Benefit Analysis of the Multi-Jurisdictional Disclosure System 2003(*Ontario, USA).

What Trebilcok, Majone and Puri and Sen seem to imply is that, regulatory competition comes with negative externalities which may be cured by the minimum regulatory standard that harmonization brings. By implementing harmonization (cooperation) alongside mutual recognition (competition), legislators and regulators in the COMESA Region would be combining the benefits of both cooperation and competition. The blend of these two regulatory approaches is considered the best approach to ISM regulation.[847]

In the COMESA Region, the efficacy of the hybrid model—harmonization and mutual recognition—could be enhanced by extra-territorial criminalization of market misconduct. The author argues that the legal, regulatory and institutional framework that would result from implementing these proposed measures is likely to serve the two fundamental functions of securities regulation, namely:

a) facilitating contracting among issuers, intermediaries and investors with minimum transaction costs; and
b) protecting the interests of market participants by limiting the set of legally available terms.[848] This way, regulatory rules are likely to guard against market failures that might arise from externalities such as:
    (i) abuse of investor rights;
    (ii) investor irrational behaviour;

[847] See, Jeffrey G MacIntosh, 'International Securities Regulation: Of Competition, Cooperation, Convergence, and Cartelization' (1995) 30 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=10162> accessed 12 November 2017 ; see also, David W Leebron, 'Lying down with Procustes: An Analysis of Harmonization Claims' in Jagdish Bhagwati and Robert E Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (Economic Analysis, Vol. 1, MIT Press 1996) at 88.

[848] Goshen Z. and Parchomovsky G., 'The Essential Role of Securities Regulation' (2005), American Law & Economics Annual Meeting, 2005, Paper 9; Samamba Lennox Trivedi BOOK I, Vol. I, *op.cit*

(iii) unscrupulous issuers;

(iv) information asymmetries; and

(v) anti-competitive behaviour or misuse of market power.[849]

The author argues that the resulting effective regulation of ISMs in the COMESA region is likely to make the region the most attractive segment of the African side of the frontier universe. The author also argues here that the enhanced attractiveness of the COMESA securities markets is likely to increase issuer and investor participation—especially investors who are looking to the frontier for IPD. The author argues further that with a wide range of financial assets that would be supplied by issuers, financially-educated investors would sufficiently hedge against financial market risk and maximize returns on their investments. As a possible way of consolidating the said efforts, regulatory enforcement should be reinforced in the region. This could be achieved by implementing the proposals which we have made for the improvement of the regulatory and enforcement capacity of DSECs and the proposed RSEC. As observed above, effective enforcement of effective regulatory rules ensures sound regulation thereby raising market confidence. Similarly, COMESA observes that effective cross-border monitoring and enforcement of laws, and the resulting investor confidence are critical to the success of stock markets in the region.[850]

The following section explores the possibility of reducing legal uncertainty in cross-border securities systems through harmonization of regulatory rules.

[849] Paul Mahoney, 'The Development of Securities Law in the United States' (2009) 47(2) Journal of Accounting Res 325.
[850] Common Market for Eastern and Southern Africa (2007) 3, *op cit*

5.5. HARMONIZATION AS A POSSIBLE WAY OF REDUCING LEGAL UNCERTAINTY.

The preceding section has looked at harmonization as a possible way of enhancing the efficacy of the international passport in promoting cross-border trade in securities. It was noted that diverse legal and regulatory rules are likely to compromise investor protection in ISMs. The section demonstrated that harmonization could create a minimum regulatory standard and enhance investor protection in ISMs. The section further demonstrated that such a [minimum] regulatory standard could facilitate the success of the proposed international passport. In this section, we explore the possibility of reducing legal uncertainty in cross-border securities systems through harmonization of legal and regulatory rules.

In Chapter 4, it was noted that what may qualify as a valid pledge in one COMESA country may not qualify as such in another due to legal diversity. It was also noted in Chapter 4 that a financial asset distributed as a 'security' in one COMESA jurisdiction may not be regarded as such in other jurisdictions due to legal diversity. It was noted that this problem is caused by the application of *lex situs* to cross-border securities disposition. The author argues that such a challenge could possibly be surmounted by adopting uniform rules.

The following section explores the possibility of enhancing regulatory cooperation among securities markets regulators through harmonization of regulatory rules.

5.6. HARMONIZATION AS A POSSIBLE WAY OF ENHANCING REGULATORY COOPERATION IN THE REGION.

The preceding section has examined harmonization as a possible way of eliminating legal uncertainty in cross-border securities transactions. It was noted that diverse legal and regulatory

rules increase legal uncertainty. The section demonstrated that harmonization of regulatory rules and systems could reduce legal uncertainty in cross-border trade in securities in the region. In this section, we look at harmonization as a possible way of increasing regulatory cooperation among securities markets regulators in the region. The central premise of this section is that regulatory cooperation among DSECs in the COMESA Region is critical to effective regulation of ISMs.[851] The author argues that harmonization of regulatory rules is likely to create a regulatory common-place, and reduce regulatory gaps and costs. This argument is based on an observation that harmonization reduces underlying differences in selected areas of domestic legal systems thereby increasing cooperation between the jurisdictions concerned.[852] Thus, it is submitted that harmonization is likely to enhance the quality of enforcement in COMESA securities markets.

In chapter 6, lack of power by most DSECs in the region to act in support of foreign regulators, has been highlighted as a notable constraint on effective regulation of ISMs. The author argues here that such a power is critical to sound regulatory cooperation. As a possible way of ensuring effective regulation of ISMs in the region, it is proposed that the 'power to act in support of foreign regulators' be implemented as a pre-requisite to mutual recognition of disclosure documents.

The following section explores the possibility of increasing issuer and investor protection on the RSE through the minimum regulatory standard that would come from harmonization.

[851] See, Chaffee E.C (2010), *op.cit*
[852] Joseph Issa-Sayegh (1999), *op cit*

5.7. THE HARMONIZED STANDARD AS A BASIC REGULATORY STANDARD FOR THE REGIONAL STOCK EXCHANGE.

The section appearing immediately above, has explored the possibility of enhancing regulatory cooperation among regulators in the COMESA region through harmonization of regulatory rules. It was noted that diverse regulatory rules do not provide regulatory commonplace for domestic regulators. The section demonstrated that harmonization could provide regulatory commonplace and improve the quality of securities markets regulation in the region. In this section, we examine the possibility of enhancing issuer and investor protection on the RSE through harmonization.

Earlier studies by Mwenda[853] and Irvin[854] have proposed the establishment of a RSE as a possible way of improving liquidity of DSEs through cross-listings. The author argues that issuers listed on DSEs are unlikely to migrate to the RSE by way of cross-listing unless the regulatory framework and enforcement on the latter are better than the regulatory framework and enforcement on the former.[855] Thus, the minimum regulatory standard which would come from harmonization is likely to guarantee a minimum standard of protection for participants on the RSE.[856] It is therefore proposed that the regulatory framework for the RSE builds upon the minimum regulatory standard that would come from harmonization. The author argues here that a better and effective legal, regulatory and institutional framework on the RSE is likely to benefit both domestic issuers and investors. However, stringent legal and regulatory rules without effective enforcement are as useless as a toothless bulldog. Therefore, effective regulatory rules (the bark) require(s)

[853] Mwenda, PhD Thesis (2001), *op cit*
[854] Jacqueline Irvin (2005), *op cit*
[855] The bonding theory or hypothesis holds that issuers are more likely to cross-list into markets with stronger regulatory rules and more rigorous enforcement than those with weaker laws and poor enforcement: See, John C Coffee (2002), *op cit*; Lyle W Pine, (2010), *op cit* for espousal of this theory.
[856] See, above

commensurate effective enforcement (the bite).[857] To this very effect also, the Group of Twenty Countries (G-20) observes that regulatory rules are likely to be violated by market participants if they are perceived to be weak or if enforcement is lax.[858] Thus, not only should regulators enact better regulatory rules for the RSE than those for the DSEs but also ensure means of effectively enforcing rules for the RSE.[859]

The following section explores the possibility of increasing the efficacy of extra-territorial criminalization in ensuring effective regulation of ISMs through harmonization of legal and regulatory rules,

5.8. HARMONIZATION AS A POSSIBLE WAY OF ENHANCING EFFICACY OF THE EXTRA-TERRITORIAL CRIMINALIZATION MODEL.

The preceding section has looked at harmonization as a possible source of a minimum regulatory standard for the proposed RSE. It was noted that harmonization would create a common regulatory standard upon which members of the harmonization process could build better regulation. The section demonstrated that harmonization could facilitate the migration of domestic issuers from DSEs to the RSE. In this section, we explore the possibility of increasing the efficacy of the extra-territorial criminalization model in ensuring effective regulation of ISMs, harmonization of legal and regulatory rules.

[857] The bite must equal or supersede the bark.
[858] Group of Twenty Countries (G-20) (2009), *op cit*
[859] To this end, proposals were made in Chapter 3 for the introduction of a RSEC and a RCF. Further proposals were made for increasing regulatory cooperation between domestic regulators amongst themselves and, between those regulators and the regional regulator.

The requirement of an extraditable offence for effective extradition of offenders could be achieved through criminalization of extra-territorial securities market misconduct.[860] However, the matter does not end there. There is need to include extra-territorial securities crimes in the Schedule to the Extradition Act, also.[861] There is also the requirement of double-criminality. Double-criminality, on equal footing, would be achieved by harmonizing legal and regulatory rules.[862] Harmonization would also ensure that the ingredients of the offence and punishment for the offence are the same or substantially the same.[863] That way, regulatory gaps would be eliminated at best and minimized at least.[864] As observed earlier, the elimination or minimization of regulatory gaps is likely to create a minimum regulatory standard.[865] Finally, extradition treaties between and among COMESA States would ensure mandatory extradition of offenders.[866]

The following section looks at the possibility of increasing the speed of cross-border transfer of payments, and reducing the cost of such payments through harmonization of legal and regulatory rules.

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[860] At International Law, there are three basic conditions for effective extradition, namely (i) existence of an extraditable offence, (ii) double criminality—the offence being a crime in the requesting state and the requested state, and (iii) existence of an extradition treaty between the two countries concerned: Malcolm Shaw, *International Law* (6th edn, CUP 2018), at 686-694.

[861] The Schedule listing Extraditable Offences: See, Samamba Lennox Trivedi I, 263-264, *op.cit*

[862] Shaw (2018), *op.cit;* Rogers H.W., 'International Extradition' (1888) Forum 6, 612-621.Chakraborty A., 'Extradition under International Law' (2013); Jones M.J.,' Modern Developments in the Law of Extradition' (1941) at 114-121;

[863] *ibid*

[864] *ibid*

[865] *ibid*

[866] *ibid;* See, Particularly, Green L.C., 'Recent Practice in the Law of Extradition' (1953) 6(1) Current Legal Problems 274-296; Clute E.R., 'Law and Practice in Commonwealth Extradition' (1959) 8(1) The American Journal of Comparative Law 15-28;

5.9. HARMONIZATION AS A POSSIBLE WAY OF INCREASING SPEED OF CROSS-BORDER TRANSFER OF PAYMENTS.

The preceding section has looked at harmonization as a possible way of enhancing the efficacy of the extra-territorial criminalization model in ensuring sound regulation of ISMs. It was noted that harmonization could facilitate the fulfilment of the three basic requirements of effective extradition for securities market misconduct. The section demonstrated that harmonization could enhance the efficacy of the extra-territorial criminalization model in ensuring effective regulation of ISMs. In this section, we explore the possibility of increasing the speed of cross-border payments and reducing the cost of such payments through harmonization of legal and regulatory rules.

In Chapter 4, proposals were made for the integration of domestic payment systems in the COMESA Region as a possible way of increasing speed of cross-border transfer of payments, and reducing the cost of the same. However, regional integration of domestic payment systems would not eliminate the inherent political risk, exchange rate risk and conflict of laws issues associated with international payments.[867] Singh and Sharma observe that such problems are clearly beyond the choice of laws clause.[868] Singh and Sharma also observe that said risks could be eliminated by harmonization of domestic payment laws and institutions.[869] Thus, it could be argued that harmonization of domestic payment systems is likely to increase the speed of international payments and reduce their cost. The author also argues that harmonization of domestic payment laws and regulations, to the extent that it speeds up cross-border transfer of funds, is likely to speed

[867] See, generally Anders Grath, *The Handbook of International Trade and Finance: The Complete Guide to Risk Management, International Payments and Currency Management* (Nordia Publishing 2005); Kwai Wing LUK, *International Trade Finance: a Practicle Guide* (2nd edn, City University of Hong Kong Press 2011);
[868] Sankriti Singh and Aishwarnarna Sharma, 'Problems of International Payments' (2014) 3(2) IOSR Journal of Economics and Finance 43-47 (hereinafter, 'Singh and Sharma (2014)').
[869] *ibid*

up the settlement of cross-border trades in the COMESA Region.[870] It is also likely to increase cross-border trade in securities in the region.[871]

The following section draws together inferences and conclusions made in various sections of the chapter.

5.10. CONCLUSION.

The Chapter has examined the efficacy of the harmonization model in ensuring sound regulation of ISMs in the COMESA Region. The conclusion reached in this chapter is that the harmonization model is likely to facilitate effective regulation of ISMs in the region. It was noted that harmonization of legal and regulatory rules has the potential of enhancing the quality of regulation in ISMs in the region. In particular, it was noted that the harmonization model is likely to lower transaction costs for cross-border securities deals, reduce regulatory gaps, enhance issuer and investor protection, and increase cross-border trade in securities in the region. It was also noted that the in-force regulatory competition model increases regulatory gaps, imposes high regulatory costs, increases transaction costs for cross-border securities deals, and promotes the interests of investors at the expense of those of issuers. The author argued that the harmonization model is likely to improve the quality of regulation in ISMs in the COMESA Region. As a possible way of enhancing the quality of regulation in ISMs in the region, it was proposed that the current regulatory competition model be replaced with the harmonization model. The following Chapter examines the legal, regulatory and institutional framework so as to establish whether or not it provides adequate incentive for issuer and investor protection in ISMs.

[870] It is also likely to speed up settlement of cross-border trades.
[871] See, Singh and Sharma (2014), *op.cit*

CHAPTER 6

THREATS ON ISSUER AND INVESTOR PROTECTION IN INTERNATIONAL SECURITIES MARKETS IN THE COMESA REGION.

6.0. INTRODUCTION.

Chapter 5 of the thesis has examined the efficacy of the harmonization model in promoting cross-border trade in securities. It was also noted that harmonization reduces regulatory and transactions costs, and enhances investor protection in ISMs. It was noted that harmonization could also reduce legal uncertainty and promote regulatory cooperation among regulators in ISMs. The chapter demonstrated that harmonization could promote cross-border trade in securities in the COMESA Region. In this chapter, we turn to examine some threats on issuer and investor protection in ISMs in the COMESA Region. The central premise of this chapter is that the quality of regulatory enforcement may be discerned, in part, from the quality of issuer and investor protection in a particular market. In the COMESA Region, poor regulatory enforcement in ISMs is highlighted by lack of key regional institutions such as a RCF and a RSEC. Given the central thesis of this study, this chapter argues that enhancing issuer and investor protection in ISMs through an effective legal, regulatory and institutional framework is likely to encourage market participation. The author also argues that enhanced issuer and investor participation in ISMs is likely to increase cross-border trade in securities in the region.

6.1. AN OUTLINE OF CHAPTER 6.

Chapter 6 of the thesis is divided into eight sections. The first section gives the general introduction to the chapter.[872] The second section outlines the chapter.[873] The third section examines the role of

[872] See, section 6.0 of Chapter 6 of the thesis.
[873] See, section 6.1 of Chapter 6 of the thesis.

issuer and investor protection in promoting market participation.[874] Fourth section examines constraints relating to the narrow scope of SEC's power to commence representative civil recovery actions.[875] The author argues that by confining the said power to loss that is caused by misrepresentation in disclosure documents, legislators have effectively left out many other causes of action that could possibly arise under the legal and regulatory framework. The author also argues that such a narrow scope of SEC's representative-action power is likely to compromise issuer and investor protection in ISMs in the region. The sixth section examines constraints relating to non-criminalization of extra-territorial market misconduct in the COMESA Region.[876] The author argues that non-criminalization of extra-territorial market misconduct, is likely to compromise investor protection in ISMs.[877] The seventh section examines constraints relating to lack of power on the part of most domestic regulators in the region to act in support of foreign regulators.[878] The author argues that lack of such a power is likely to compromise the quality of enforcement in ISMs. The eighth section examines constraints relating to the wide continuous disclosure obligation of listed issuers.[879] The author argues that since periodic disclosure is a cost on issuers, a wide continuous disclosure obligation only serves as a source of additional compliance costs. The author also argues that high compliance costs for listed issuers is likely to discourage multiple cross-listings. The ninth section draws together the conclusions of various sections of this chapter, and makes the conclusion of the chapter.[880]

[874] See, section 6.2 of Chapter 6 of the thesis.
[875] See, section 6.3 of chapter 6 of the thesis
[876] See, section 6.4 of chapter 6 of the thesis
[877] Securities market misconduct committed wholly in one COMESA jurisdiction but having harmful effect in other COMESA jurisdictions in the region.
[878] See, section 6.5 of chapter 6 of the thesis
[879] See, section 6.6 of chapter 6 of the thesis.
[880] See, section 6.7 of chapter 6 of the thesis

The following segment examines the role of issuer and investor protection in encouraging market participation.

6.2. THE ROLE OF ISSUER AND INVESTOR PROTECTION IN INCREASING MARKET PARTICIPATION.

Regulatory rules are likely to be violated if they are perceived to be weak or if enforcement is lax.[881] Investors, in investing in securities markets, rely on the effectiveness of the legal, regulatory and institutional framework and the integrity of the market.[882] Integrity of the market, in turn, partly depends on effective enforcement of legal and regulatory rules.[883] Similarly, issuers rely on effective enforcement of legal and regulatory rules in the market in which they choose to list or cross-list their securities.[884] Thus, investor and issuer confidence in ISMs will partly depend on effective enforcement of legal and regulatory rules for these markets.[885] As a possible way of enhancing issuer and investor protection in ISMs in the COMESA Region, proposals were made in Chapter 3 for the introduction of key regional institutions.[886] The author argues here that effective enforcement of effective legal and regulatory rules by the key regional institutions is likely to enhance issuer and investor protection in ISMs.

The following section examines the efficacy of SEC's representative-action power in ensuring effective enforcement of regulatory rules in ISMs.

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[881] G-20, 'Enhancing Sound Regulation and Strengthening Transparency' (2008), Final Report, (hereinafter, 'G-20 Final Report'); Carvayal A. and Elliot J., 'The Challenge of Enforcement in Securities Markets: Mission Impossible' (2009), International Monetary Fund Working Paper, WP/09/168;

[882] *ibid*

[883] *ibid*

[884] Coffee J.C., 'Racing Towards the Top?: The Impact of Cross-listings and Stock Market Competition on International Corporate Governance' (2002) 102(7) Columbia Law Review 1757-1831.

[885] *ibid*

[886] Namely, a RCF, RSE and a RSEC.

6.3. CONSTRAINTS RELATING TO NARROW SCOPE OF SEC'S REPRESENTATIVE ACTION POWER.

The segment appearing immediately above has examined the role of issuer and investor protection in encouraging market participation. It was noted that effective enforcement of stringent regulatory rules is likely to promote participation in COMESA securities markets. In this section, we turn to examine the efficacy of SEC's representative-action power in ensuring effective enforcement of regulatory rules in ISMs. The central premise of this section is that participation of rational issuers and investors in securities markets is partly influenced by effective enforcement of legal and regulatory rules for the markets.[887] Chew argues that a power to take civil action against misfeasors in securities markets must be available to regulators where it is in the public interest to do so.[888] And, where a particular market misconduct threatens the efficiency, transparency and fairness in securities markets, it may be in the public interest for the regulator to commence civil recovery actions on behalf of injured market participants.[889] Thus, the Zambian SEC has power to commence civil actions on behalf of injured issuers and investors who neglect or are unable to commence actions.[890] However, the SEC can only do so with leave of the Zambian High Court.[891]

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[887] Giannetti M. and Koskinen Y., 'Investor Protection, Equity Returns and Financial Globalization' (2010) 45(1) Journal of Financial and Quantitative Analysis' 135-168; Kwabi F., Boateng A. and Adegbite E., 'International Equity Portfolio Investment and Enforcement of Insider Trading Laws' (2019) 53 Review of Quantitative Finance and Accounting 329-349. Market misconduct is defined as '(a) the use or disclosure of price-sensitive information contrary to this Act, (b) engaging in improper trading practices as provided in Part XVIII, (c) failure to comply with any provision of this Act, and (d)a conviction of an offence under this Act': Zambian Securities Act 2016, s 2

[888] Chew M., 'The Securities Regulator in Civil Pursuit: "Quaere" A New Enforcement Option' (1999) 40th Anniversary Issue, Journal of Legal Studies 596-629.

[889] *ibid*

[890] Zambian Securities Act 2016, s 175(1)(a)(b)(c).

[891] *ibid*

Where the offender is sophisticated, small-scale market participants may not have the capacity to effectively investigate the perpetrator of the market misconduct.[892] Thus, small-scale market participants may not gather as much information about the offender as may be necessary for a case worth prosecuting in the Capital Markets Tribunal (the CMT).[893] Also, geographical location of the injured party and the high cost of cross-border litigation are likely to discourage civil recovery actions against the offender.[894] It is such constraints in securities markets that SEC's representative-action power is designed to overcome. Therefore, the author argues here that effective exercise of SEC's representative-action power is likely to enhance issuer and investor protection and encourage participation in ISMs. However, in Zambia, exercise of the said power depends on the existence of a cause of action for damages for misrepresentation in prospectuses.[895] Thus, SEC cannot come to the aid of any market participant who suffers loss as result of any other cause of action than misrepresentation in disclosures documents. The author argues that such a regulatory approach is likely to compromise issuer and investor protection since a plethora of other forms of securities market misconduct than misrepresentation in disclosure documents have been left out. As a possible solution to this shortcoming in the regulatory framework, proposals are made for the extension of SEC's representative-action power to other forms of market misconduct than misrepresentation in disclosure documents. The following amendment to section 175 of the Zambian Securities Act 2016 is proposed:

> s. 175(1) The Commission may apply to the Court for leave to bring an action, in accordance with this Act, in the name of, and on behalf of an issuer or security holder, and the Court may grant leave on such terms as to security for costs that the Court considers appropriate, if it is satisfied that—(a)the Commission has reasonable grounds

[892] Samamba Lennox Trivedi XIII, 16, *op.cit*
[893] *ibid*
[894] *ibid*
[895]Or other disclosure documents for that matter: Zambian Securities Act 2016, ss 175(1)(a), 166, 177.

for believing that a cause of action for market misconduct under this Act, or regulations, rules or order thereunder made, exists.

Constraints relating to lack of the Power by most Domestic Securities Market Regulators in the Region to commence civil actions on behalf of Market Participants.

Despite the regulatory and economic benefits of the regulator's power to take civil recovery action on behalf of market participants, some regulators in the region lack such power. Such jurisdictions include Kenya, Mauritius, Seychelles and Zimbabwe. The author argues that the lack of such a regulatory power by DSECs in key COMESA jurisdictions is likely to compromise the quality of enforcement in securities markets in region. And, since the cost of domestic litigation is expected to be higher than the cost of cross-border litigation—all things being equal—lack of such a power is likely to discourage foreign participation and hinder growth of cross-border trade in securities in the region. As a possible way of enhancing the quality of regulation in securities markets in the region, it is proposed that all DSECs be clothed with the power to take civil action on behalf of market participants if it is in the public interest to do so. And as observed earlier, such a power must cover all forms of market misconduct that could possibly arise under the legal and regulatory framework. The following section examines threats posed by non-criminalization of extra-territorial market misconduct on issuer and investor participation in ISMs.

6.4. CONSTRAINTS RELATING TO NON-CRIMINALIZATION OF EXTRA-TERRITORIAL SECURITIES MARKET MISCONDUCT.

The preceding section has examined the efficacy of the scope of SEC's representative-action power in ensuring effective regulation of ISMs in the region. It was noted that the scope of SEC's power is restricted to causes of action relating to misrepresentation in disclosure documents. The section demonstrated that the narrow scope of SEC's representative-action power is likely to

compromise effective enforcement in ISMs in the COMESA Region. In this section, we turn to examine the effect of non-criminalization of extra-territorial securities market misconduct on effective regulation of ISMs in the region. The central premise of this section is that participation of risk-averse and less wealthy issuers and investors in securities markets is partly influenced by the cleanliness of the market. Market cleanliness and investor confidence partly depend on the effectiveness of legal and regulatory rules and enforcement of those rules.[896] Austin observes that regulatory rules for DSMs are not suited for the regulation of ISMs.[897] Thus, the author argues that internationalization of securities regulation is critical to effective regulation of ISMs in the COMESA Region.

The author observes that, although foreign participation has been on the rise in the COMESA Region, no regional rules have been enacted for the regulation of foreign participants. There is also no enforcement mechanism at regional level. This appears to support the proposals which we have made in Chapter 3 for the introduction of a RSE and a RSEC. The author also argues that the lack of regional regulatory rules and an enforcement mechanism does not provide the necessary incentives for the growth of issuer and investor participation in ISMs in the region. This view is supported by the International Organization for Securities Commissions when they state that

[896] Janet Austin, 'when Insider Trading and Market Manipulation cross jurisdictions: what are the challenges for Securities Regulators and how can they best preserve the integrity of the Market? (PhD Thesis, York University, Ontario, 2016) at 16 https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/32223/Austin_Janet_E_2016_PhD.pdf?sequence=2&isAllowed=y accessed 13 September 2019.

[897] *ibid;* Stephen J. Choi, Gatekeepers and the Internet: Rethinking Regulation of Small Business Capital Formation' (1998) 2(27) Small and Emerging Business Law Journal 40.

emerging markets must exercise maximum regulatory authority over foreign intermediaries as a way of minimising the risk of fraud and market manipulation.[898]

Constraint relating to Non-Criminalization Extra-Territorial Securities Market Misconduct: Setting the Enquiry into Context.

The enquiry may be set into context by way of the following scenario:

> A is a director of finance in XCo—a company incorporated under the laws of Uganda. XCo provides auditing and financial consultancy services to YCo—a company incorporated according to the laws of Kenya. YCo has listed its equity securities on Nairobi Stock Exchange (NSE) and cross-listed them on the Lusaka Stock Exchange. At 9AM, XCo emails to YCo a gloomy financial forecast of YCo's financial performance for the next six months. An emergency board meeting is called by YCo's directors at 11AM and a decision is made to decline payment of a dividend. Before the board decision could be made public and disseminated to NSE, LuSE and the investing public, at 11:30AM, A calls B his childhood friend holding a substantial portion of YCo equity securities and gives him the news. At 11:35AM, B instructs his LuSE broker to sell the three outstanding orders. The LuSE broker proceeds to sell the orders which are executed at 11:38AM, 11: 41AM and 11: 45, respectively essentially disposing of B's entire position in YCo securities to C, D and E.At 14:30PM, the news on YCo of posted on NSE website, LuSE website and published in the Financial Times of Kenya and the Financial Times of Zambia. At 15:00PM the price of YCo securities plummets to the detriment of C, D and E. B is resident in Zimbabwe, while C and D are resident in Zambia. E is resident in Malawi. Can A and B be effectively prosecuted in Zambia for insider trading? What civil remedy is available to C, D and E against A and B?

The relevant sections which deal with insider trading under the Zambian Securities Act 2016 are sections 138, 139 and 2. In light of the said provisions, four positions may be distilled from the hypothetical scenario presented above, namely:

[898] International Organization of Securities Commissions, *Report on Cross-border Activities of Market Intermediaries in Emerging Markets 2005* (2005) 10 (IOSCO Report 2005) <www.iosco.org/library/pubdocs/pdf/IOSCOPD193.pdf > accessed 27 August 2017.

a) A is an insider of YCo on account of section 2(b), (a) (iv) of the Zambian Securities Act 2016;
b) A has committed the offence of insider trading—as a tipper[899]—in Uganda;
c) B is an insider of YCo on account of section 2(a)(v) and (b) of the Zambian Securities Act 2016; and
d) B has committed the offence of insider trading—as a tippee[900]—in Zimbabwe.

In Zambia, the commission of a socially immoral act does not warrant a trial and punishment of the offender. For the accused to be tried and punished, two conditions must be met, namely:

a) The act in question should be classified as an offence and penalty thereof prescribed in a written law;[901]
b) The Zambian courts should have jurisdiction to hear and determine the case concerning such an offence.[902]

By sections 139(1) and 138 of the Zambian Securities Act 2016, paragraph (a) above has been satisfied. But do Zambian criminal courts have jurisdiction to hear, determine and punish for such offences?[903] For jurisdiction on the part of Zambian courts and tribunals to assume, the misconduct in question should be committed wholly in Zambia, or partly in Zambia and partly outside Zambia.[904] This is the position in most jurisdictions in the region which are former British colonies or protectorates.[905] Thus, it is submitted that Zambian courts and tribunals would have no

[899] A 'tipper' is a person who supplies another person—the tippee—with inside information.
[900] A 'tippee' is a person who receives inside information from tipper.
[901] Zambian Constitution 1995/96, Art 18(8)
[902] Zambian Penal Code Act, ss 5, 6
[903] Offences committed wholly outside Zambia against a Zambian citizen or resident.
[904] See, Zambian Penal Code, ss 5, 6; Zambian Securities Act 2016, s 215.
[905] See, Ugandan Penal Code Act, ss 5, 6; Malawian Penal Code Act, ss 5, 6, Zimbabwean Penal Code, ss 5, 6; Kenyan Penal Code, ss 5, 6.

jurisdiction since the misconduct in question was committed [wholly outside Zambia]. The United States Supreme Court has observed that investors will hesitate to venture their capital in securities markets where misconduct such as insider trading is unregulated.[906] Since the quality of regulatory enforcement has a bearing on market integrity,[907] the author argues that such a shortcoming in the law is likely compromise the integrity of ISMs in the region.[908] The author also argues here that such a shortcoming in the legal, regulatory and institutional framework is also likely to discourage risk-averse and less wealthy investors from participating in securities markets.[909] The author further argues that limited investor participation in ISMs is likely to hinder growth of cross-border trade in securities in the COMESA Region.[910]

As a possible way of overcoming this shortcoming in the law, and enhancing investor protection in ISMs in the region, it is proposed that extra-territorial market misconduct be criminalized.[911] Insertion of the following sections in Penal Codes of COMESA states, is proposed.

> 5A. For purposes of enforcing offences under the Securities Act 2016, the jurisdiction of the Courts of Zambia shall extend to every place [within] the Common Market for Eastern and Southern African Community.

[906] *United States v O'Hagan* 521 U.S. 642, 642, 658 (1997).
[907] Austin, PhD Thesis (2016), *op.cit*
[908] See, Osode (2000), *op.cit*
[909] Empirical evidence shows that markets with quality issuer and investor protection tend to attract issuers and investors: Bernard Black, 'The Legal and Institutional Pre-Conditions for Strong Securities Markets' (2001) 48 UCLA Law Review, 781; Raphael La Porta et al, 'Legal Determinants of External Finance' (1997) 52 Journal of Finance, 1131

[910] The United States Congress in explaining the rationale for passing the Insider Trading and Securities Enforcement Act of 1988 observed that 'insider trading diminishes the public's faith in capital markets…the small will be—and has been—reluctant to invest in the market if he feels it has been rigged against him'.: H.R. Rep. No. 100-910 (1988) 7-8
[911] Region-wide criminalization is targeted at satisfying the principle of 'double criminality' which is crucial to effective extradition of offenders at international law.

6A(1). A person who commits an offence under any Part of the Securities Act 2016 wholly or partly outside Zambia but within the Common Market for Eastern and Southern Africa, shall be liable to be tried and punished as if the act had been committed wholly in Zambia provided the harmful act is injurious to the stock market and investors within Zambia.

(2). A person who commits an offence under any Part of the Securities Act 2016, wholly or partly inside Zambia which act has injurious effects on the Stock market and investors in a country within the Common Market for Eastern and Southern Africa, shall be liable to be tried and punished in Zambia as if such harmful act had been wholly committed in Zambia.

(3). Without prejudice to any civil remedy available to any injured party, a person who have been tried and punished or acquitted outside Zambia shall not be tried for the same offence in Zambia.

Mwenda, observes that effective regulation of extra-territorial insider dealing by a broad-based approach, as proposed above, is critical to the development of robust and competitive securities markets in the COMESA Region.[912]

The following section examines constraints relating to lack of power by domestic regulators in the COMESA Region to act in support of foreign regulators.

[912] Not only should regulatory rules be broad in terms of the domestic reach but also with respect to regional/international reach: See generally, Mwenda, PhD Thesis (2001), *op.cit*; Kenneth Kaoma Mwenda, 'Insider Trading Law in Zambia: a Flawed Concept' (1996-1999) 20 U. Ghana L. J. 137, at 138; Kenneth Kaoma Mwenda, *Zambia's Stock Exchange and the Privatization Programme: Corporate Finance Law in Emerging Markets* (Edwin Mellen Press 2001).

6.5. CONSTRAINTS RELATING TO LACK OF POWER BY MOST SECs IN THE COMESA REGION TO ACT IN SUPPORT OF FOREIGN REGULATORS.

The preceding section has examined the effect of non-criminalization of extra-territorial market misconduct on regulation of ISMs. It was noted that the current regulatory regime is not adequate for effective regulation of cross-border market misconduct. The section demonstrated that non-criminalization of extra-territorial market misconduct is likely to hinder effective regulation in ISMs in the COMESA Region. In this section, we turn to examine constraints relating to lack of power by most domestic regulators in the region to act in support of foreign regulators.[913] Given the central thesis of this study, the author argues that the quality of enforcement in ISMs could be enhanced by empowering DSECs to act in support of foreign regulators.[914] The author also argues that effective enforcement of regulatory rules is likely to increase participation in ISMs. It is also likely to increase cross-border trade in securities in the region.[915]

Regulatory Cooperation under the Zambian Legal Framework.

The International Monetary Fund observes that an effective regulatory framework for securities markets must facilitate the provision of regulatory-enforcement support to foreign regulators.[916] Cross-border cooperation among securities market regulators enhances the quality of cross-border

[913] The effect of lack of such a power on effective enforcement of regulatory rules in ISMs is examined.

[914] In Chapter 3 of the thesis, proposals were made for introduction of a RSEC as a possible way of enhancing issuer and investor protection in ISMs. The author argued in chapter 3 of the thesis that increasing regulatory cooperation among DSECs, and those DSECs and the RSEC is likely to increase issuer and investor protection in ISMs. The author also argued that enhanced issuer and investor protection is likely to attract more issuers and investors: Raphael La Porta et al, 'Legal Determinants of External Finance' (1997) 52 Journal of Finance, 1131; Bernard Black, 'The Legal and Institutional Pre-Conditions for Strong Securities Markets' (2001) 48 UCLA Law Review, 781.

[915] *ibid*

[916] The International Monetary Fund, 'Strengths and Weaknesses in Securities Markets Regulation: A Global Analysis' (2007) Working Paper WP/07/259.

enforcement.[917] It also reduces the cost of liquidity provision in capital markets.[918] Thus, the Zambian SEC has express power to act in support of foreign regulators in the region and beyond if so requested.[919] Where the Zambian SEC is satisfied that it is desirable or expedient to render assistance as requested, it may give the assistance.[920] In particular, the Zambian SEC must be satisfied that it is in the public interest to do so or that such assistance would enable the requesting regulator to perform its functions.[921] The Zambian SEC may also render assistance pursuant to a bilateral mutual legal assistance treaty. In this respect a question may be asked, would be it lawful for the Zambian SEC to exercise its power over the assets of a domestic licensed person in aid of investigations by foreign regulators?[922] Yes, it would be. This position is supported by express provision for power to act in support of foreign regulators. Otherwise, SEC's power would be limited to offences committed under the Zambian legal and regulatory framework.[923] The author argues that such a power is likely to raise market confidence by ensuring that the regional securities market is not turned into a barbary coast for securities pirates.

Regulatory Cooperation in other COMESA Jurisdictions.

Most jurisdictions in the COMESA Region have not clothed their DSECs with the power to act in support of foreign regulators.[924] Such a state of affairs is unacceptable since COMESA Members are under an obligation to cooperate in the creation of an enabling environment for cross-border

[917] Silver R., 'Cross-border Cooperation between Securities Regulators' (2020) 69 (2-3) Journal of Accounting and Economics 101301.
[918] *ibid*.
[919] See, the Zambian Securities Act 2016, s 165(2).
[920] See, Zambian Securities Act 2016, s 165(3)(a).
[921] See, Zambian Securities Act 2016, s 165(3)(b).
[922] The Zambian SEC has power to exercise control over the assets of licensed or authorized persons by way of notice in writing to (a) prohibit the licensed person from disposing of the asset or dealing with the asset in a manner specified in the notice, (b) require the licensed person to deal with the asset in a manner specified in the notice, or (c) prohibit the licensed person from pledging securities and other assets as collateral for borrowings: the Zambian Securities Act 2016, s 12(1)(a)-(c).
[923] See, the Zambian Securities Act 2016, s 9(2)(a).
[924] Jurisdiction such as, Egypt, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Seychelles, and Zimbabwe

trade in securities in the region.[925] For lack of space, only three jurisdictions will be considered here, namely, Zimbabwe, Kenya, and Mauritius.

The Zimbabwean Securities Commission is established pursuant to section 3 of the Securities Act of 2004.[926] It has express power to appoint investigators and institute investigations against a licensed person.[927] Also, the Zimbabwean SEC has power to demand certain information from licensed persons who are under investigation.[928] However, there is no express provision that such power may be exercised in support of foreign regulators.[929]

The Kenyan Capital Markets Authority is established pursuant to section 5(1) of the Capital Markets Act of 2000.[930] The Kenyan CMA has power to appoint investigators, enter upon premises and conduct searches.[931] The Kenyan CMA has also power to demand production of certain records during investigation of a licensed person.[932] The Kenyan regulator has additional power to intervene in the management of a licensed person for compliance purposes.[933] There is however, no express provision that such powers could be exercised in support of a foreign regulator.[934]

[925] See, COMESA Treaty 1993, Arts 3(c) and 81(b)(c)
[926] For purposes of brevity, the 'Zimbabwean Securities Commission' will simply be referred to as 'the Zimbabwean SEC'.
[927] See, Zimbabwean Securities Act 2004, s 101
[928] See, Zimbabwean Securities Act 2004, s 100
[929] These powers are specifically conferred to encourage the development of fair and orderly capital and securities markets in Zimbabwe. The mandate of the Commission is restricted to enforcement of the Securities Act 2000 and regulations made under this Act. Thus, the jurisdiction of the Commission is restricted to Zimbabwe: Zimbabwean Securities Act 2004, s 4(2)(d)(f).
[930] For purposes of brevity, the Kenyan Capital Markets Authority shall be referred to as 'the Kenyan CMA'.
[931] Kenyan Capital Markets Act 2000, ss 13A, 33D
[932] *ibid*
[933] *ibid*
[934] The mandate of the Capital Markets Authority is restricted to enforcement of the Capital Markets Act and regulations made under it: Kenyan Capital Markets 2000, s 11(c)(i)-(iv)

The Mauritian Securities Commission is established pursuant to section 6 of the Securities Act 2005.[935] The Mauritian SEC has power to appoint investigators and investigate any licensed person.[936] The Mauritian regulator has also power to direct a licensed person to compensate injured market participants in a particular way.[937] Further, in order to preserve the integrity of the market, the Mauritian SEC may issue cease-trading orders.[938] However, there is no express provision that such power could be exercised in support of a foreign regulator.

A question may be asked, 'would it be competent for the Zimbabwean regulator, or Kenyan regulator, or Mauritian regulator to exercise its power over the assets of a licensed person in aid of on-going investigations by the Zambian SEC? No, it would not be. This view is rationalized by the position that the power of the said regulators is generally limited to breaches of domestic law. This view is anchored on the territorial principle of public international law which holds that the force of domestic law is limited to the territorial jurisdiction of the state for which it is made.[939] However, the territorial principle may be disregarded where extra-territorial misconduct has substantial effect on the market of a particular jurisdiction.[940] In such cases, regulatory authorities of that particular jurisdiction may invoke domestic laws to assist themselves (self-help), and indirectly, the Zambian SEC. Another question may be asked, 'would it be competent for a foreign securities exchange to suspend or cancel a cross-listing of a Zambian issuer who is found guilty of breach of LuSE Listing Rules? As noted above, without an express provision for the power to act

[935] For purposes of brevity, the 'Mauritian Securities Commission' will be referred to as 'the Mauritian SEC'.
[936] See, the Mauritian Securities Act 2005, s 124
[937] Mauritian Securities Act 2005, s 126(a)(b)
[938] Mauritian Securities Act 2005, s 133.
[939] Gerber D.J., 'Beyond Balancing: International Law Restraints on the Reach of National Laws' (1984) 10(1) Yale J. Int'l L. 185-221.
[940] This is the Effects Doctrine: See, Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge University Press 2005) at 47.

in support of foreign stock exchanges, it would be open to the cross-listed entity to argue that the jurisdiction of the cross-listing exchange is limited to breaches of its own rules. Consequently, any attempt by the foreign DSEC or stock exchange to cancel or suspend a listing or cross-listing would be resisted by an action for judicial review on the ground of illegality and irrationality.[941]

In order to overcome such shortcomings in the legal, regulatory and institutional framework, the following proposals are made:

(i) Clothe the DSECs with power over authorized person and their assets;

(ii) Clothe DSECs with power to act in support of foreign regulators. Foreign regulator includes the proposed RSEC;

(iii) The power referred to in paragraph (ii) should be exercised either at the initiative of the DSEC or request of a foreign regulator; and

(iv) Once the DSEC decides to render the requested support, it should be entitled to exercise the power referred to in paragraph (i) above;

(v) Similarly, where the misconduct complained of hurts or is likely to hurt the integrity of the regional market, exercise of power referred to in paragraphs (i), (ii) and (iii) above should be justified; and

[941] For these and the other ground for judicial review—procedural impropriety—see, Lord Diplock's speech in, *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9. In Zambia, rules of the LuSE are a form of statutory instrument: See, Zambian Constitution, Art 266, (Definition of 'statutory instrument'); Zambian Securities Act 2016, s 67. This makes judicial review an attainable remedy for acts or omissions of the LuSE. In other COMESA jurisdictions where stock exchange rules are contractual in nature, judicial review may be available on account of the width of the socio-economic influence of the activities of the stock exchange in a particular economy: See, *R (Datafin Plc) v Panel on Takeovers and Mergers, ex parte Datafin Plc* [1987] 1 ALL ER 564. However, the default nature of the remedy of judicial review in former British colonies and protectorates makes it generally unavailable where some other remedy or procedure is expressly or impliedly provided: See, *New Plast Industries v Commissioner of Lands and Attorney General* (SCZ Judgment No. 8 of 2001) [2001], ZMSC 19 (9 May 2001).

(vi) Empower Boards of stock exchanges in the region to suspend or terminate a listing of an issuer if that issuer if found guilty of an offence in other COMESA countries. Such power should be exercised with proviso that the offence compromises or is likely to compromise the integrity of the regional market.

Since securities exchanges are primary regulators of securities markets,[942] this proposed regulatory architecture should be duplicated among DSECs, and between the DSECs and the proposed RSEC.

Power to act in Support of Overseas Regulators by United Kingdom and United States Securities Market Regulators.

The United Kingdom Financial Services Authority (the UK FSA) has power to take certain actions or implement certain measures in support of foreign regulators. Such power may be exercised whether or not the UK FSA has power that could be exercised in relation to authorized persons by virtue of the Financial Services and Markets Act 2000.[943] The UK FSA's 'power in support' may be exercised either at the request of a foreign regulator[944] or at own initiative.[945] The exercise of the power-in-support by the UK FSA is illustrated by *Financial Services Authority and Others v Amron International SA & Others*.[946] In this case, the United States SEC sought the assistance of the UK FSA in securing production of certain documents by London-based firms of accountants in aid of on-going civil proceeding in New York. Upon receiving the request, the UK FSA sought clarification from the US SEC regarding the scope of the request. The US SEC gave a satisfactory explanation. Thereafter, the UK FSA appointed investigators in accordance with the request of the US SEC. The respondent firms challenged the propriety of the decision of the UK FSA in the

[942] See, Gakeri J.K., 'Regulating Kenya's Securities Markets: An Assessment of the Capital Markets Authority's Enforcement Jurisdiction' (2012) 2(20) International Humanities and Social Sciences 265, at 268.
[943] United Kingdom Financial Services and Markets Act 2000, s 47(1)(a)(b)(2)
[944] *ibid*
[945] *ibid*
[946][2010] EWCA Civ 123 (CA).

English High Court of Justice. The High Court held that the FSA had acted improperly in requesting documents from the London-based firms in aid of on-going litigation in New York. The FSA appealed the High Court decision to the Court of Appeal. The Court of Appeal reversed the decision of the High Court holding that there was no error of law or principle in the decision of the FSA to appoint investigators.

The following section examines constraint relating to the wide continuous disclosure obligation on cross-listed issuers.

6.6. CONSTRAINTS RELATING TO THE WIDE CONTINUOUS DISCLOSURE OBLIGATION ON CROSS-LISTED ISSUERS.

The section appearing immediately above has examined constraints relating to lack of power by most DSECs to act in support of foreign regulators. It was noted that although the Zambian SEC has power to act in support of foreign regulators, most regulators in the region do not. The section demonstrated that lack of such a power by most regulators in the region is likely to compromise the quality of enforcement in ISMs. In this section, we examine constraints relating to the wide continuous disclosure obligation of listed issuers. The central premise of this section is that, the cost of disclosure is one of the factors influencing the issuer's decision to participate in a particular market in much the same way the quality of disclosure is to investors. On the strength of the hydraulic theory of disclosure, issuers are likely to turn to nuanced forms of disclosure such as sub-optimal disclosure and insider dealing if the cost of disclosure exceeds the benefit of

disclosure.[947] Given the central thesis of the study, this section argues that, the cost of period disclosure and the cost of the lower threshold for continuous disclosure under the Zambian regulatory framework are likely to push the overall cost of disclosure above the benefit of disclosure. The section also argues that the excessive cost of disclosure is likely to encourage nuanced forms of disclosure such as insider trading and sub-optimal disclosure.

Regulating Continuous Disclosure under the Zambian Legal Framework.

Under the Zambian Securities Act 2016, listed issuers have a duty to continuously disclose matters which affect the value of registered listed securities. However, the Zambian Securities Act 2016 does not define the word 'affect'. As a fall-back in Zambia, recourse could be had to dictionaries of English.[948] Thus, the Oxford Dictionary of English, 'affect' means 'to have effect on'.[949] However, this definition does not set a clear disclosure threshold since the degree of the effect of the new information on the price of securities has not been spelt out in the Zambian Securities Act 2016. This makes any novel information disclosable and actionable however insignificant the movement in the price it is likely to cause. The author argues that given the pre-existing periodic disclosure obligation on listed issuers, such a low standard for continuous disclosure is likely to increase compliance and litigation costs for issuers. It is also likely to push the overall cost of disclosure above the potential benefit of disclosure.[950] It is also argued that the excessive cost of disclosure is likely to encourage nuanced forms of disclosure such as sub-optimal disclosure and insider trading.[951] A further argument is made that sub-optimal disclosure and insider trading are

[947] G.A. Manne, 'The Hydraulic Theory of Disclosure Regulation and other Costs of Disclosure' (2007) 58(3) Alabama Law Review 473 (G.A. Manne (2007)).
[948] See, *Stallion Motors Ltd and African Cargo Services vs Zambia Revenue Services* (Supreme Court of Zambia, Appeal No. 11 of 2012), and the English authorities which have been cited in this case in support of this proposition.
[949] Sarah Worthington (ed), *Oxford Dictionary of English* (2nd edn, Oxford University Press 2003) at 26.
[950] See, *TSC Industries Inc. v Norway Inc* 426 US 438 (1976) 449 (Marshall J).
[951] G.A. Manne (2007), *op.cit*

likely to compromise efficiency and fairness in securities markets.[952] A related argument is made that the resulting information asymmetry is likely to lead to the problem of adverse selection.[953] It is also argued that sub-optimal disclosure, insider dealing and the problem of adverse selection are likely to increase the cost of capital for issuers and investors,[954] and cause liquidity problems.[955]

The United States of America has set quite a high threshold for disclosure.[956] Thus, in the United States, only 'material information' is disclosable.[957] Similarly, in Australia, only information that a reasonable person would expect to have a material effect on the price or value of that entity's securities is disclosable.[958] And in both cases, material information is information which reasonable investors and their advisors are likely to consider in making their investment decisions.[959] And information is likely to be considered in investment decisions as aforesaid if its non-disclosure has a significant propensity to affect the investment decision or voting process.[960] This eliminates the evidential burden of proving the substantial likelihood that disclosure of the omitted fact would have caused a reasonable investor to change their investment decision or vote.[961] Thus, it would be enough to show that the omitted fact would have assumed actual significance in the reasonable investor's deliberations.[962] This is quite a high standard of disclosure

[952] Kenneth Kaoma Mwenda, 'Insider Trading in Zambia: a Flawed Concept' (1996-1999) 20 U. Ghana. L. J. 137. Thus, it is submitted that a disclosure regime that facilitates full disclosure at minimum cost is critical to the efficient functioning of securities markets.
[953] Merton R.C., 'A Simple model for Capital Market Equilibrium with incomplete information' (1987) 42 J. Fin. 483; Easley D. and O'Hara M., 'Information and the Cost of Capital' (2004) 59 J. Fin. 1553-1583; Lambert R., Leuz C. and Varrenchia R.' 'Accounting Information, Disclosure and the Cost of Capital' (2006).
[954] Glosten L.R. and Milgrom P.R., 'Bid, Ask, Transaction prices in a Specialist Market with Heterogeneously Informed Traders' (1985) 14 J. Fin. Econ. 71-100; See, Akerlof G., 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1971) 84 The Quarterly Journal of Economics 488-500.
[955] *ibid*
[956] For the cost of adopting a low disclosure threshold, see, *Basic Inc vs Levinson* 485 US 224 (1988).
[957] United States Securities Exchange (Duties of Issuers, etc) Rules 1942, Rule 10b-5. These rules were made pursuant to section 10b of the Securities Exchange Act 1934.
[958] Australian Corporations Act 2001, s 672(2)(c)(ii); Australian Securities Exchange Listing Rules, r 3.1.
[959] See, *TSC Industries, Inc vs Northway Inc.,* 426 U.S. 438, (1976).
[960] *Mills vs Electric Auto-Lite Co.,* 396 U.S. 375, 396 U.S. 384.
[961] *TSC Industries Inc.*
[962] *ibid*

which is likely to lower disclosure and litigation costs for issuers. And as noted above, it is also likely to safeguard the interests of investors by setting a lower standard of proof for investor claimants. It is strongly recommended that domestic capital markets tribunals in the COMESA Region adopt the United States approach to the disclosure threshold.

Constraints relating to Disclosure of Generally-Available Information.

Where material information is already in public domain and could be accessed with due diligence, regulatory efficiency requires that issuers be exempt from disclosure since the cost of disclosure is likely to be higher than the benefit of the same. For this very reason, in Australia, as a possible way of overcoming such shortcomings in the regulatory framework, only material information which is not generally available is disclosable. [963] And, information is generally available if it is readily observable.[964] As a possible solution to this shortcoming in the legal, regulatory and institutional framework, it is proposed that 'generally-available information' be excluded from disclosure under the Zambian Securities Act 2016.[965] And, as a possible way of lowering the cost of disclosure and disincentivizing recourse to nuanced forms of disclosure such as sub-optimal disclosure and insider trading, it is proposed that the concept of materiality be introduced in Zambia. This could be achieved by amending section 81(1) of the Zambian Securities Act 2016 as follows:

> s. 81(1) An issuer shall, once registered securities are listed, keep the public informed of all material facts, which are <u>not generally available,</u> immediately upon their becoming known to the officer(s) of the issuer, by placing an advertisement in a newspaper of general circulation or in other media approved by the Commission and shall submit

[963] Australian Corporations Act 2001, s 1002B(2)(a). Information is material if it is relevant to a reasonable investor's decision. Thus, Australia has adopted the United States' *Basic Inc. v Levinson* standard of materiality.
[964] *ibid*
[965] 'Generally-available information' is information which is in public domain and could be accessed with due diligence: *R vs Firn* [2001] NSWCCA 191, 193-196. A matter is readily-observable if it is available and accessible to a significant portion of the public notwithstanding that the such matter or information is unlikely to be known by the investing community: *ibid*.

> reports to the Commission and to the securities exchange on which those securities are listed.
> (2) For the purposes of sub-section (1), material fact includes a change in the business, operations, assets or ownership of an issuer that could reasonably be expected to have a material effect on the market price or value of the securities of the issuer, and includes a decision to implement a change made by the issuer.
> (3) Information is generally available if it is readily observable in the sense of being available and accessible to a significant portion of the public notwithstanding that such information is unlikely to be known by the investing community.

Such a regulatory standard would ensure that only material information imposes a duty on listed issuers to disclose corporate information on a continuous basis.[966] It is submitted that such a measure is likely to bring the Zambian legal, regulatory and institutional framework in conformity with international best practice. Such a measure is also likely to reconcile LuSE Listing Rule 3.4(a) with the Securities Act 2016.[967]

Constraints relating to disclosure of Confidential and Detrimental Information.

Further, the Zambian legal, regulatory and institutional framework requires issuers to disclose confidential and detrimental information on a continuous basis. As a possible way of striking a balance between the need to ensure transparency in securities markets and the need to sustain listed entities, proposals are made for the exemption of listed issuers from such disclosure.

[966] Change or a fact is material if it relates to the business, operations, assets or ownership of an issuer that could reasonably be expected to have a significant effect on the market price or value of the securities of the issuer, and includes a decision to implement a change made by the issuer: Zambian Securities Act 2016, s 2 (Definition of 'material change' and 'material fact').

[967] Similarly, Rule 11(c) of the Registration of Securities Rules, Statutory Instrument No. 164 of 1993, made under the repealed Securities Act 1993, places an obligation on listed issuers to disclose to the listing exchange, the Commission and the investing public any new information relating to its operations which could reasonably be expected to have a material effect on the price or value of its listed securities. However, this and the LuSE Listing Rules 2012 are simply statutory instruments which could not be expected to override or amend the position of the parent Act of Parliament—the Securities Act 2016. The proposed amendment is thus, justified.

6.7. CONCLUSION.

This Chapter has examined the legal, regulatory and institutional framework so as to establish whether or not it provides adequate issuer and investor protection in ISMs in the COMESA Region. The conclusion reached in this chapter is that the said framework does not provide adequate issuer and investor protection in ISMs in the region. It was noted that the said framework does not provide adequate issuer and investor protection in ISMs. The Chapter demonstrated that a regional approach to securities regulation could ensure effective protection of issuers and investors in ISMs in the region. The chapter identified following as threats on issuer and investor protection in ISMs in the COMESA Region, namely:

i) Lack of key regional institutions such as a RCF and a RSEC;
ii) Narrow scope of the Zambian SEC's power to commence civil recovery actions on behalf of issuers and investors who fail or neglect to do so;
iii) Lack of power by most DSECs in the region to take civil recovery on behalf of market participants;
iv) Non-criminalization of extra-territorial securities market misconduct;
v) A wide continuous disclosure obligation of listed issuers; and
vi) Lack of power by most DSECs to act in support of foreign regulators.

The chapter further demonstrated that issuer and investor protection in ISMs in the COMESA Region could be enhanced by:

a) introducing key regional institutions such as a RCF and a RSEC;
b) extending the scope of the Zambian SEC's representative-action-power to all causes of action which could possibly arise under the legal and regulatory framework;

c) clothing other DSECs in the region with power to take civil recovery action on behalf of injured market participants;

d) extra-territorial criminalization of securities market misconduct;

e) narrowing the continuous disclosure obligation of listed issuers by—

   i) ensuring that only material information is disclosable;

   ii) exempting generally available, confidential and detrimental information from disclosure;

f) ensuring that [all] domestic securities markets regulators are clothed with the statutory power to act in support of foreign regulators.

The following Chapter introduces empirical evidence on constraints which affect the efficacy of the legal, regulatory and institutional framework in promoting cross-border trade in securities in the COMESA Region.

PART IV

CHAPTER 7

EMPIRICAL EVIDENCE ON CONSTRAINTS AFFECTING THE EFFICACY OF THE LEGAL, REGULATORY AND INSTITUTIONAL FRAMEWORK.

7.0. INTRODUCTION.

Chapter 6 has examined the legal, regulatory and institutional framework so as to establish whether or not it provides adequate issuer and investor protection in ISMs in the region. It was noted that the said framework is not adequate for effective regulation of ISMs. The chapter demonstrated that a regional approach to securities markets regulation could ensure effective issuer and investor protection in ISMs in the region. In this chapter, we introduce empirical evidence on constraints that affect the efficacy of the said framework in promoting cross-border trade in securities. The central premise of this chapter is that the effectiveness of the legal, regulatory and institutional framework is hindered by constraints within and upon it. Thus, given the central thesis of the study, the author argues that the efficacy of the said framework could be enhanced by identifying and remedying constraints which affect its efficacy in promoting cross-border trade in securities. The author argues further that an effective legal, regulatory and institutional framework is likely to promote cross-border trade in securities in the COMESA Region.

7.1. AN OUTLINE OF CHAPTER 7.

Chapter 7 of the thesis consists of three sections. The first section gives the general introduction to the chapter.[968] The second section outlines the chapter.[969] The third section gives empirical evidence on constraints which affect the efficacy of the legal, regulatory and institutional framework in increasing cross-border trade in securities in the COMESA Region.[970] The third section is divided into six subsections. The first subsection gives empirical evidence on the low competence of LuSE intermediaries.[971] The author argues that the low competence of intermediaries to handle cross-border securities deals is likely to discourage cross-border trade in securities. The second subsection gives empirical evidence on low institutional presence on the LuSE and in cross-border trade in securities.[972] The author argues that the low presence of institution in the said arenas is likely to compromise demand for listed securities. The author also argues that low foreign demand for securities is likely to hinder growth of cross-border trade. The third subsection gives empirical evidence on low investor financial education among potential investors in Zambia.[973] The author argues that poor investor financial education is likely to hinder investor participation, especially in ISMs. The fourth subsection gives empirical evidence on higher cross-border transaction costs than domestic ones.[974] The author argues that the high transaction costs for cross-border securities deals are likely to cause equity home bias by putting a premium on foreign securities. The author also argues that this negative trend is likely to serve as a constraint on the efficacy of the legal, regulatory and institutional framework in increasing cross-

[968] See, section 7.0 of chapter 7 of the thesis.
[969] See, section 7.1 of chapter 7 of the thesis.
[970] See, section 7.2 of chapter 7 of the thesis.
[971] See, subsection 7.2.1 of chapter 7 of the thesis.
[972] See, subsection 7.2.2 of chapter 7 of the thesis.
[973] See, subsection 7.2.3 of chapter 7 of the thesis.
[974] See, subsection 7.2.4 of chapter 7 of the thesis.

border trade in securities in the region. The fifth subsection gives empirical evidence on the operational status of key DSEs in the COMESA Region.[975] The evidence provided shows that most DSEs in the region operate as mutuals. The author argues that the operation of key DSEs as mutuals is likely to lower their performance. The author also argues that the resulting poor performance of these exchanges is likely to compromise their ability to attract FPI. The sixth subsection supplies empirical evidence on the poor institutional enforcement capacity of the Zambian SEC.[976] The author argues that the poor institutional enforcement capacity of the Zambian SEC is likely to serve as a constraint on the efficacy of the legal and regulatory framework in promoting cross-border trade in securities in the region. Subsection six also examines the functional independence of the Zambian Capital Markets Tribunal (ZCMT). It is noted that the ZCMT lacks judicial independence. The author argues that the lack of judicial independence on the part of the ZCMT is likely to compromise the quality of the decisions of the Tribunal.

The third section draws together the arguments and conclusions which have been made in other sections of the chapter, and makes the conclusion of the chapter.[977]

The following section introduces empirical evidence on constraints which affect the efficacy of the legal, regulatory and institutional framework in increasing cross-border trade in securities in the COMESA Region.

[975] See, subsection 7.2.5 of chapter 7 of the thesis
[976] See, subsection 7.2.6 of chapter 7 of the thesis
[977] See, section 7.3 of chapter 7 of the thesis

7.2. CONSTRAINTS AFFECTING THE EFFICACY OF THE LEGAL, REGULATORY AND INSTITUTIONAL FRAMEWORK.

The preceding section has given an outline of the chapter. In this section, we provide empirical evidence on constraints which affect the efficacy of the legal, regulatory and institutional framework in increasing cross-border trade in securities in the COMESA Region. Thus, in the following subsection, we supply empirical evidence on the competence of LuSE intermediaries to handle cross-border securities deals.

7.2.1. CONSTRAINTS RELATING TO COMPETENCE OF INTERMEDIARIES TO HANDLE CROSS-BORDER SECURITIES DEALS.

In Chapters 2 and 3, it was noted that listing, buying and selling of securities can only be conducted on a legally-constituted securities exchange.[978] It was also noted in the said chapters that such transactions could only be effected through licensed financial intermediaries.[979] Therefore, the central premise of this subsection is that the competence or incompetence of licensed intermediaries has a bearing on the issuer's or investor's decision to list or trade on a particular stock exchange. The following segment defines 'dealing' as a way of defining the parameters of competence to which the evidence relates.

Defining 'Dealing' in Securities.

'Dealing' is defined in section 2 of the Zambian Securities Act 2016 as acquiring, disposing of, subscribing for or charging or pledging securities. It also means underwriting securities, or an invitation or offer for the acquisition, disposal of, subscription for or charging or pledging, or

[978] See, Zambian Securities Act 2016, ss 79(1)(2), 80(1)(2).
[979] See, Zambian Securities Act 2016, ss 77(1)(20, 78, 79(1)(2).

indeed underwriting of securities.[980] Therefore, dealing in securities may be defined as undertaking any activity/ies enumerated above. Thus, in this section, 'intermediary competence' means 'the capacity, experience and skill' of LuSE intermediaries to undertake any activity/ies stated above. The following segment gives and discusses evidence on the competence of LuSE intermediary to handle domestic and foreign deals.

Empirical evidence on Intermediary Competence.

Thirty (30) respondents who usually invest in securities on the LuSE were asked, on a scale of 'zero to ten', whether they thought LuSE intermediaries were competent to handle domestic and cross-border securities deals. On the said scale, 'not competent scored '0'. 'Quite competent' scored '5' while 'competent' scored '10'.

Seven (7) respondents indicated that LuSE intermediaries were not competent to handle domestic deals.[981] Twenty-three (23) respondents indicated that LuSE intermediaries were quite competent.[982] Twenty (20) respondents indicated that LuSE intermediaries were not competent to handle the complexities of cross-border dealing.[983] Eight (8) respondents said LuSE intermediaries were quite competent to handle cross-border securities deals.[984] Two (2) respondents thought they were competent to do so.[985] Twenty (20) respondents, one way or the other, indicated the need for special training and capacity building on the part of LuSE intermediaries.[986] Similarly, all the seven (7) LuSE intermediaries indicated the need for special training and capacity building.[987]

[980] Zambian Securities Act 2016, s 2 (Definition of 'dealing').
[981] See, Table 17 below for a tabular representation of the results.
[982] *ibid*
[983] *ibid*
[984] *ibid*
[985] *ibid*
[986] *ibid*
[987] The new legal framework has introduced new institutional features and commercial practices in the domestic and cross-border securities landscape: See, chapters 2, 3 and 4 of the thesis.

Table 17: Intermediary Competence to handle securities deals		
Domestic Securities Deals		
Response	**Respondents**	**Sample Size**
Not competent	7	30
Quite competent	23	30
Competent		
Total	**30**	**30**
Cross-border Securities Deals		
Not competent	20	30
Quite competent	8	30
Competent	2	30
Total	**30**	**30**

The capacity and competence of brokers and dealers to facilitate listing and trading make securities and the listing exchange attractive to issuers and investors.[988] Consequently, the author argues that the low capacity and competence of LuSE intermediaries to handle cross-border deals is likely to

[988] K.A. El-Wassal, 'The Development of Stock Markets: In Search of a Theory' (2013) 3(3) International Journal of Economics and Financial Issues 606-624, 618 (hereinafter 'El-Wassal (2013)').

make LuSE-listed securities unattractive to foreign investors. The author also argues that the low capacity and competence of LuSE intermediaries is also likely to make LuSE unattractive to foreign issuers as a listing or cross-listing venue.[989] Such constraints are likely to discourage both issuer and investor participation.[990] As a possible way of enhancing the attractiveness of LuSE and listed securities, proposals are made for special intermediary training. It is also proposed that SEC embarks on capacity-building programs for LuSE intermediaries. This proposal is rationalized by the position that while incentives for listed issuers tend to increase investor subscription, regulatory incentives that enhance investor confidence in intermediaries encourage investment and trading in securities.[991] Further, the intermediary sector development that could come from implementing the proposed measures is likely to accelerate development of the LuSE.[992]

The following subsection gives empirical evidence on institutional presence in cross-border trade in securities in the COMESA Region.

7.2.2. CONSTRAINTS RELATING TO LIMITED INSTITUTIONAL PARTICIPATION IN CROSS-BORDER TRADE IN SECURITIES.

The preceding subsection has examined the competence of LuSE intermediaries to handle securities deals. It was noted that LuSE intermediaries have low competence with regard to cross-border securities deals. The subsection demonstrated that the low competence of LuSE intermediaries is likely to make LuSE and listed securities unattractive to foreign issuers and investors. In this subsection, we introduce empirical evidence on institutional presence in cross-

[989] *ibid*
[990] *ibid*
[991] *ibid*
[992] C.A. Yartey, Financial Development, the Structure of Capital Markets and the Global Digital Divide' (2008) 20(2) Information Economics and Policy 208-227.

border trade in securities in the COMESA Region. We also discuss the effect of institutional participation on the growth of cross-border trade and stock market development. The central premise of this subsection is that institutional investors have more financial capacity than individual and retail investors to purchase huge quantities of securities. Empirical evidence shows a significant relationship between institutional investor ownership and firm performance.[993] The author argues that the better performance of listed issuers, which would come from institutional investment, is likely to enhance their credit ratings, and make their listed securities more attractive to the general investing community. The author argues further that such a positive development is likely to increase cross-border trade in securities.

The following subsection introduces empirical evidence on institutional presence in cross-border trade in the region.

7.2.2.1. Limited Institutional Participation in Cross-border Trade in Securities.

This subsection introduces empirical evidence on institutional investor presence in cross-border trade in securities in the COMESA Region. This puts the legal arguments which we have made in this thesis in proper socio-economic context.

A study conducted by Liquid Africa in 2003 investigated capital-raising-trends in Africa.[994] This study also examined the causes of low cross-border portfolio flows in Sub-Saharan Africa.[995] One

[993] A stock return of ninety-five (95%) per cent confidence: Moghadam AG, Reihanzadeh L, Gharjagh M, Ahmadi F, Foroghi M and Akbari Z, 'The Effect of Institutional Investor Ownership On Stock Returns' (2014) 6(5) Interdisciplinary Journal of Contemporary Research in Business 118-127.

[994] United Nations Development Programme, *African Stock Markets Handbook* (2003) at 17 <http://emerging-africa.com/files/UNDPafricanstockmarkets.pdf> accessed 12 July 2017.

[995] *ibid*

of the main findings of the study was that most of the capital was raised from domestic institutions and retail investors. International emerging market and retail investors were absent.[996] Outside the SADC region, cross-border institutional portfolio flow was virtually nil.[997] These negative trends were attributed to the relative absence of foreign institutions in cross-border equity trading, exchange controls and country pension fund regulation.[998]

Institutions investors create real demand for listed securities by purchasing huge quantities of securities.[999] Thus, the author argues that unless institutional investors increase their participation in cross-border trade in securities, cross-border trade in securities in the region is likely to remain low.

The following subsection provides empirical evidence on institutional participation on the LuSE.

7.2.2.2. Limited Participation of Financial Institutions on the LuSE.

This subsection gives empirical evidence on institutional presence on the LuSE. The effect of institutional participation on the capacity of LuSE to develop into a competitive securities exchange in the region is also examined.

There is not as much institutional presence on the LuSE as is necessary for the growth of liquidity.[1000] High institutional presence on the LuSE is likely to enhance the depth and breadth of the LuSE and stimulate growth of liquidity. Institutional investors are also likely to serve as a

[996] *ibid*
[997] *ibid*
[998] *ibid*
[999] El- Wassal (2013) 615-616, *op.cit*
[1000] H. Marone, 'Small African Stock Markets-The Case of Lusaka Stock Exchange' (2003) International Monetary Fund Working Paper, IMF, 03/6, January. http://www3.uah.es/iaes/publicaciones/DT_01_05.pdf accessed 11 August 2018

steady source of demand for listed securities.[1001] Even more importantly, institutional investors are crucial to the survival and success of a FSM like LuSE by doing the following:[1002]

i) Institutional investors enhance market competition and act as a balancing influence in bank-dominated financial systems. They act as an alternative savings mechanism for individual investors;

ii) Institutional investors also help to address the problem of information asymmetry between company management and individual investors as they impose discipline on company management through transactions in company stocks;

iii) Institutional investors may encourage issuance of securities thereby increasing liquidity of the market;

iv) Institutional investors provide a wide range of investors who differ in their risk preferences and expectations. This results in rapid price discovery from trading. It also reduces vulnerability to shocks that would otherwise destabilize the market; and

v) Institutional investors also support the emergence of market makers, thereby improving market liquidity.

7.2.2.2.1. Limited Participation of Banks on the LuSE.

This subsection supplies empirical evidence on bank participation on the LuSE. All the nine (9) respondent banks indicated they did not invest in listed securities on the LuSE.[1003] They indicated that they preferred to invest on deeper and more liquid markets, generally. Two (2) respondent

[1001] In Chapter 2 of the thesis, proposals were made for lifting quantitative restrictions on cross-border investment of pension assets as a possible of increasing demand for listed securities in international securities markets.
[1002] S Iorgova, L.L Ong, 'The Capital Markets of Emerging Europe: Institutions, Instruments and Investors' (2008) IMF Working Paper 08/103, International Monetary Fund https://imf.org/external/pubs/ft/wp/2008/wp08103.pdf accessed 7 December 2018, in El-Wassal (2013), 615-616.
[1003] See, Table 18 below for a tabular representation of the results.

banks mentioned the Johannesburg Stock Exchange (JSE) and the London Stock Exchange (LSE) as their preferred destinations.[1004]

Table 18: Institutional Participation on the LuSE and in Cross-border Trade.

Nature of institution	Respondents	Market		Cross-border Trade	Sample Size
		LuSE	Foreign		
Bank	9	X	✓ (9)	X	9
Insurance Company	7	X	✓ (7)	X	7
Pension Scheme	10	X	✓ (2)	X	10

Constraints relating to Bank Liquidity Ratios and Capital Adequacy requirements.

In Zambia, there is a statutory restriction on equity investment by banks. Thus, except with [prior] written approval of the Bank of Zambia, on such terms and conditions as the Bank may prescribe for that purpose, a bank or financial institution is not permitted to, either directly or indirectly, invest in equities of any business undertaking.[1005] However, a bank or financial institution may accept equities in any business undertaking as security for payment of a debt or liability of another

[1004] *ibid*
[1005] Zambian Banking and Financial Services Act 2017, s 84(1).

entity to a bank or financial institution.[1006] For certain regulatory reasons, permission of the Bank of Zambia may be granted or declined. The Bank of Zambia may also grant conditional permission. For example, the Bank of Zambia may direct the applicant bank or financial institution to hold on to the acquired securities position for a certain period of time for capital adequacy reasons. The Bank of Zambia may also direct the applicant bank or financial institution to dispose of only a portion of their securities position. Such regulatory requirements appeal to un-listed equity as opposed to listed equity—which identifies with the 'buy-and-sell' culture. The author argues here that the uncertainty of the Bank of Zambia's permission—a condition precedent to investment in listed securities—and the buy-and-hold culture by banks are likely to discourage listed-securities investment by banks. Besides the requirement of prior permission of the Bank of Zambia before equity investment is made, there is a quantitative restriction on investment by banks. Thus, not more than fifteen per cent (15%) of all equity interest in an entity may be acquired by a bank or financial institution.[1007] The author here argues that quantitative restrictions on equity investment by banks are likely to reduce the presence of banks in securities markets. As a possible way of increasing bank presence in domestic and foreign stock markets, it is proposed that banks or financial institutions which meet the minimum capital requirement, the capital adequacy requirement and the capital conservation buffer requirement be allowed to decide where, when and how much to invest. The author argues that qualitative regulation of securities investment by banks through the prudent-person rule as proposed above, is likely to increase bank presence in securities markets, and increase cross-border trade in securities in the region.

[1006] *ibid*
[1007] Zambian Banking and Financial Services Act 2017, s 84(2).

7.2.2.2.1.1. Lack of Lending by Financial Institutions for Securities Purchase.

In line with an earlier study by Mwenda,[1008] all the respondent banks indicated that they did not provide equity (securities) investment finance.

7.2.2.2.2. Limited Participation of Insurance Companies on the LuSE.

The preceding subsection examined bank participation on the LuSE. It was noted that bank participation on the LuSE is very low. In this subsection, we introduce empirical evidence on insurance participation on the LuSE. All the seven (7) respondent insurance companies indicated that they did not participate on the LuSE.[1009] They clearly indicated that they preferred European capital markets to LuSE.[1010]

The finding of this study is that ownership seems to influence the choice of the market for equity financing and securities investment. Shareholders tend have more faith in securities markets established in their home countries or close to home.

7.2.2.2.3. Limited Participation of Pension Funds on the LuSE.

The subsection appearing immediately above has examined insurance company participation on the LuSE. It was noted that the presence of insurance companies on the LuSE is very low. In this subsection, we provide empirical evidence on the presence of pension funds on the LuSE. Pension funds were virtually absent on the LuSE. Although empirical evidence indicates that pension funds could accelerate the development of the LuSE,[1011] all the ten (10) respondent pension funds

[1008] Mwenda, PhD Thesis (2001), *op cit*
[1009] See, Table 18 above for a tabular representation of the results.
[1010] *ibid*
[1011] N Musawa and C Mwaanga, 'Impact of Pension Funds' Investment on Capital Markets—The Case of the Lusaka Securities Exchange' (2017) 7(10) American Journal of Industrial and Business Management 1120-1127.

indicated that they regarded investment in securities listed on the LuSE as risky.[1012] They opted for capital project investment.[1013] The two respondent public pension funds indicated that poor remittance of pension contributions by employers was one of the major constraints on general investment by pension funds. Earlier empirical evidence suggests a lack of equity investment mentality in public pension funds as one of the notable constraints on pension fund participation on the LuSE.[1014] Similarly, in Kenya, the Pension Fund Consortium intends to pool USD 50 million for investment in infrastructure, an indication that securities investment is not a priority.[1015] Thus, the lack of securities investment mentality on the part of investment managers of regional pension funds and the poor remittance of pension contributions do not provide the necessary incentives for the growth pension fund presence in securities markets in the region. As a possible way of increasing the participation of pension funds in securities markets in the region, we have proposed in Chapter 2 that pension funds be educated on the importance of investing surplus money in listed securities.[1016]

[1012] See, Table 18 above for a tabular representation of the results.
[1013] A good example of this sort of mentality is the multi-million wacha real estate project that the Zambian National Pension Scheme Authority (NAPSA) embarked on early 2017.
[1014] "The Zambian National Pension Scheme Authority (NAPSA) which is a mandatory pension scheme is reported to have had well-over USD 200 Million that needed investing in equities. However, only less than 2 per centum of these funds were actually invested in equities": Zambia-Invest, interview with Phillip K. Chitalu, Secretary and Chief Executive of the Zambian Securities and Exchange Commission, Lusaka, 15 April 2015.

[1015] Nyiraini Muchira, 'East Africa Targets Pension Funds to Spur Capital Markets (2019 *The East African* 1
[1016] The measure has been proposed there as a possible way of overcoming such a negative trend. Such practice would be in line with the new legal framework which allows pension funds to invest between 5% and 70% of their net assets in listed securities: See, section 2.6 of Chapter 2 of the thesis. It is also likely to accelerate growth of the LuSE.

7.2.2.2.4. Limited Participation of Pension Funds in Cross-border Trade in Securities.

Seven (7) out of the nine (9) respondent pension funds indicated that they did not invest in foreign securities market within the COMESA Region.[1017] Two (2) of the respondent pension fund indicated that they invested on the JSE.[1018]

Observation:

It is observed that the findings of this study are in line with the findings of earlier studies by Mwenda[1019], Marone[1020], Africa Liquid[1021] and the Africa Development Bank[1022].[1023] These studies found, as this study does, that institutional participation on the LuSE and other securities markets in the region is very low. It is submitted that low institutional presence in foreign markets has contributed to the poor state of cross-border trade in securities in the COMESA Region.

The following subsection gives empirical evidence on the level of investor financial education and literacy in Zambia.

7.2.3. CONSTRAINTS RELATING TO LIMITED PARTICIPATION OF THE ZAMBIAN PUBLIC (INDIVIDUALS) ON THE LuSE AND IN CROSS-BORDER TRADE.

The preceding subsection has examined the participation of pension funds on the LuSE and in foreign securities markets. It was noted that the presence of pension funds on the LuSE and in

[1017] See, Table 18 above for a tabular representation of the results. Of this number, two (2) were public pension funds while seven (7) were private ones. The seven (7) respondent private pension funds indicated Europe as their preferred destination.
[1018] *ibid*
[1019] Mwenda, PhD Thesis (2001), *op cit*
[1020] Marone (2003), *op cit*
[1021] United Nations Development Programme (2003), *op cit*
[1022] Africa Development Bank (2010), *op cit*
[1023] Studies on institutional participation on the LuSE and other securities markets in Eastern and Southern Africa.

foreign securities markets is low. The subsection demonstrated that the participation of pension funds could promote success of the LuSE, and increase cross-border trade in securities in the region. In this subsection, we give empirical evidence on investor financial education and literacy in Zambia. We also examine the effect of investor financial education and literacy on securities market participation.

The Limits of Corporate Personality and the Role of Natural Persons in Corporate Investment and Trading.

In the economy of each and every jurisdiction in the COMESA Region, human economic players (natural persons) out-number juristic ones. Also, the establishment of trading vehicles such as companies, cooperative societies and associations depends on the financial knowledge of natural persons. Further, it is the financial knowledge of human investment and fund managers which determines the scope of the activities of corporate issuers and investors in securities markets. Therefore, although bodies corporate are considered as separate legal entities—existing separately from the incorporators and shareholders,[1024] they can only manifest their wishes through the mind and conscience of natural persons.[1025] Thus, the author argues that increased participation of financially-educated natural persons in securities markets is likely to increase supply and demand for listed securities. The author also argues that investor financial education, cross-border

[1024] Watson S., 'The Corporate Legal Person' (2018) Journal of Corporate Law Studies 1-36; Kraakman J. et al (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) at 6-10.
[1025] See, Canfield G.F., 'The Scope and Limits of the Corporate Entity Theory' (1917) 17(2) Colum. L. Rev. 128-143.

securities advertisement,[1026] and cross-border cross-listing are likely to increase cross-border trade in securities in the region.[1027]

Constraints relating to Limited Financial Education of the Investing Public.

Random interviews were conducted with five hundred (500) individuals in Lusaka, Central, Copper-belt and North Western provinces of Zambia.[1028] Three hundred and fifteen (315) were responsive. The respondents were asked if they knew a stock exchange existed in Zambia, and what kind of financial products could be purchased on the stock exchange. Bar Chart 1 below indicates that two hundred and one (201) respondents did not know a stock exchange existed in Zambia. Bar Chart 5 indicates that two hundred and sixteen (216) of the three hundred and fifteen (315) indicated that they did not know what sort of financial products could be bought on a stock exchange. From the group of the two hundred and one (201) respondents who indicated they did not know a stock exchange existed in Zambia, 118 were female (83 were male). Bar Chart 2 indicates that from the 118 female respondents, 64, were aged 20-39 years (54 were aged 40-65). Bar Chart 3 shows that from the 83 males who had no knowledge of the LuSE or its business, 45 were aged 25-47 years (38 were aged 48-69 years). Bar Chart 1 indicates that one hundred and fourteen (114) respondents knew a stock exchange existed in Zambia. Bar Chart 4 indicates that from this group of respondents, 70 were male aged 23-41 years (44 were female aged 21-39). Also,

[1026] In Chapter 2 of the thesis, proposals have made for the introduction of an international passport to multi-jurisdictional securities advertisement as a possible way of increasing international demand for securities listed or cross-listed on DSEs and the RSE. In Chapter 3 of the thesis, proposals have been made for the introduction of an international passport to region-wide cross-border cross-listing as way of increasing cross-listings in the region.

[1027] The LuSE manager was asked through a questionnaire which category, between natural persons (individuals) and legal persons (corporate and institutional investors), was responsible for higher trading volumes in any trading year passed. The response was…corporate investors**.** When asked whether or not foreign individual investors constituted the larger component of foreign participation that has been recorded in the recent past, the Listing and Trading Manager for the LuSE stated that juristic and institutional investors accounted for the larger share of foreign participation on the LuSE.

[1028] 200 respondents were selected from Lusaka Province; 150 respondents were selected from Copper-belt Province; 75 respondents were selected from Central Province; 75 respondents were selected from North Western Province.

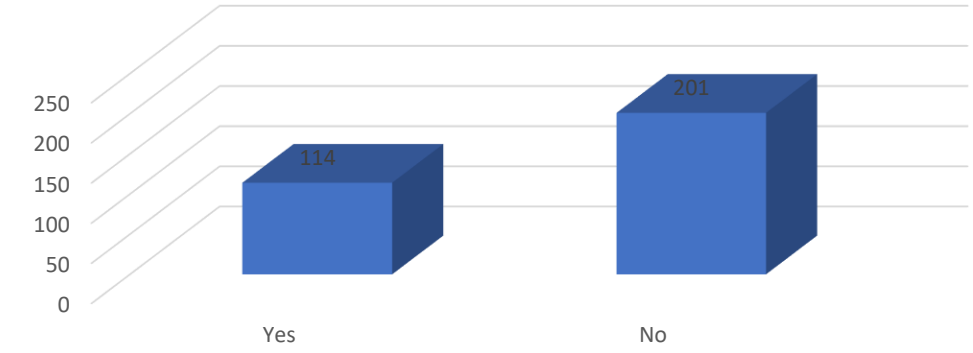
from the said group, fifteen (15) said that they did not know what sort of financial products could be purchased on a stock exchange. From this group, 9 were female aged 25-42 years while 6 were male aged 26-47 years. Ninety-nine (99) respondents from the 114 respondents who knew a stock exchange existed in Zambia indicated that 'shares' could be bought on the stock exchange.[1029] From the ninety nine (99) who said shares could be purchased from a stock exchange, sixty one (61) were male aged 45-67 years while thirty eight (38) were female aged 39-71 years. From the 114 respondents who knew a stock exchange existed in Zambia, twelve (12) indicated that 'bonds and stock' could also be bought on a stock exchange.

The ninety-nine (99) respondents who stated they knew a stock exchange existed in Zambia and the kind of financial products that could be bought on a stock exchange were also asked if they had ever bought securities on the LuSE or any other exchange within the region. Bar Chart 6 indicates that eighty-six (86) respondents had not purchased shares on the LuSE. Bar Chart 6 also shows that thirteen (13) respondents had bought securities on the LuSE. Bar Chart 7 shows that from the thirteen (13) respondents who said they had purchased securities on the LuSE, eleven (11) had not bought any securities across international borders on any stock exchange within the COMESA region. From this group, 7 were male aged 45-63 years while 4 were female aged 43-69 years. Bar Chart 7 also shows that from the thirteen (13) respondents who had bought securities on the LuSE, only two (2) had purchased securities in foreign securities markets in the region. The said respondents were male aged 53 and 72 years, respectively. From the eighty six (86) respondents who stated they knew the LuSE existed and the kind of financial assets that could be traded on it, but had not bought any securities on the exchange, fifty eight (58) respondents, in one

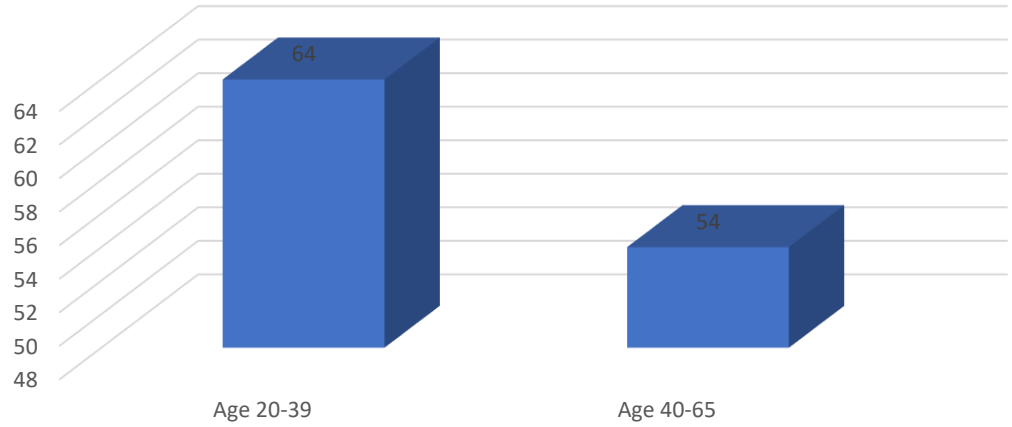
[1029] Five (5) were unresponsive.

way or the other, indicated delayed payment of pensions as the main reason for not investing. Twenty eight (28) respondents said lack of financial knowledge was the reason for not investing.

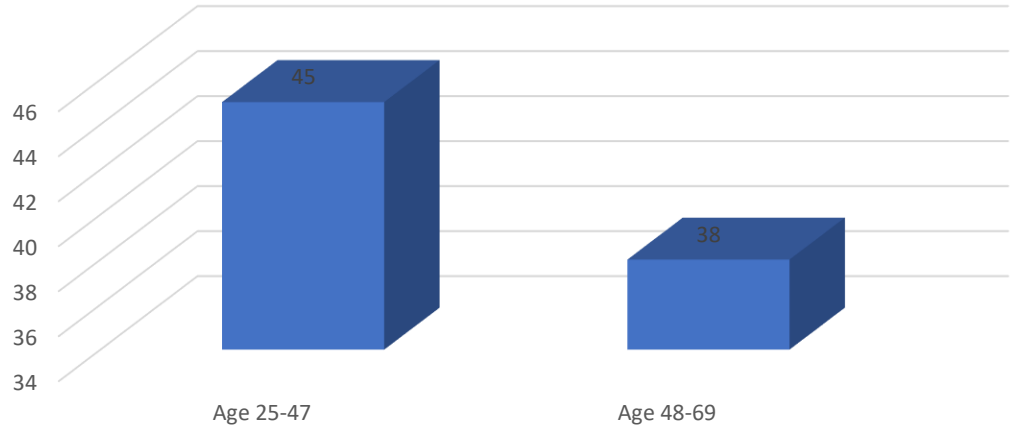
Bar Chart 1: Those who know about the existence of stock exchange in Zambia



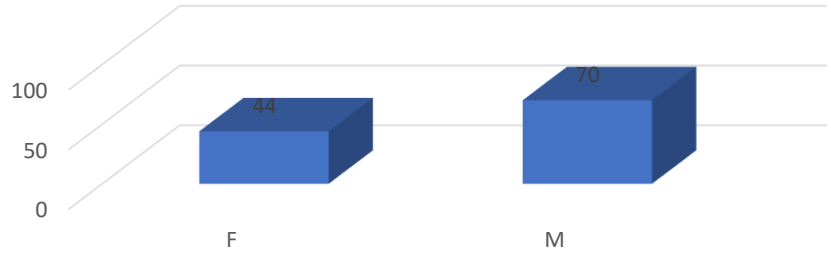
Bar Chart 2: Age range for Females who did not know the existence of stock exchange



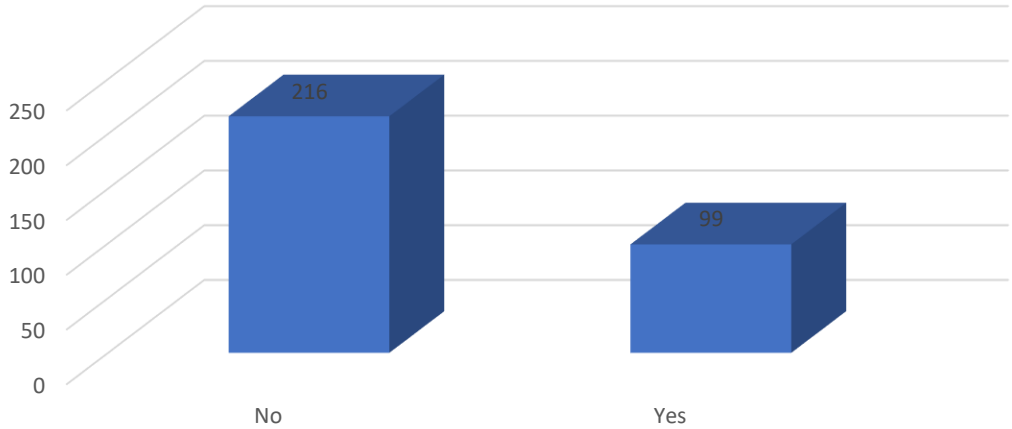
Bar Chart 3: Age range for Males who did not know the existence of stock exchange



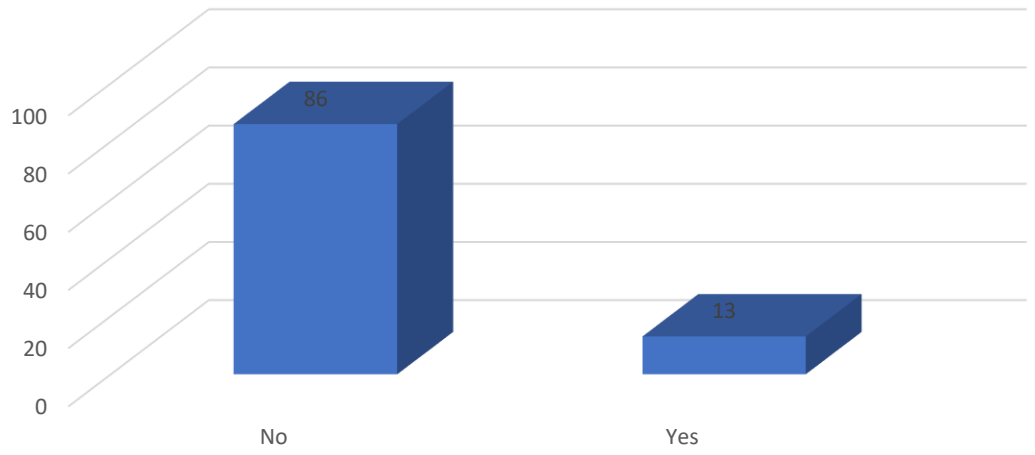
Bar Chart 4: The sex of those who new the existence of a stock exchange in Zambia



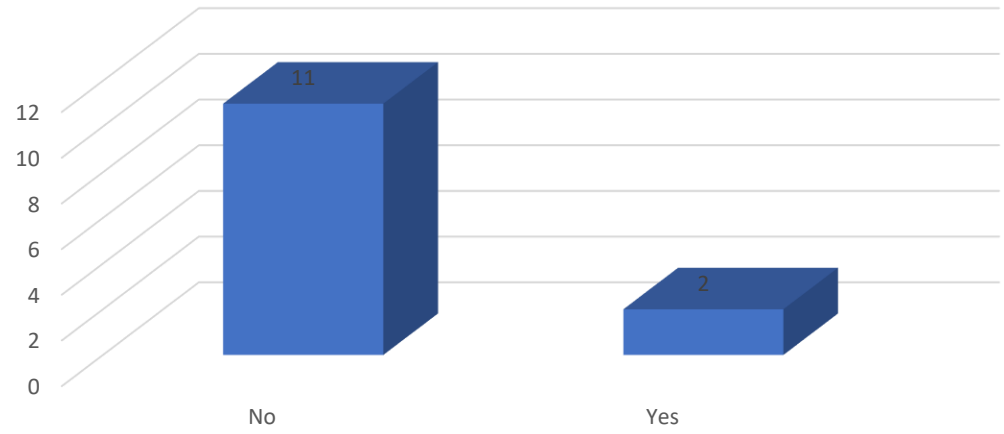
Bar Chart 5: The number of those who did not know what sort of financial products could be purchased from the stock exchange



Bar Chart 6: Those who had ever bought securities on LuSE



Bar Chart 7: Those who bought securities across international boarders



Subject to limitations that are inherent in the small sample size, the general conclusion that has been drawn from the analysis of the data is that, most potential investors do not have enough knowledge on the existence of the LuSE. The researcher also concludes that most individual investors do not have enough knowledge on the nature of business and financial products that could be purchased on a stock exchange. It is generally observed that potential female investors are less knowledgeable than their male counterparts about the existence of the LuSE and its

business, and general investment knowledge.[1030] It is also observed that potential investors who are aged 20-47 years are less financially educated than those who are aged 40-69 years.[1031] It is further observed that even within sex categories, the younger adults are less financially educated than older adults. In the female category, respondents who were aged 20-39 years were less financially educated than those who were aged 40-65 years.[1032] Similarly, in the male category, respondents who were aged 25-47 years were less financially educated than those who were aged 48-69 years.[1033]

The Population of Zambia and Financial Inclusion/Exclusion.

As at 14th September, 2020, the population of Zambia was estimated at 18, 383, 955 people.[1034] The population of Zambia is equivalent to 0.24 per cent (0.24%) of the total world population.[1035] The median age in Zambia is 17.6 years.[1036] From the said population, 78 per cent (78%) are aged 16-45 years.[1037] Sixty per cent (60%) of the Zambia's population are aged 16-35 years.[1038] Sixty two (62%) of the population of Zambia are financially excluded.[1039] Thus, only forty eight per cent (48% of the population is financially included.[1040] From the excluded population, fifty two per cent (52%) are female while forty eight per cent (48%) are male.[1041]

[1030] See, Bar Chart 4 above.
[1031] See, Bar Charts 2 and 3 above.
[1032] *ibid*
[1033] *ibid*
[1034] The United Nations, 'Zambia Demographics 2020: Population, Age, Sex and other trends' (2020).
[1035] *ibid*
[1036] *ibid*
[1037] Chileshe C., 'A Review of Financial Inclusion in Zambia' (2020).
[1038] *ibid*
[1039] *ibid.* See also, FinScope Zambia Survey 2015.
[1040] *ibid*
[1041] *ibid.* According to a World Bank Report, 63 per cent (63%) of the female population are excluded while only fifty seven percent (57%) of the male population is excluded: The World Bank, 'Zambia: Enhancing Financial Capability' (2017), (World Bank Financial Capability Report 2017).

Some proposals for the acceleration of financial education and inclusion.

As a possible way of increasing investor participation, it is proposed that SECs within the COMESA Region embark on financial education of the general public. Such efforts should not be confined to the investing public.[1042] Particularly in Zambia where non-participation was partly attributed to low income and irregular payment of pensions, emphasis should be placed on prompt payment of pensions and long-term saving for investment. Also, particular attention should be paid to financial education and inclusion of women and young adults. Further, financial education programs should be incorporated in the curriculum of secondary schools, colleges and university so that young people embrace the culture of saving and investment from an early age. The proposals for policy reform which we have made above are in line with the financial education strategy of the Government of the Republic of Zambia.[1043] The Zambian Government aims to accelerate financial education by targeting the following groups:[1044]

i) Children;

ii) Youths;

iii) Adults;

iv) All age groups; and

v) Small and Medium scale Enterprises (SMEs);

The Ministry of General Education and the Curriculum Development Centre have collaborated in incorporating financial education in the curriculum for primary and secondary schools (from

[1042] The Zambian SEC has statutory mandate to "provide, promote or otherwise support financial education, awareness, and confidence with regard to financial products, institutions and services: Zambian Securities Act 2016, s 9(2)(r).

[1043] Government of the Republic of Zambia, Ministry of Finance, 'The National Strategy on Financial Education in Zambia 2019-2024, (NSFE II).

[1044] *ibid*

grades 1 to 12). The author argues that such a policy is likely to enhance financial education of the Zambian population and accelerate financial inclusion. It is argued further that meaningful financial inclusion and education are likely to promote issuers and investor participation in financial markets. The author also argues that sound financial education of SMEs is likely to promote the formation of collective investment schemes (CISs), and accelerate the development of the LuSE Alternative Investment Market.[1045] However, one of the major constraints on effective implementation of the NSFE II is erratic funding.[1046] It is also observed that although the NSFE II targets the children and youths, it does not have a deliberate focus on financial inclusion of girls and women. A deliberate policy on women is important because, as empirical evidence indicates, girls and women outnumber boys and men in Zambia. Also, girls and women are more excluded than boys and men. It is therefore strongly recommended that the Zambian Government increases funding to NSFE II. It is also strongly recommended that deliberate focus on the inclusion of girls and women be introduced in the NSFE II.

General Observation:

The findings which have been discussed above support the proposals which we have made in Chapter 2 for the promotion of investor financial education as a possible way of increasing real demand for listed securities. Indeed, it is sound investor financial education which creates real demand for listed securities.[1047] Sound investor financial education is also likely to complement

[1045] For the role of alternative investment markets in accelerating stock market development see, Samamba Lennox Trivedi, 'Promoting Success of African Securities Markets through the Alternative Investment Markets' (2020) International Political Economy: Investment & Finance eJournal; DOI: 10.2139/ssrn.3497846; Corpus ID: 219372665.
[1046] *ibid*
[1047] El-Wassal (2013), 619, *op.cit*

positive regulatory enforcement by deterring securities market misconduct, and instil market confidence.[1048]

Empirical Evidence on the relationship between Financial Literacy and Investor Stock Market Participation.

An empirical study by Rooij, Lusardi and Alessie investigates the relationship between financial literacy and investor participation in stock markets.[1049] Among other findings, the study posts evidence of an independent effect of financial literacy on stock market participation.[1050] This study shows that those who have low financial literacy are significantly less likely to invest in stocks.[1051] Empirical evidence also shows that poor financial education leads to poor investment culture and illiquidity of stock markets, and vice versa.[1052]

7.2.3.1. GRAPHIC REPRESENTATION OF THE RELATIONSHIP BETWEEN INVESTOR AWARENESS AND STOCK MARKET PARTICIPATION.

Below is a graphical representation of the relationship between investor awareness and stock market participation using the Capital Asset Pricing Model (the 'CAPM').

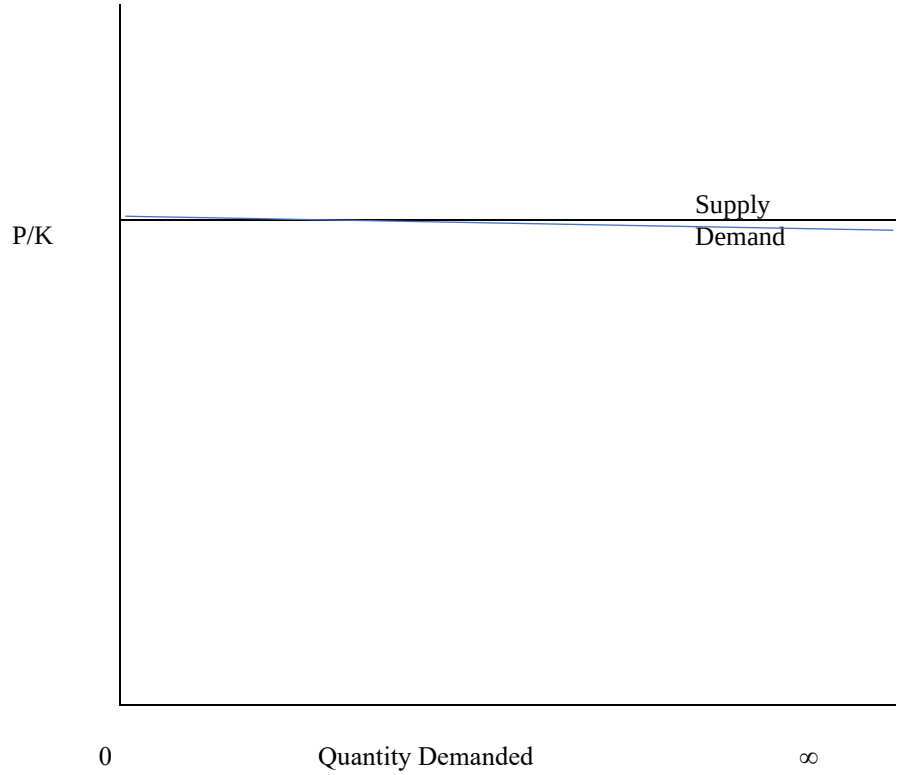
[1048] Hogarth MJ, 'Financial Education and Economic Development' (2006) <www.oecd.org/finance/financial-education/37742200.pdf > accessed 12 October 2017.

[1049]Maarten van Rooij, Annamaria Lusardi and Rob Alessie, 'Financial Literacy and Stock Market Participation' (2007), National Bureau of Economic Research Working Paper No. 13565 <http://www.nber.org/papers/w13565 > accessed 29 March 2018.

[1050] *ibid*
[1051] *ibid*
[1052] Igor Gvozdanovic and Justice S. Baning-Osafo, 'Challenges of Frontier Stock Markets with Low Liquidity: a Case Study of Ghana Stock Exchange' (2016) International Journal of Economics and Management Science

Graph 7: Graphical representation of the relationship between Investor Awareness and Stock Market Participation.

The Capital Asset Pricing Model



KEY:
P=Initial Price/Value of Securities
K=Initial level of knowledge of stock markets, issuers and securities
∞=infinity

According to the CAPM, at the price/value P, investors value securities equally. As indicated by the horizontal supply curve, any price above P leads to infinite selling. Any price below P, leads to infinite demand. In interpreting the graphical representation of the relationship between investor awareness of financial assets and stock market participation, we make the following assumptions:[1053]

[1053] All of these assumptions are actually proposals for legislative and policy reform which have been made in various chapters of this thesis as possible ways of enhancing the effectiveness of the legal, regulatory and institutional framework for cross-border trade and investment in securities in the COMESA Region.

i) Investors are aware of a wide menu of securities;[1054]

ii) Investors have savings for investment in securities;

iii) Investors are not risk-averse, or are risk-seeking;

iv) Issuers and distributors of securities maintain a constant supply of securities to securities exchanges;

v) There are no non-tariff barriers—such as exchange controls—to cross-border trade in securities; and

vi) There is an effective legal, regulatory and institutional framework for cross-border disposition of securities.

With these assumptions, at the level of knowledge K,[1055] investor value the securities equally. Also, at this level of awareness, investors consume the same units of securities. Any level of knowledge above K, leads to infinite consumption of more units of securities. Similarly, any level of knowledge below K leads to infinite consumption of lesser units of securities. This view is rationalized by the position that, unlike real assets/goods, securities are not subject to the law of diminishing marginal utility.[1056] Therefore, consumption of some units of securities would not make additional units any less desirable.[1057] Thus, the author argues here that investors who value

[1054] Investors purchase only securities they know about. Even in the absence of monetary transaction costs, portfolio choices depend on the particular asset menu known to each investor: Merton Robert C., 'a simple Model of Capital Market Equilibrium with incomplete information' (1987) 42 Journal of Finance 483-510. Thus, investor education, securities advertisement (cross-border securities advertisement), investor social networks and effective continuous disclosure play a critical role in ensuring investor awareness of stock markets, and issuers and their securities. Also, a wide menu of securities is necessary for product diversification of the stock exchange. Product diversification of the stock market is critical to the efficacy of the performance of the stock exchange to attract foreign investors for international portfolio diversification: See, chapter 2 of the thesis.

[1055] Level of awareness of existence of stock markets, and issuers and their securities.

[1056] Nicholas L. Georgakopoulos, 'Frauds, Markets, and Fraud-on-the-Market: The Tortured Transition of Justifiable Reliance from Deceit to Securities Fraud' (1995) 49 U. Miami L. Rev. 671, at 679.

[1057] *ibid*

the securities more than their market price on account of better knowledge, are likely to gain by buying more securities. This argument is rationalized by the position that the law of diminishing returns will not ensure that additional units of securities are worth less than the market price.[1058] It is therefore submitted that, the implementation of proposals which we have made for investor education is likely to increase consumption of listed-securities in the COMESA Region.[1059]

The following subsection provides empirical evidence on the average cost of cross-border and domestic securities deals.

7.2.4. CONSTRAINTS RELATING TO HIGH TRANSACTION COSTS FOR CROSS-BORDER SECURITIES DEALS.

The preceding subsection has examined constraints relating to poor financial education among potential investors in Zambia. It was noted that there is poor financial education among potential investors in Zambia. The subsection demonstrated that quality financial education of the Zambian public is likely to promote domestic and cross-border investor participation. In this subsection, we give empirical evidence on the average cost of cross-border securities deals.[1060] The potential effect of the cost of cross-border securities deals on investor participation is also examined in this subsection. The central premise of this section is that the high transaction costs for cross-border

[1058] In the real goods market, buyers who value the goods more than their market price will not gain by buying more units of those goods because the law of diminishing returns will ensure that the additional units are worth less than the market price: *ibid*

[1059] See, chapter 2 of the thesis for this proposal. Empirical evidence shows that informed (financially-educated) investors and potential investors lead to active secondary markets and enhance performance of stock markets: Godfrey A., Abbot A.O. and Charles S., 'Determinants of Performance of Stock Exchanges in East Africa' (2018) 7(3) Journal of Finance and Investment Analysis 1

[1060] The cost of cross-border securities deals is examined in comparison to that of purely domestic securities deals.

securities deals raise the price of foreign securities above the price of domestic ones.[1061] Such costs put a premium on foreign securities.[1062] The author argues that the premium on foreign securities is likely to create equity home bias.[1063] The author also argues that the resulting equity home bias is likely to hinder the growth of cross-border trade in securities in the COMESA Region.

All the thirty (30) respondents who usually participate in domestic and cross-border securities dealing were asked as follows:

> [W]hat are some of the factors constraining your participation in cross-border securities trading?

All of the respondents, in one way or the other, indicated that, among other constraints, the high cost of cross-border securities deals was one of the notable constraints on cross-border trading. As a possible way of overcoming this constraint, proposals are made for the implementation of the reforms which we have proposed in Chapter 5 for the reduction of transaction costs for cross-border securities deals.

The following subsection gives empirical evidence on the operational status of most stock exchanges in the region.

[1061] Pownall G., Vulcheva . and Wang X., 'The Role of Transaction Costs vs. Information Costs in Explaining the Equity Home Bias Puzzle: Empirical Evidence from Euronext' (2011) SSRN Electronic Journal, DOI: 10.2139/ssrn.1865349; Samamba Lennox Trivedi, 'Enhancing Regulation of International Securities Markets in Eastern and Southern Africa through Harmonization of Regulatory Rules' (2018)4(4) Afr. L. J. 1 (hereinafter 'Samamba Lennox Trivedi VI')

[1062] *ibid*

[1063] As a fall-back, investors will settle for cheaper domestic near-substitutes. This preference for domestic near-substitutes in essence causes equity home bias: Ardalan K., 'Equity Home Bias: A Review Essay' (2018) 33(3) Journal of Economic Surveys 1.

7.2.5. CONSTRAINTS RELATING TO THE MUTUAL STATUS OF MOST STOCK EXCHANGES IN THE COMESA REGION.

The subsection appearing immediately above has examined constraints relating to high transaction costs for cross-border securities deals. It was noted that transaction costs for cross-border securities deals are higher than the costs of domestic ones. The subsection demonstrated that the high transaction costs for cross-border securities serve as constraint on growth of cross-border trade in securities. In this subsection, we introduce empirical evidence on the operational status of some key stock exchanges in the region. The possible effect of the operational status of a stock exchange on its performance and ability to attract FPI is also examined.[1064]

Empirical Evidence on the Relationship between the Operational Status of a Stock Exchange and Performance, and Capacity to Attract Foreign Portfolio Investment.

Although the LuSE has been demutualized,[1065] empirical evidence shows that most of the key stock exchanges in the COMESA Region operate as mutuals. Empirical evidence also shows a positive link between the operational status of a stock exchange and its performance. In particular, empirical evidence shows that demutualized exchanges perform better than mutuals.[1066] Empirical evidence further links the performance of a securities exchange to its capacity to attract FPI.[1067]

[1064] This will serve to put in proper socio-economic context, the legal arguments made in the thesis.
[1065] Demutualization is the separation of the ownership of a stock exchange from the trading rights of the brokers. In effect, a demutualized stock exchange is a for-profit entity. Mutualisation is the combination of ownership of a stock exchange and the trading rights of the brokers. Thus, a mutual assumes a club-like structure whereby the owners of the exchange (the brokers) also enjoy trading rights on the exchange. A mutual is a not-for-profit entity: A Morsy and K Rwegasira, 'An Empirical Investigation of the Demutualization Impact on Market Performance of Stock Exchanges' (2010) 1(40) International Research Journal of Finance and Economics 38-58
[1066] R Aggarwal and S Dahiya, 'Demutualization and Public Offerings of the Financial Exchange' (2005) 18 Journal of Applied Corporate Finance 96-106; I Otchere and K Abou-Zeid, 'Stock Exchange Demutualization, Self-listing and Performance: The Case of the Australian Stock Exchange' (2007) 32 Journal of Banking and Finance 512-525
[1067] MA Haider, MA Khan, S Saddique and SH Hashmi, 'The Impact of Stock Market Performance on Foreign Portfolio Investment in China' (2017) 7(2) International Journal of Economics and Financial Issues 460-464

Empirical evidence is provided in Chapter 3 to the effect that COMESA FSMs receive only a tiny fraction of the FPI flows to the Subs-Saharan region.[1068] The author argues here that demutualization of stock exchanges in the region is likely to enhance their capacity to attract FPI. As a possible way of enhancing the capacity of COMESA stock exchanges to attract FPI, proposals are made for their demutualization.

The following segment gives empirical evidence on the operational status of some key stock exchanges in the COMESA Region.

Operational Status of some Key Stock Exchanges in Eastern and Southern Africa.

This segment introduces empirical evidence on the operation status of some key stock exchanges in the region.

Table 12: Organizational/Operational Status of key eastern and southern African securities exchanges.

No.	Name of Exchange	Country	Status	Date of Demutualization	
1	Botswana Stock Exchange	Botswana	DE	Aug 2018	
2	Egypt Stock Exchange	Egypt	NDE		
3	Johannesburg Stock Exchange	South Africa	DE	2005	
4	Lusaka Stock Exchange	Zambian	DE	Dec 2017	
5	Madagascar Stock Exchange	Madagascar	NDE		

[1068] FPI flows to the region in form of listed equity.

6	Malawian Stock Exchange	Malawi	NDE		
7	Maseru Securities Market	Lesotho	NDE		
8	Mauritian Stock Exchange	Mauritius	DE	2000	
9	Mozambique Stock Exchange[1069]	Mozambique	NDE		
10	Nairobi Stock Exchange	Kenya	DE	2014	
11	Namibian Stock Exchange	Namibia	NDE		
12	Swaziland Stock Exchange	Iswatini	NDE		
13	Trop-X Seychelles	Seychelles	DE	2013	
14	Uganda Stock Exchange	Uganda	DE	May 2018	
15	Zimbabwe Stock Exchange	Zimbabwe	NDE		

Source: Collected from questionnaires distributed to Listing Managers for selected Stock Exchanges in the region.

As indicated in Table 15 above, most of the key exchanges in the COMESA Region operate as mutuals. On the strength of empirical evidence provided above, the author argues that the mutuals status of most key securities exchanges in the region is likely hinder FPI inflows and stall growth of cross-border trade in securities in the region. The author submits that mutual status of key exchanges in the region serves as constraint on the efficacy of the legal, regulatory and institutional framework in promoting cross-border trade in securities in the region.

[1069] Mozambique Stock Exchange is a public institution under the guardianship of the Minister of Finance: https://african-exchanges.org/en/membership/members/mozambique-stock-exchange accessed 26 February 2019.

Demutualization of the Lusaka Securities Exchange: Some Views from the Primary and Secondary Regulators.

According to the Lusaka Stock Market primary regulator's standpoint—the LuSE, the underlying objective of undertaking demutualization of the LuSE was to 'enhance LuSE's ability to attract listings and allow for the creation of diverse investment products.'[1070] And, as earlier noted in chapter 2, diverse investment products are likely to enhance the efficacy of the low correlation of COMESA FSMs with emerging and developed markets in facilitating IPD. From the secondary regulator's point of view—Zambian SEC (the overseer), demutualization of the LuSE will increase listings and capitalization of the LuSE.[1071]

7.2.6. CONSTRAINTS RELATING TO THE POOR INSTITUTIONAL CAPACITY OF THE ZAMBIAN SECURITIES AND EXCHANGE COMMISSION.

The preceding subsection has examined constraints relating to the mutual status of most securities exchanges in the COMESA Region. It was noted that most securities exchanges in the region operate as mutuals. The subsection demonstrated that FPI flows to the region could be promoted through demutualization of securities exchanges. In this subsection, we examine constraints relating to the low institutional enforcement capacity of the Zambian SEC. The central premise of this subsection is that the quality of institutional enforcement capacity of the competent regulatory

[1070] Albert Lungu, 'LuSE Set to Boost Listings' *Zambia Daily Mail* (Lusaka, 6 December 2017) 15. Mr Lungu is the current Chairperson of LuSE.

[1071] See Appendices for interview with Evans David Wala Chabala, former Secretary and Chief Executive of the Zambian Securities and Exchange Commission (Lusaka, Zambia, 24 October, 2014). Dr Chabala was asked what he thought was the reason for reluctance by companies to list on the LuSE, and low investor participation.

authority partly determines the efficacy of the legal, regulatory and institutional framework in regulating securities markets.[1072]

The quality of the governing regulatory framework and its effective enforcement by the regulatory authority are critical to the development of robust securities markets.[1073] Some scholars have argued that effective enforcement may be discerned from an analysis of first-generation measures[1074] and second-generation measures[1075].[1076] Yet other scholars argue that the quality of regulatory enforcement may be measured by the quality of the legal and regulatory framework and the number of cases that are prosecuted, and the time-frame of their resolution.[1077] What may be gathered from the academic discourse above is that the quality of regulatory enforcement may be discerned from:

a) the quality of regulatory rules;
b) the institutional enforcement capacity of the competent regulatory authority as determined by:
    i) the volume of staff (especially staff dedicated to regulatory compliance and enforcement);
    ii) competence and dedication of staff to duty;
    iii) freedom from political and public pressure on the part of staff;

[1072] Chimpango observes that an effective legal and institutional framework is key to the development of effective and efficient capital markets in Africa: Boniface Chimpango, *'the Development of African Capital Markets: a Legal and Institutional Approach* (Taylor and Francis Group 2017).
[1073] John C. Coffee, 'Law and the Market: The Impact of Enforcement' (2007) University of Pennsylvania Law Review 229 (hereinafter, 'Coffee (2007)').
[1074] Also referred to as 'enforcement inputs' such as volumes of staff and financial resources of the regulator.
[1075] Also referred to as 'enforcement outputs' such as actions brought and penalties imposed.
[1076] Coffee (2007), *op.cit*
[1077] Raphael La Porta, Florenzo L. Solanes and Andrei Shleifer, 'what works in Securities Laws? (2006) Journal of Finance 1. The number of cases prosecuted and the time-framework of their resolution identifies with the institutional enforcement capacity of the regulatory authority.

iv) security of tenure of staff especially those responsible for compliance and enforcement;

v) financial capacity of the regulatory authority; and

vi) the number of enforcement actions commenced and the time-frame of their conclusion, and penalties imposed on offenders.

The quality of the legal and regulatory framework has been examined in preceding chapters of the thesis. In this subsection, we examine only the institutional enforcement capacity of the Zambian SEC using the six determinants highlighted above.

7.2.6.1. Constraints relating to the poor staffing of the Directorate of Compliance and Enforcement of the Zambian SEC.

The Directorate of Compliance and Enforcement of the Zambian SEC is headed by a director. The director is assisted by two support staff.[1078] The author argues that this is too small a number of staff to effectively grapple with the demands and dynamics of a pre-emerging securities market like the LuSE.[1079] Given the far more pressing demands and dynamics of cross-border securities markets, such a small number of staff leaves so much to be desired. As a possible way of enhancing the institutional enforcement capacity of the Zambian SEC, it is proposed that more staff be recruited to SEC's Directorate of compliance and enforcement.[1080]

[1078] Data gathered through a questionnaire administered to the Zambian SEC.

[1079] The operational infrastructure for the Capital Markets Tribunal has been secured. After the recruitment of the Registrar for the Tribunal, what remains a challenge is the appointment of members of the Tribunal. The Tribunal is yet to hear market misconduct cases which have been investigated by the SEC once presented: Phone interview with Mwewa Chola, the inaugural Registrar of the Zambian Capital Markets Tribunal (Lusaka, Zambia, 24 November, 2019). Mr Chola was asked whether or not the Capital Markets Tribunal has already heard and determined any market misconduct case as presented by the Zambian SEC.

[1080] Some staff could be dedicated to investigation, some to prosecution, some enforcement of penalties, and some to market participant education.

7.2.6.2. Constraints relating to a restriction on the exercise of delegation powers.

Under the Zambian Securities Act 2016, the Board for the SEC can only delegate its statutory functions to either the CEO or any of its committees.[1081] This implies that except the CEO or a committee, officers in the Directorate of Compliance and Enforcement cannot perform the enforcement functions of the SEC. As the United States Supreme Court observes, 'every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department or person'.[1082] As a possible way of enhancing the efficacy of the institutional framework, it is proposed that the Board be empowered to delegate its enforcement functions to the Directorate of Compliance and Enforcement as well.

7.2.6.3. Competence of Staff and dedication to Enforcement.

Competence of regulatory staff and dedication to enforcement may be measured by the academic qualifications, experience of staff, and their overall enforcement performance. Since the Zambian SEC is yet to present and prosecute a market misconduct case before the Capital Markets Tribunal, it is difficult to measure its dedication to enforcement. The enforcement record that SEC is going to establish following commencement of sittings by the Capital Markets Tribunal is going to speak for itself in this respect. Suffice to say that the Director of Compliance and Enforcement holds a Bachelor of Laws Degree, Master of Corporate and Commercial Law, and is an Advocate of the High Court for Zambia. She also boasts extensive experience in litigation and adjudication. The two support-staff hold Bachelor of Laws Degrees, are advocates of the High Court of Zambia and have a rich background of investigation and enforcement. One would say, the Zambian SEC is rich

[1081] Zambian Securities Act 2016, s 14(1).
[1082] *State, ex rel, Crawford v. Hastings* 10 Wis 525, at 531, (United States Supreme Court), in Clifton Williams, 'Expressio Unius Est Exclusio Alterius' (1931) XV(IV) The Marquette Law Review 191-192

on this score. However, given the internationalization of securities markets in the COMESA Region, the introduction of the Capital Markets Tribunal, a Central Securities Agency, Securities Transfer Agents, et cetera, it is generally recommended that besides the need for bigger numbers, the recruitment of other legal practitioners and social scientists be undertaken so as to adequately staff the respective sections of the Directorate of enforcement and compliance.

7.2.6.4. Constraints relating to political pressure on the Enforcement Process.

Empirical evidence gathered shows that one of the major drawbacks on effective enforcement by the Zambian SEC is political interference with the enforcement process.[1083] External pressures of this kind make it increasingly difficult for the regulatory authority to freely investigate politically-connected market participants. The lack of autonomy from political pressure by regulatory authorities for the Zambian financial services industry—that is, the Bank of Zambia, the Pensions and Insurance Authority, and the SEC—compromises the quality of enforcement in financial markets.[1084]

7.2.6.5. Constraints relating to insecurity of Tenure of Office of the Chief Executive Officer for the Zambian SEC.

The Chief Executive Officer of the Zambian SEC (CEO of SEC) is appointed by the Board of the SEC.[1085] The CEO of SEC holds office on such terms and conditions as may be stipulated in the

[1083] See, Appendices for a questionnaire administered to the SEC.
[1084] For similar observations in earlier works, see, Kenneth Kaoma Mwenda, 'Regulatory and Institutional Framework for Unified Financial Services Supervision in the United Kingdom and Zambia' (2005) 13 Mich. St. J. Int'l. L. 347.
[1085] Zambian Securities Act 2016, ss 8(1)(b), 16(1). The Board of the SEC consists of seven persons drawn from various institutions, namely the Bank of Zambia, Law Association of Zambia, Zambia Institute of Chartered Accounts, Zambia Chamber of Commerce and Industry, the Ministry of Finance, the Ministry of Justice, and the Pensions and Insurance Authority: Zambian Securities Act 2016, s 8(2).

contract of employment.[1086] The CEO of the SEC is an ex-officio member of the Board of the SEC.[1087] Despite the dual role of the CEO, the legal relationship that exists between the SEC and the CEO is that of pure master and servant. And as such, the CEO for the SEC may be dismissed for any reason or none at all subject to an award for damages in case of wrongful dismissal.[1088] This view is rationalized by the position that, unlike constitutional office holders like the Director of Public Prosecutions who can only be dismissed on specific grounds,[1089] no specific statutory grounds exist for the dismissal of the CEO of the SEC. The author argues that the lack of security of tenure of office is likely to make the bearer of the office of CEO of the SEC susceptible to political pressure.[1090] Thus, the lack of autonomy from political pressure is likely to compromise the regulatory role of the CEO in enforcing regulatory rules on behalf of the Board of the SEC.

As a possible way of ensuring security of tenure of the CEO of the SEC, it is proposed as follows:[1091]

a) The CEO should be appointed by the Minister of Finance subject to ratification by the National Assembly;

[1086] Zambian Securities Act 2016, s 8(2); Zimbabwean Securities Act 2004, s 14, Mauritian Securities Act 2005.
[1087] Zambian Securities Act 2016, s 8(3).
[1088] See, *Contract Haulage Limited v Mumbuwa Kamayoyo* [1982] Z.R. 13, Supreme Court of Zambia. See, Subsection 7.1.7 for further clarification and discussion.
[1089] In Zambia, the Director of Public Prosecutions may only be dismissed on specific grounds, namely infirmity of body or mind or both that makes the office bearer unable to perform the functions of the office, incompetence, gross misconduct, and bankruptcy: Zambian Constitution 1995/1996 as amended by Act No. 1 of 2016, Arts 182(3), 143. Further the Director of Public Prosecutions is not subject to direction of any person or authority in the exercise of the functions of their office as the CEO of the SEC is to the Board: Zambian Constitution 1995/1996 as amended by Act No. 1 of 2016, Art 180(7); Zambian Securities Act 2016, s 16(2)(a)(b)(c).
[1090] Although it is the function of the Board to perform the functions of the SEC, traditionally and in practice, it is the CEO, and sometimes the Directorate of Enforcement that actually does most of the work through delegation of the functions of the Board to the CEO: See, Zambian Securities Act 2016, ss 8(1)(a), 14(1), 16(1)(2)(a)(b)(c), 209.
[1091] See also, Kenneth Kaoma Mwenda, 'Regulatory and Institutional Framework for Unified Financial Services Supervision in the United Kingdom and Zambia' (2005) 13 Mich. St. J. Int'l. L. 347, at 361.

b) The CEO of SEC should be removed from office using the same procedure and grounds for removing the Director of Public Prosecutions from office, as discussed above; and

c) The CEO and support staff of the SEC should not be subject to the direction or control of any person or body in the exercise of the enforcement functions of their office.

7.2.6.6. Constraints relating to the lack of Immunity by the CEO of SEC and Support Staff from Liability for acts and omissions committed during Enforcement Exercises.

In Zambia, SEC investigators/inspectors have power to enter premises of any licensed person, a capital markets operator or listed entity where there is a reasonable and probable cause to believe that a particular entity has violated the regulatory rules.[1092] During the inspection or investigation, as the case may be, the inspectors/investigators have power to request certain documents or inspect any property whether the documents or property is in the possession of the entity which is under investigation or another person.[1093] The inspector/investigators have also power to access bank accounts and financial records of the suspect entity.[1094] However, in Zambia, immunity from personal liability for acts and omissions committed in good faith in the performance of enforcement functions is restricted to members of the Board and the Committees of the Board. To this very effect, section 7 of the First Schedule to the Securities Act 2016 provides as follows:

> **7.** An action or proceeding **shall not lie or be instituted against a member of the Board or a committee of the Board** for, or in respect of, any act or thing done or omitted to be done in good faith in the exercise of or performance, or purported exercise or performance of any of the powers, functions or duties conferred under this Act.

[1092] Zambian Securities Act 2016, ss 160(1)(2), 163.
[1093] *ibid*
[1094] *ibid*

However, since the CEO of the Zambian SEC is an ex-officio member of the Board for the SEC,[1095] it could be argued that as an ex-officio member of the Board, the CEO is by that very fact also immune from suits for acts or omissions committed in the performance of their enforcement functions. However, the fact that the CEO is not a voting member of the Board, and as such, does not perform enforcement functions by reason of the ex-officio membership but by delegation of such functions by the Board, seems to inspire the view that the immunity from suits is the preserve of voting members of the Board. This view is rationalized by the position that if the CEO was entitled to the same privileges as the voting members of the Board, s/he would not need to have enforcement functions of the Board delegated to her/him. The enforcement functions would be delegated to another person than the CEO. This view is also supported by the *expressio unius est exclusio alterius* rule of statutory interpretation which is literally Anglicized as "expression of one thing is the exclusion of the other".[1096] Whereas the members of the committees of the SEC have been expressly mentioned in section 7 of the First Schedule to the Securities Act 2016, the CEO and other enforcement officers of the SEC have not been mentioned as such. It is therefore, submitted that the CEO of the SEC and other staff are not immune from suits for acts or omission committed in the performance of their delegated enforcement functions.[1097] The author argues that the risk of personal liability is likely to have a chilling effect on the performance of enforcement functions of the SEC by SEC officers.[1098] The author also argues that poor enforcement of regulatory rules by the SEC is likely to hinder the development of competitive securities markets

[1095] Zambian Securities Act 2016, s 16(4).
[1096] See generally, Clifton Williams, 'Expressio Unius Est Exclusio Alterius' (1931) XV(IV) The Marquette Law Review 191.
[1097] See, Zambian Securities Act 2016, Parts II, XIV. Key jurisdictions which have not granted such immunity/indemnity to enforcement officers of the SEC include South Africa, Mauritius, Zimbabwe and Tanzania.
[1098] See similar remarks by Mwenda: Kenneth Kaoma Mwenda, 'Regulatory and Institutional Framework for Unified Financial Services Supervision in the United Kingdom and Zambia' (2005) 13 Mich. St. J. Int'l. L. 347, at 360.

in the COMESA Region.[1099] As a possible solution to this shortcoming in the regulatory and institutional framework, it is proposed that the CEO of SEC and support staff be clothed with immunity from suits for acts or omissions committed in the course of their business. Towards this proposed legal order, the Kenyan Capital Markets Act 2000 grants immunity to the Capital Markets Authority and its staff as proposed above.[1100]

7.2.6.7. Constraints relating to the poor financial Capacity of the Zambian SEC.

The Zambian SEC finances its operations from the following general sources, namely:[1101]

a) such sums as may be payable to the Commission from moneys appropriated by Parliament for use by the SEC;
b) such sums as may be payable to the Commission under the Securities Act 2016 or any other written law;
c) such sums as may be levied by the Commission in terms of licence fees, transactions and any other levies imposed; and
d) such sums of money or such other assets as may accrue to or vest in the Commission whether in the course of the exercise of its functions or otherwise.

The following are some of the specific sources of operational funds for the Zambian SEC, namely:

i) license fees from licensed persons and capital market operators;[1102]
ii) license fees from securities exchanges and clearing and settlement agencies;[1103]

[1099] It should be recalled here that the Zambian SEC has power to act in support of regulatory enforcement efforts of other regulators in the region: Zambian Securities Act 2016, s 165(2)(3).
[1100] See, Kenyan Capital Markets Act 2000, s 10(1)(2).
[1101] Zambian Securities Act 2016, First Schedule, s 8(1)(a)—(d).
[1102] See, Zambian Securities Act 2016, Part V. LuSE has 27 licensed dealers, 100 licensed dealer's representatives, 7 investment advisors, and 18 investment advisor's representatives.
[1103] See, Zambian Securities Act 2016, Part III. There is currently only one clearing and settlement agency for securities exchanges in Zambia. There are three securities exchanges, namely the traditional securities exchange—the LuSE, the

iii) application fees for credit rating agencies;[1104]

iv) authorisation fees for collective investment schemes and venture capital funds;[1105]

v) application fees for managers, trustees and custodian of the property of collective investment funds and venture capital funds;[1106]

vi) disgorged gains from insider dealing;[1107]

vii) administrative penalties imposed on securities market offenders;[1108] and

viii) registration fees for registrable securities and documents.[1109]

Empirical evidence gathered on the funding of the Zambian SEC shows that for the years 2016 and 2017, about fifty per centum of the total annual income/revenue of the SEC came from remitted portions of Parliamentary appropriations.[1110] Empirical evidence gathered through questionnaires and emails shows that the Central Government does not remit the said parliamentary appropriations on time. Further, as Table 16 indicates below, for the period under consideration, SEC hardly had enough revenue/income to finance its domestic enforcement operations.[1111] The author argues that since the Zambian SEC cannot adequately fund domestic

Bonds and Derivatives Exchange—BaDEx, and the commodity exchange—Pan African Commodity Exchange (PanEx).

[1104] Zambian Securities Act 2016, Part VI.

[1105] Zambian Securities Act 2016, Part X.

[1106] Zambian Securities Act 2016, ss 121, 125

[1107] Zambian Securities Act 2016, 141(1)(2)

[1108] Zambian Securities Act 2016, ss 141(3), 218(1)(2)(b)(c)

[1109] See, for instance, Zambian Securities Act, ss 75, 81

[1110] SEC's Annual Reports 2016 and 2017. For the years 2016 and 2017, SEC-generated revenue in licenses and related fees averaged 42 per centum of SEC's total annual revenue/income. Registration of securities and trade commissions averaged 8 per centum of SEC's total annual revenue for the period under consideration: SEC's Annual Reports, 2016 and 2017.

[1111] As has been observed above, the Capital Markets Tribunal is set to start hearing and determining securities market misconduct cases once the members of the Tribunal are appointed—a process that has taken longer than a couple of years to be completed. It is no doubt that disgorgement and administrative fines—revenue sources for the SEC, if properly administered, could make for a meaningful source of enforcement funds for the SEC. However, since both these regulatory tools are tied to decisions or orders of the Capital Markets Tribunal, the SEC will have to wait until the Tribunal starts to sit: For the reliance of disgorgement and administrative fines on decisions, judgments, or orders of the Tribunal for their administration, see, Zambian Securities Act 2016, ss 141(3), 218(2)(b)(c).

securities market enforcement, cross-border securities market enforcement is likely to prove a challenge if not impossible. The author also argues that the lack of adequate enforcement funds is likely to hinder effective exercise of SEC's statutory power to act in support of foreign regulators. It is therefore submitted that SEC's poor enforcement capacity is likely to compromise the quality of enforcement in securities markets in the COMESA Region.[1112] As a possible way of increasing enforcement funds for the SEC and enhancing the efficacy of the regulatory and institutional framework in ensuring effective enforcement in securities markets, it is proposed as follows:

i) The Central Government should increase funding to the SEC, and ensure timely remittance of Parliamentary appropriations;
ii) A portion of administrative fines and disgorged funds should be applied to enforcement operations and capital market development; and
iii) The SEC should be expressly empowered to invest surplus assets listed securities and capital projects.

Table 13: SEC's Expenditure on Market Participant Education, Publicity and Enforcement for 2016-2017.

Year	Total Annual Revenue/Income (K)	Total Annual Expenditure on Education & Publicity (K)	Total Annual Expend. As % of Total Annual Income (K)	Total Annual Expenditure on Enforcement (K)
2016	15, 883, 223	970, 890	6.1	Nil
2017	20, 299, 377	2, 172, 708	10.7	Nil

[1112] Chanetsa observes that effective enforcement of regulatory rules is critical to the development of robust and competitive capital markets: Chanetsa K.C., *Securities and Capital Markets Regulation in South Africa* (Brill 2019)

Source: Zambian Securities and Exchange Commission Annual Reports 2016/2017

7.2.6.8. Constraints relating to the poor enforcement record of the Zambian SEC.

Empirical evidence gathered from the questionnaire which were administered to the Zambian SEC shows that the regulator has not prosecuted any case of insider dealing, market manipulation or creation of a false market for the period 2013—2019. The poor enforcement record of the Zambian SEC could be partly attributed to political interference, poor staffing, and poor financial capacity as discussed above. Such a poor enforcement record could also be linked to the low volumes of trade in securities and low liquidity on the LuSE which make it difficult for the regulator to detect insider dealing and similar forms of market misconduct.[1113] As a possible way of enhancing the enforcement capacity of the Zambian SEC, it is recommended that institutional autonomy from political pressure be ensured. It is also recommended that staffing levels and financing of the operations of the SEC be enhanced.

7.2.6.8.1. Merit relating to the availability of Appeal against decisions of the Zambian SEC.

The Zambian Capital Markets Tribunal (ZCMT) has general jurisdiction to hear and determine appeals from decisions of the SEC.[1114] Thus, where a right of appeal is expressly provided in respect of certain decisions or actions or omissions of the SEC, an aggrieved person may lodge an appeal in the Tribunal.[1115] The author argues that the available of such an appellate avenue is likely to enhance the quality of enforcement in securities markets.

[1113] Kenneth Kaoma Mwenda, 'Can Insider Trading Predicate the offence of Money Laundering? (2006) 6(2) Much. St. Uni. J. BUS. & SEC. L. 127, at 131.
[1114] Zambian Securities Act 2016, s 184(3)(b).
[1115] For some of the specific grounds of appeal from the decisions of the SEC, see, Zambian Securities Act 2016, s 191. A party who is dissatisfied with the decision of the Tribunal has the right to appeal to the Court of Appeal: Zambian Securities Act 2016, s 195(1).

7.2.6.8.2. Redefining the Enforcement Philosophy.

The enforcement theory of market regulation is predicated on the notion that effective enforcement will compel compliance, lead to efficient markets, lower agency costs and enhance market confidence.[1116] However, Hodges urges that an enforcement philosophy that uses fear of sanctions rather than an understanding of the effects of non-compliance on the market is likely to have limited success in regulating markets.[1117] Hodges further argues that enforcement must focus on the causes and effects of non-compliance as motivation for complete compliance as opposed to sanctions.[1118] Thus, Hodges proposes a new theory of regulation—the ethical or holistic theory—which consists of the following:

i. Public regulation by regulatory bodies such as the SEC or a unified regulator;
ii. Imposition of criminal sanctions;
iii. Effective internal corporate governance for market participants; and
iv. External influences of stakeholders.[1119]

To the integrated regulatory device proposed by Hodges, one might add:[1120]

i. Civil remedies for injured market participants;
ii. Administrative penalties; and
iii. An independent, functional and capable Financial Markets Tribunal.

[1116] Armour J., Hansmann H. and Kraakman R., 'Agency Problems, Legal Strategies, and Enforcement' (2009), Havard University, John Olin Centre for Law, Economics, and Business, Discussion Paper No. 644; Samamba Lennox Trivedi, *Cross-border Insider Trading Regulation: Current Legal, Regulatory and Institutional Challenges* (LAMBERT Academic Publishing) at 9, (hereinafter, 'Samamba Lennox Trivedi, BOOK IV').
[1117] Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (1st edn, Hart Publishing 2015) (hereinafter, 'Hodges (2015)')
[1118] *ibid*
[1119] *ibid*
[1120] *ibid*

Under the Hodges ethical theory of regulation, as augmented in this subsection, regulatory authorities in the region will be required to take a cooperative regulatory approach as opposed to a confrontational or iron-fisted one. In particular, regulators will be expected to:[1121]

i. Issue warnings, reprimands and lighter sanctions (where appropriate) as opposed to drastic penalties for remorseful first offenders;
ii. Enter settlements where possible;
iii. Undertake research into the causes of breaches of regulatory rules and implement remedial measures;
iv. Receive submissions from participants of the target market (and incorporate their preferences, values, culture, etc) before regulatory rules are formulated;
v. Conduct regular financial and other forms of education of market participants;
vi. Encourage market participants to formulate effective corporate governance systems, and incentivize compliance;[1122]
vii. Encourage self-regulation; and
viii. Promote the concept of voluntary disclosure.

The author argues that such an integrated regulatory approach is likely to yield regulatory rules which reflect the culture, preferences and needs of the target market. It is also argued that such an

[1121] *ibid*
[1122] Tying a good corporate governance to credit ratings and waivers of fees are such incentive. A good disclosure culture eliminates opportunities for insider trading: Fried M.J., 'Reducing the Profitability of Corporate Insider Trading through Pretrading Disclosure' (1998) 71(2) Southern California Law Review 303-392; Rider B.A.K. and Ffrench L., Regulation of Insider Trading (Oceana Publications 1980); See generally, Samamba Lennox Trivedi, *Disclosure Regulation in Emerging Markets: An International Comparative Analysis* (LAMBERT Academic Publishing 2020) (hereinafter, 'Samamba Lennox Trivedi, BOOK VI').

approach is likely to inspire compliance, reduce agency costs for participants, ensure market integrity and enhance the attractiveness of COMESA stock markets.

7.2.7. CONSTRAINTS RELATING TO LACK OF JUDICIAL INDEPENDENCE ON THE PART OF THE ZAMBIAN CAPITAL MARKETS TRIBUNAL.

The Zambian Capital Markets Tribunal (the ZCMT) is established as a superior court of record with jurisdiction to hear and determine:

i) Appeals from decisions of the Commission, or a person exercising the functions or powers of the Commission;
ii) Proceedings relating to misconduct in the securities market; and
iii) Such other matters as may be specified in, or prescribed in terms of this Act or any other written law.[1123]

Despite existing as a superior court of record, with a significant role to play in capital markets development, the members of the ZCMT are appointed by the Minister of Finance in consultation with the Judicial Service Commission.[1124] Besides, the members of the ZCMT serve on part-time basis on renewable three-year contracts of employment.[1125] Such contracts may be terminated by the Minister for any reason or none at all.[1126] Although, the Zambian Employment Code Act 2019 provides certain safeguards against wrongful termination of contracts of employment, it does not provide that a termination of employment that is made contrary to those safeguards is null and

[1123] Zambian Securities Act 2016, s 184(1)(2)(3)(a)(b)(c).
[1124] Zambian Securities Act 2016, s 185(1)(2).
[1125] Zambian Securities Act 2016, s 185(3).
[1126] Zambian Employment Code Act No. 3 of 2019, s 52(1)(2). The Zambian Employment Code Act 2019 shall hereinafter be referred to as 'the ZECA 2019').

void.[1127] All the said piece of legislation does is criminalize such acts.[1128] The author argues that in the absence of a 'null and void' stipulation, the said safeguards only serve as grounds upon which an award for damages may be based. Similarly, the ZECA 2019 does not stipulate the consequence of failure by the employer to give reasons for terminating a contract of employment. Again here, the author argues that in the absence of a 'null and void' provision, failure by the employer to give reasons for terminating a contract of employment only serves as a basis upon which an award for damages may be based. The author further argues that this essentially leaves the employer with the right to terminate a contract of employment "for any reason or none at all—a position that takes us back to *Kamayoyo*.[1129] The author argues that such conditions of service compromise the security of tenure of office of members of the ZCMT.[1130] Such insecurity of tenure is likely to erode the functional independence of the members of the ZCMT and compromise the quality of their decisions. The pillars of effective judicial independence are:[1131]

i) Knowledgeable and competent judges appointed through a clearly defined procedure (we will call this 'intellectual independence', and 'transparency');
ii) Security of tenure;
iii) Functional independence; and
iv) Financial independence.

[1127] The said Act of Parliament stipulates that an employer shall not terminate a contract of employment on the ground of (a) union membership (b) seeking certain office (c) filing a complaint against an employer (d) temporary absence from work due to leave or injury (e) discrimination on the basis of (i) colour (ii) nationality (iii) tribe (iv) place of origin (v) race (vi) language (vii) social origin (viii) gender (ix) sex (x) marital status (xi) ethnicity (xii) family responsibility (xiii) disability (xiv) status (xv) health (xvi)culture, and (xvii) economic grounds: ZECA 2019, ss 52(4), 5.
[1128] See, ZECA 2019, s 5(5).
[1129] *Contract Haulage Limited v Mumbuwa Kamayoyo* [1982] Z.R. 13, Supreme Court of Zambia. This decision holds that "an employer can terminate a contract of employment for any reason or none at all". See generally, Winnie Sithole Mwenda, *Employment Law in Zambia: Cases and Materials* (Rev. edn, University of Zambia Press 2011).
[1130] This is likely to make them susceptible to political and other forms of external pressure.
[1131] The Commonwealth, *The Commonwealth Latimer House Principles: Practitioner's Handbook* (The Commonwealth Secretariat 2017) at 28, Principle IV (Rules on Judicial Independence).

The ZCMT is constituted by the Ministry of Finance of the Republic of Zambia. Also, the Tribunal is funded by Parliamentary appropriations which are administered by the said ministry. These aspects are likely to compromise the financial and functional independence of the ZCMT. It is recommended that remittance of Parliamentary appropriations to the Tribunal be prompt so as to ensure timely conclusion of cases. The Executive and other arms of government should desist from using their sway on remittance of funds to the Tribunal as a tool for securing favorable judicial outcomes. Shetreet observes that 'judicial independence is essential to an impartial and effective judicial system and is the lifeblood of the rule of law'.[1132] Therefore, as a possible way of enhancing the judicial independence of the ZCMT, it is proposed as follows:

a) Members of the ZCMT should be appointed by the President on the recommendation of the Judicial Service Commission subject to ratification by the National Assembly just as judges of superior courts of record are appointed;[1133] and
b) Members of the ZCMT should be removed from office on the same grounds as judges of superior courts of record. The grounds for removing judges of superior courts from office are:[1134]
    i) Mental or physical disability that makes a judge incapable of performing judicial functions;
    ii) Incompetence;
    iii) Gross misconduct; or
    iv) Bankruptcy.

[1132] Shimon Shetreet (ed), *The Culture of Judicial Independence: Rule of Law and World Peace* (Lam edn, Brill-Nijhorff); Bruce Peabody and Thomas S. Wells, *The Politics of Judicial Independence: Courts, Politics and the Public* (1st edn, Johns Hopkins University Press 2011)
[1133] See, Zambian Constitution 1996 (as amended by Act No. 1 of 2016), Art 140.
[1134] Zambian Constitution 1996 (as amended by Act No. 1 of 2016), Art 143(a)(b)(c)(d).

Bewaji observes that in order to develop an effective regulatory regime for securities markets in emerging and pre-emerging markets, the functional independence of the SEC and the Investments and Securities Tribunal (the equivalent of the ZCMT) must be secured.[1135] As a possible way of promoting effective enforcement of regulatory rules in securities markets in the region, it is highly recommended that the proposals which we have made for the promotion of intellectual, financial and functional independence of the DSECs and the domestic capital markets tribunals be implemented.

7.3. CONCLUSION.

This Chapter has examined constraints which affect the efficacy of the legal, regulatory and institutional framework in increasing cross-border trade in securities in the COMESA Region. The chapter identified the following as constraints which affect the efficacy of the said framework in increasing cross-border trade in securities, namely:

i) Poor intermediary competence to handle cross-border securities deals;
ii) Poor institutional participation on the LuSE and in cross-border trade in securities in the region;
iii) Low investor financial education and financial literacy;
iv) High transaction costs for cross-border securities deals;
v) Mutual status of most key stock exchanges in the region.
vi) Poor institutional enforcement capacity of the Zambian SEC; and
vii) Lack of the judicial independence on the part of the Zambian Capital Markets Tribunal.

[1135] Wumni Bewaji, *Insider Trading in Developing Jurisdictions: Achieving an Effective Regime* (Routledge 2012) at 134-141.

As a possible way of overcoming the constraints which affect the efficacy of the said framework in increasing cross-border trade in securities, proposals were made for:

i) Special intermediary training and capacity building;
ii) The lifting of quantitative restrictions on cross-border investment of pension assets in listed securities;
iii) The education of pension funds, banks and other institutions on the importance of investing their surplus assets on stock markets;
iv) Investor financial education and literacy;
v) Harmonization of regulatory rules;
vi) Demutualization of stock exchanges in the region.
vii) The enhancement of the institutional enforcement capacity of the Competent Regulatory Authorities for securities markets in the COMESA Region; and
viii) The promotion of judicial independence of the Domestic Capital Markets Tribunals in the COMESA Region.

The following chapter examines the allocative effectiveness that could possibly come from the implementation of some of the legal, regulatory and institutional reforms which we have proposed in this study.

PART V

CHAPTER 8

ALLOCATIVE EFFECTIVENESS/EFFICIENCY OF THE PROPOSED REMEDIAL LEGAL, REGULATORY AND INSTITUTIONAL MEASURES.

8.0. INTRODUCTION.

Chapter 7 has examined constraints which affect the efficacy of the legal, regulatory and institutional framework in promoting cross-border trade in securities. It was noted that the efficacy of the said framework in promoting cross-border trade in securities in the region is constrained by a number of factors. The chapter demonstrated that the efficacy of the said framework in promoting cross-border trade in securities could be enhanced by improving factors such as intermediary competence, investor education, institutional participation in securities markets and demutualization of securities exchanges. In this chapter, we examine the possible allocative effectiveness of some of the proposed remedial legal, regulatory and institutional reforms. This chapter also explores possible methods of implementing the proposed legal and regulatory instruments. It also fleshes out some of the challenges that are faced by securities markets and investors in the COMESA region.

8.1. AN OUTLINE OF CHAPTER 8.

The preceding section has given the general introduction to the chapter. This chapter outlines the chapter. This Chapter 8 consists of six sections. The first section gives the general introduction to

the chapter.[1136] The second section outlines the chapter.[1137] The third section highlights some specific legal, regulatory, institutional and policy constraints on cross-border trade in securities in the COMESA Region.[1138] It also highlights some specific challenges that are faced by securities markets in the region. The fourth section discusses possible methods of implementing the HSC 2006 and the 'international passport' to multi-jurisdiction cross-listing and advertisement of securities.[1139] The fifth section discusses proposals for reform and their potential to enhance allocative effectiveness in the three components of a cross-border securities deal.[1140] The sixth section concludes the chapter.[1141]

8.2. CONSTRAINTS ON THE GROWTH OF CROSS-BORDER TRADE IN SECURITIES IN THE COMESA REGION.

The preceding section has given an outline of the chapter. In this section, we highlight legal, regulatory and institutional constraints on cross-border trade in securities in the COMESA Region. Also, specific challenges that are faced by DSEs in the region are fleshed out in this section.

Quite a number of constraints on growth of cross-border trade in securities in the COMESA region have been identified in the thesis. They include:

a) Lack of an effective legal, regulatory and institutional framework for cross-border disposition of securities;

[1136] See, section 8.0 of Chapter 8 of the thesis.
[1137] See, section 8.1 of Chapter 8 of the thesis.
[1138] See, section 8.2 of chapter 8 of the thesis.
[1139] See, section 8.3 of chapter 8 of the thesis.
[1140] See, section 8.4 of chapter 8 of the thesis.
[1141] See, section 8.5 of chapter 8 of the thesis.

b) Application of *lex situs* as a conflict of laws rule for determining the substantive property law in cross-border disposition of securities;
c) Non-application of the doctrine of the proper law of the contract to proprietary aspects of a cross-border securities deal;
d) Fragmented domestic payment systems in the region;
e) Heavy presence of exchange controls in the region;
f) Existence of quantitative restrictions on cross-border investment of pension assets in listed securities;
g) Non-criminalization of extra-territorial securities market misconduct; and
h) Diverse regulatory rules in the region.

Also, a number of constraints which affect the efficacy of the said framework in promoting cross-border trade in securities in the region were identified, namely:

a) Low levels of cross-border cross-listings in the region;
b) High transaction costs of cross-border securities deals;
c) Limited participation of institutional investors in regional cross-border trade in securities and on securities exchanges;
d) Low intermediary competence; and
e) Poor institutional enforcement capacity of the Zambian SEC.

The following were identified as challenges faced by securities markets in the COMESA Region, namely:

a) Small size;
b) Low capitalization;
c) Inadequate low liquidity;

d) Undeveloped bond markets;

As a possible way of overcoming the constraint highlighted above, proposals were made as follows:

1) Increase supply of securities to securities exchanges by increasing the number of listed issuers. This measure could stimulate securities market liquidity provided the following complementary measures are put in place, namely:
    a) Relaxed listing requirements for domestic and foreign SMEs which may not qualify for listing on current conditions in listing rules;[1142]
    b) Provision of better tax incentives for listed issuers than for the unlisted;
    c) Provision of attractive tax incentives to foreign issuers; and
    d) An international passport to multi-jurisdictional cross-listing, disclosure and securities advertisement.
2) Increase supply of securities by enlarging the definition of listable securities in the COMESA Region. COMESA jurisdictions should adopt a uniform definition of 'securities' for this purpose. Such a uniform definition of 'securities' should be incorporated into the regulatory framework for the RSE.
3) Increase demand for listed securities by:
    a) Educating the general public about securities markets so that they can actively participate in them by investing;
    b) Increasing domestic and cross-border securities advertisement in the region;

[1142] In Zambia, this has been achieved by establishing the LuSE Alternative Market and enacting Special Listing Rules for this market: See, LuSE Listing Rules 2012, s 21

c) Increasing the institutional investor base. This could be achieved by increasing participation of banks, pension funds, local authorities and parastatals;
d) Fostering regional integration of securities markets through cross-border cross-listings; and
e) Developing domestic bond markets in the region.
f) Enhancing issuer and investor protection in DSMs and ISMs in the region.

4) Develop a legal, regulatory and institutional framework which is based on real needs, culture, beliefs and preferences of domestic securities markets. Also, increase COMESA participation in global economic policy-making fora for the setting of international standards for securities markets;
5) Create a single regional economic cooperation body for Eastern and Southern Africa.
6) Harmonize domestic securities and property laws. These efforts could be complemented by the implementation of the HSC 2006 and the GSC 2009;
7) Integrate domestic payment systems;
8) Remove of exchange controls in the region;
9) Remove quantitative restrictions on cross-border investment of pension assets in listed securities;
10) Criminalize of extra-territorial securities market misconduct; and
11) Establish key regional institutions.

The following section discusses possible ways of implementing some of the remedial reforms which we have proposed in this thesis.

8.3. POSSIBLE METHODS OF IMPLEMENTING THE HAGUE SECURITIES CONVENTION, THE INTERNATIONAL PASSPORT PROTOCOL, ETC.

The preceding section has highlighted some constraints on cross-border trade in securities in the COMESA region. In this section, we examine possible methods of domesticating the proposed international instruments.

The proposed international instruments could be domesticated through a piece of legislation that is designed for their domestication. For example, an Act for the domestication of the international instrument(s) could be entitled "Hague Securities Convention Act". This approach simply reproduces the content of the international instrument and gives it a different label such as "Geneva Securities Convention Act". The resulting domestic Act of Parliament forms part and parcel of the domestic legal and regulatory regime. The proposed international instruments could also be domesticated by adopting these instruments as part of the domestic Securities Acts. This is achieved by expressly providing in the domestic Securities Act that a particular international instrument is an integral part of the Securities Act. Finally, in this alternative process, the international instrument is appended to the Schedule to the Securities Act. This makes the international instrument an integral part of the Act.[1143]

The following section explains how the proposed remedial legal, regulatory, institutional and policy reforms could possibly contribute to allocative effectiveness in the respective components of a cross-border securities deal.

[1143] *ibid*. The schedule to an Act of Parliament is an integral part of the Act: Zambian Interpretations and General Provisions Act, s 9.

8.4. ALLOCATIVE EFFECTIVENESS IN THE THREE COMPONENTS OF THE CROSS-BORDER SECURITIES DEAL.

The preceding section has examined possible ways of implementing the proposed international instruments. It was noted that the proposed international instruments could possibly be implemented by reproduction or scheduling. In this section, we examine the allocative effectiveness that could possibly come from the proposed remedial legal, regulatory, institutional and policy reforms.

It was noted in Chapter 4 that a cross-border securities deal consists of three basic components, namely:

a) The cross-border contractual component;
b) The cross-border proprietary component; and
c) The cross-border financial component.

It was also noted in Chapter 4 that measures which promote allocative effectiveness by reducing transaction costs should be encouraged.[1144] In this chapter, in examining allocative effectiveness of the proposed remedial measures, we make the following basic assumptions:

i) Parties to a cross-border securities transaction will act rationally and try to maximize their self-interest in the face of scarcity of resources; and
ii) Legal and regulatory rules will impose costs on cross-border securities deals or provide incentives for their fulfilment. It is further assumed that effective legal and regulatory rules, and institutions will lower transaction costs and facilitate cross-border securities deals. By

[1144] See, HR Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1-44 (hereinafter 'HR Coase (1960)').

contrast, ineffective legal and regulatory rules, and institutions will increase transaction costs and inhibit cross-border securities deals.[1145]

8.4.1. ALLOCATIVE EFFECTIVENESS IN THE THREE COMPONENTS OF THE CROSS-BORDER SECURITIES DEAL.

It should be recalled here that in section 3.7 of chapter 3, that under the new institutional economics theory, both formal legal and regulatory rules and legal infrastructure (in the sense of regulatory institution) are institutions. Transaction costs affect the optimal level of a transaction.[1146] Thus, new institutional economics theorists argue that that quality of economic exchanges could be improved by establishing institutions that reduce transaction costs.[1147] Thus, this subsection examines the allocative efficiency that could possibly come from the implementation of some of the legal, regulatory and institutional reforms which we have proposed in this study. An assumption is made that the proposed measures will be based on the recommended North's New Institutional Economics Theory of legal change and development.

In Chapter 4, it was noted that when *lex situs* is applied to modern cross-border securities systems, it raises transaction costs. It was also noted that high transaction costs for cross-border transactions

[1145] The perfect competition model is predicated on the assumption that economic exchanges will be brought about costless. However, no market is going to conform to the perfect competition ideal. Information will not be perfect, neither is it going to come at no cost. Further, there may be adverse external shocks on the transaction, and all those costs which are traditionally associated with the entire process of contracting cross-border. This view represents the second stage of the Coase Theorem. The first stage of the Coase Theorem holds that if there are no transaction costs, efficient outcomes will come about whatever legal rule of liability exists, that is, the parties will bargain to a least-cost solution: See, Sedon N.C. and Bigwood R.A. (eds), *Cheshire & Fifoot Law of Contract* (11th Australian edn, LexisNexis 2017).

[1146] Charles Nolan and Alex Trew, 'Transaction Costs and Institutions' (2011) 1-4

[1147] Ronald Coarse, 'The New Institutional Economics' (1998) 88(2) American Economic Review 72

could serve as a non-tariff barrier to cross-border trade in securities.[1148] Thus, *lex situs* may be regarded as an ineffective conflict of laws rule for ascertaining the substantive property law.[1149]

As a possible way of lowering transaction costs for cross-border securities deals, proposals were made in Chapters 4 and 5 for the harmonization of domestic securities and property laws. Proposals were also made for the adoption and implementation of the HSC 2006 in the region. It was noted in Chapter 4 that PRIMA is likely to reduce transaction costs for cross-border securities dispositions. It was also noted that PRIMA is likely to speed up the settlement of cross-border securities trades. Consequently, PRIMA is likely to stimulate growth in cross-border trade in securities in the COMESA Region. It is also likely to increase liquidity of stock markets in the region by:[1150]

a) facilitating speedy cross-border disposition of securities;
b) lowering transaction costs for cross-border securities deals; and
c) increasing the number of trades that could possibly be settled in any given trading day.

To this extent, PRIMA may be regarded as an effective conflict of laws rule for ascertaining the substantive property law.

[1148] *ibid*

[1149] In this regard twenty-seven (27) out of thirty (30) respondents who usually participate in domestic and cross-border securities trading indicated that the cost of cross-border securities deals was much higher than that of purely domestic deals. Twenty-five (25) of the group of twenty seven (27) also indicated that they found the cost of cross-border securities transaction discouraging.

[1150] On the relationship between transaction costs and stock market liquidity, see, Gerhold S. et al, 'Transaction Costs, Trading Volumes and the Liquidity Premium' (2011) Journal of Finance and Stochastics, DOI: 10.1007/s00780-013-0210-y; Burshop C., 'Transaction Costs, Liquidity and Expected Returns at the Berlin Stock Exchange, 1892-1913' (2010).

In Chapter 5, harmonization of regulatory rules was proposed as a possible way of reducing transaction costs for cross-border securities deals. Chapter 5 demonstrated that harmonization of regulatory rules could reduce regulatory gaps and costs.[1151] Harmonization also reduces the cost of capital for issuers[1152] as well as transaction costs for cross-border securities deals.[1153] Further, harmonization of regulatory rules increases the value of securities to investor and secured creditors.[1154] Against this background, harmonization of regulatory rules in the COMESA Region may be regarded as an effective regulatory measure.[1155] More importantly, harmonization has the potential of reducing friction in the regional economy.[1156] Furthermore, harmonization of regulatory rules could instil stability in the regional financial system.[1157] This is achieved by reducing legal uncertainties and opportunities for systemic shocks.[1158]

Possible methods of undertaking multi-national harmonization of regulatory rules.

Multi-national harmonization of laws may be achieved through different methods at domestic, regional or international level. The process of harmonizing laws may be accomplished by:

a) revising the domestic code as was the case with the Uniform Commercial Code in the United States of America;[1159]

b) adopting an international code like the HSC 2006;[1160]

[1151] Geiger U., 'Harmonization of Securities Disclosure Rules in the Global Markets: A Proposal' (1998) 66(5) Fordham Law Review 1786.
[1152] *ibid*; G.D. Randal et al (1996), 5-7, *op.cit*
[1153] *ibid*
[1154] *ibid*
[1155] See, HR Coase (1960), *op.cit*
[1156] G.D Randal et al (1996), 6, *op.cit*
[1157] *ibid*
[1158] *ibid*
[1159] A. Rosett,'UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven' (1997) 2 UNIF.L.REV. at 441, in Samamba Lennox Trivedi VI, 20, fn 40 <http://www.unidroit.org/english/publications/review/articles/1997-3.htm> accessed 14 August 2018
[1160] *ibid*

c) by way of an international restatement as was done with the UNIDROIT Principles of International Commercial Contracts.[1161]

d) by adopting choice of law Conventions like the Rome I Regulation (formerly Roman Convention on the Law Applicable to Contractual Obligations (1980);[1162] and

e) adopting uniform private rules like the Uniform Customs and Practices on Documentary Credits.[1163]

Further, it was noted in Chapters 2 and 3 that an international passport could reduce transaction costs for multi-jurisdiction cross-listings and advertisement of securities. It was also noted in chapter 3 that an international passport could encourage cross-border cross-listings and securities advertisement.[1164] Such a measure could also encourage multi-jurisdiction continuous disclosure.[1165] It was further noted in chapter 3 that cross-border cross-listings are likely to increase cross-border trade in securities. This view is rationalized by the position that cross-border cross-listing does not assign a new *locale* to the cross-listed securities—the *situs* of the jurisdiction in which the securities have been cross-listed.[1166] By retaining the *situs* or *locale* of the issuer, every purchase by foreign investors is essentially a cross-border purchase.[1167] Cross-border cross-listings also expose the cross-listed securities to a deeper, broader, more efficient and larger market.[1168] Thus, cross-border cross-listings reduce the cost of capital for issuers and transaction costs for investors since the former can trade in foreign assets as if they were domestic ones.[1169] Coase explains that a legal rule which reduces transaction costs or

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[1161] *ibid*
[1162] *ibid*
[1163] *ibid*
[1164] *ibid*
[1165] *ibid*; See also, Chapter 7 of the thesis for this position
[1166] Samamba Lennox Trivedi BOOK I, Vol I, *op.cit*
[1167] *ibid*
[11681168] Abdallah A. and Ioannidis C., 'Why do firms cross-list? International Evidence from U.S. Market' (2010) 50(2) The Quarterly Review of Economics and Finance 202-213; Coffee J.C., 'Racing Towards the Top?: The Impact of Cross-listings and Stock Market Competition on International Corporate Governance' (2002) 102(7) Columbia Law Review 1757-1831.
[1169] *ibid*

allocates them to a party who can minimize them the most, is efficient.[1170] Coase also observes that a legal rule which increases transaction costs or leads to sub-optimal economic exchanges is inefficient.[1171] On the strength of the Coase Theorem, the cost and allocative effectiveness of the proposed international passport make the international passport an effective regulatory device.

By Chapters 3, 4 and 5, we have prescribed the hybrid model for regulating ISMs. Thus, by combining the virtues of harmonization and mutual recognition, the legislators and policy makers in the COMESA region would be advancing cooperation while retaining competition. Such a hybrid model would also promote innovation, quality service delivery, better investor protection, and lower transaction costs and regulatory costs.[1172] Consequently, the proposed hybrid model for the regulation of ISMs in the region may be regarded as an effective model.

Allocative Effectiveness in the three Components of a Cross-border Securities deal—How Achieved?

It was noted in Chapter 4 that legal uncertainty imposes additional costs on the parties to cross-border securities deals. Additional costs consist in legal and administrative fees, and the cost of gathering information.[1173] As far as the cross-border contractual component is concerned, certainty of the applicable law is provided by the choice of law clause.[1174] It may be argued that since the

[1170] HR Coase (1960) 15-17, *opcit*. For a thorough analysis of the Coase Theorem to this effect, see, Polinsky AM, *An Introduction to Law and Economics* (2nd edn, Little, Brown and Company 1989) 8-11. For the eight basic claims of the economic analysis of law see, Kornhauster L., 'The Economic Analysis of Law' (2001) Stanford Encyclopaedia of Philosophy; Richard A. Posner, *Economic Analysis of Law* (8th Revised Edn, Aspen Publishers 2011).
[1171] *ibid*
[1172] Geiger U., 'Harmonization of Securities Disclosure Rules in the Global Markets: A Proposal' (1998) 66(5) Fordham Law Review 1786.
[1173] Samamba Lennox Trivedi IX, *op.cit*
[1174] *ibid*

applicable contract law is readily identifiable in the contractual component,[1175] total transaction costs should be reduced.[1176] On the strength of the Coase Theorem, the choice of law clause may be regarded as an effective legal device. In the proprietary component of a cross-border securities deal, such effectiveness could be achieved by the HSC PRIMA rule. By introducing party autonomy in the proprietary component of a cross-border securities deal, the PRIMA rule eliminates all the costs associated with legal uncertainty and legal risk. Thus, if the HSC were implemented in the COMESA Region, the parties to cross-border securities deals would be able know the substantive property law with reasonable certainty and predictability. Consequently, parties would readily know according to which property law perfection of the acquired interests is to be had. Parties would also know how competing security interests in the same securities will rank.[1177] That way, parties would be absolved from the trouble and cost of complying with the requirement of each and every applicable jurisdiction. Thus, on the authority of the Coase Theorem, the introduction of the HSC in the COMESA Region may be regarded as an effective measure.

It was also noted in Chapter 4 that regional integration of domestic payment systems is likely to speed up cross-border transfer of payments in the COMESA Region. It was also noted in the said chapter that speedy cross-border transfer of payments ensures effective enforcement of investor rights. It was further noted in Chapter 4 that regionally integrated domestic payment systems reduce transaction costs for cross-border payments by improving efficiencies, increasing speed

[1175] By reason of the choice of law clause: Charles R. Calleros, 'Towards Harmonization and Certainty in Choice of Laws Rules in International Contracts: Should the U.S. adopt the Equivalent of Rome I? (2011) 28(4) Wisconsin International Law Journal 639

[1176] Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commerce Contracts: Party Autonomy, International Jurisdiction, and Emerging third way' (2014) 44(3) Colum. J. Transnat'l L. 959

[1177] *ibid*

and ensuring finality of payment.[1178] Thus, on the authority of the Coase Theorem, implementation of regional integration of domestic payment systems in the region may be regarded as an effective measure.

The Roadmap for Promoting Cross-border Trade in Securities in the COMESA Region.

In Chapter 2, possible ways of increasing supply and demand for listed securities in the COMESA Region were proposed. Once these measures are implemented, there is need to implement measures that would facilitate effective cross-border disposition of securities. Once effective cross-border disposition of securities is achieved, there is need to create an enabling environment for cross-border trade in securities. Such an enabling environment could be achieved by:

a) Removing of exchange controls and other like barriers to cross-border trade in the region;
b) Removing quantitative restriction on cross-border investment of pension assets in listed securities;
c) Integrating domestic payment systems in the COMESA region;
d) Criminalizing extra-territorial securities market misconduct;
e) Harmonizing legal and regulatory rules in the region;
f) Implementing the international passport system;
g) Introducing key regional institutions; and
h) Introducing a power on the part of domestic regulators to act in support of foreign regulators and the regional regulator.

[1178] The United Nations Economic Commission for Africa et al (2010) at 268, *op cit*

It is highly recommended that policy makers and legislators in the COMESA Region implement the following proposed measures, namely:

a) measures which would increase the demand and supply of securities to securities exchange;
b) measures which would enhance allocative effectiveness in the three components of a cross-border securities deal;
c) measures which would create an enabling environment for cross-border trade in securities; and
d) measures which would enhance issuer and investor protection in DSMs and ISMs.

8.5. CONCLUSION.

This chapter has examined the possible allocative effectiveness that could possibly come from the implementation of some of the proposed remedial legal, regulatory and institutional measures. It was noted that implementation of some of the proposed measures such as an international passport, the HSC 2006, and harmonization of regulatory rules is likely to enhance the allocative effectiveness in the three components of a cross-border securities deal. It was also noted that securities markets in the region, and investors in investing in these markets, face a number of challenges. Necessary remedial measures were proposed. The following chapter gives the conclusion of the study. It also makes necessary recommendations for legislators, regulators and policy makers in the area of securities markets regulation.

CHAPTER 9

GENERAL CONCLUSIONS

9.0. INTRODUCTION.

Chapter 8 has examined the possible allocative effectiveness that could come from the implementation of some of the proposed remedial legal, regulatory and institutional measures. Chapter 8 has also explored possible methods of implementing the proposed legal and regulatory international instruments, and fleshed out some of the challenges that are faced by markets and investors in the COMESA region. In this chapter, we draw together conclusions which have been made in other chapters of the thesis, and make the conclusion of the study. We also make necessary recommendation for remedial legal, regulatory, institutional and policy reform as a possible way of improving the effectiveness of the legal, regulatory, institutional and policy framework for cross-border trade in securities in the region.

9.1. AN OUTLINE OF CHAPTER 9.

The preceding section has given the general introduction to the chapter. This section outlines the chapter. Chapter 9 of the thesis is divided into three sections. The first section gives the general introduction to the chapter.[1179] The second section outlines the chapter.[1180] The third section makes the general conclusions of the thesis.[1181] The fourth section draws together conclusions and legal

[1179] See, section 9.0 of Chapter 9 of the thesis.
[1180] See, section 9.1 of Chapter 9 of the thesis.
[1181] See, section 9.2 of chapter 9 of the thesis.

arguments which have been made elsewhere in this thesis, and makes the conclusion of the study.[1182]

The following section makes some general conclusions of the thesis.

9.2. GENERAL CONCLUSIONS.

This thesis has endeavoured to answer the question whether or not the legal, regulatory and institutional framework adopted by Zambia, for public distribution of securities, has facilitated growth of cross-border trade in securities in the COMESA region. The thesis set out to achieve this objective by giving the historical background to the enactment of the said framework. The main finding of Chapter 1 was that the enactment of the legal, regulatory and institutional framework in Zambia and many other COMESA states was driven by foreign politico-economic pressures rather than the real needs of the domestic securities markets. The other finding of Chapter 1 was that the political economy in most COMESA countries has had a bearing on the inward-focus of the said framework. The author argued that such a framework is unlikely to promote growth of cross-border trade in securities. It was also argued that the said politico-economic influence makes it difficult for legislators, regulators and policy makers to enact an effective legal, regulatory and institutional framework. As a possible way of overcoming these constraints, proposals were made for the enactment of a framework that responds to real needs of securities markets in the region. Related to the foreign politico-economic influence is the observation which was made in chapter 3 that COMESA states have little or no input in the global governance rules for securities markets. It was argued there that in order to accelerate the development of a competitive regional securities market, COMESA representation and participation in global

[1182] See, section 9.3 of Chapter 9 of the thesis.

economic policy-making fora should be increased. It was further argued that unless the culture, preferences, practices and beliefs of COMESA markets are incorporated into the international standards for securities markets, these standards are likely to have limited or no success at all in promoting the development of these markets.

In Chapter 2 of the thesis, the legal, regulatory and institutional framework was examined so as to establish whether or not it provides enough incentives for increasing supply of securities to DSEs and the RSE. With regard to DSEs, the main finding was that the said framework provides quite enough incentives for increasing supply of securities. It was noted that despite this enabling legal, regulatory and institutional framework, domestic issuers have concentrated on equity securities. With regard to the RSE, it was noted that the said framework does not provide adequate incentives for increasing supply of securities. As a possible way of increasing supply of securities to DSEs and the RSE, proposals were made for the adoption, by COMESA countries, of a uniform definition of 'securities'. It was proposed that such a definition recognises securities which are issued in other COMESA and SADC jurisdictions as 'securities' for listing or cross-listing purposes. It was further proposed that such a uniform definition of securities be adopted in the legal, regulatory and institutional framework for the proposed RSE. The author argued there that such a uniform definition of securities is likely to increase supply of securities to DSEs and the RSE. The author also argued that such a uniform definition of securities is likely to facilitate success of the proposed international passport. Related to the preceding argument is the argument made in chapters 2 and 3 that unless the word 'prospectus' is redefined as a document under which 'securities of an issuer' are publicly distributable, the wide definition of the word 'securities', and the international passport are likely to have limited success in increasing supply of securities to securities markets in the region.

Further, as a possible way of increasing demand for listed securities, it was proposed that quantitative restrictions on cross-border investment of pension assets in listed securities be lifted. In this respect also, it was proposed that cross-border securities advertisement be promoted through an international passport to multi-jurisdiction securities advertisement. Further proposals were made for the development of domestic bond markets in the region. The author argued that functional bond markets, increased institutional participation in securities markets, and cross-border securities advertisements are likely to increase demand for securities. Connected to this argument is the argument that the promotion of investor financial education is likely to increase consumption of securities in the region.

In Chapter 3, the legal, regulatory and institutional framework was examined so as to establish whether or not it provides enough incentives for regional integration of securities markets through cross-listings. The main finding was that the said framework does not provide adequate incentives for that purpose. As a possible way of increasing cross-listings in the COMESA Region, proposals were made for the introduction of an international passport. As a means of increasing issuer and investor protection in ISMs, proposals were made for the introduction of a RCF. It was proposed that the RCF serves as a complement to DCFs. And as a possible way of increasing cross-listings, further proposals were made for the introduction of a RSE. The author argued that increased cross-listing among DSEs and, between those DSEs and the RSE is likely to increase cross-border trade in securities in the region. The author also argued in this respect that enhanced cross-listing is likely to ease the liquidity challenges which are faced by DSEs in the region. As a possible way of ensuring effective enforcement in ISMs and on the RSE, further proposals were made for the introduction of a RSEC. The author argued that enhanced regulatory cooperation between DSECs and the RSEC is likely to ensure effective enforcement of regulatory rules in securities markets in

the region. The author also argued in this regard that effective enforcement in securities markets is likely to enhance issuer and investor protection in the region. Chapter 3 also examined constraints on the development of stock markets in the COMESA Region. The main finding, in this respect, was that legal transplantation is one of the notable constraints on the development of stock markets in the region. The author argued that a legal, regulatory and institutional framework that is based on the real needs, practices and preferences of the market, as opposed to foreign concepts and models, is likely to facilitate the development of robust and competitive markets, and promote cross-border trade in securities in the region.

In Chapter 4, the legal, regulatory and institutional framework was examined so as to establish whether or not it provides adequate incentives for effective cross-border disposition of securities in the region. The main finding was that the said framework does not provide enough incentive for effective cross-border disposition of securities. As a possible way of enhancing the effectiveness of the said framework, proposals were made for the replacement of *lex situs* with the HSC PRIMA rule. As a possible way of enhancing the efficacy of HSC PRIMA rule in promoting cross-border trade in securities, it was also proposed that rules for the ranking of competing collateral interests in the same dematerialized securities be enacted. Further, proposals were made for regional integration of domestic payment systems as a possible way of speeding up cross-border transfers of payments. And, as a possible way of creating an enabling environment for cross-border disposition of securities, further proposals were made for the removal of exchange controls in all COMESA countries. The author argued that exchange controls serve as a non-tariff barrier to cross-border trade in securities.

In Chapters 2 and 3, we proposed reforms which could increase demand and supply of securities to securities exchanges in the COMESA Region. In Chapter 4, we proposed reforms which could

facilitate effective cross-border disposition of securities in the region. In Chapter 5, we took the matter further by exploring possible ways of reducing transaction costs for cross-border dispositions of securities. Thus, in Chapter 5, we examined the efficacy of the current regulatory competition model in reducing transaction costs for cross-border securities dispositions. The main finding of chapter 5 was that the regulatory competition model increases transaction costs for cross-border securities deals. The other finding was that, regulatory competition increases regulatory gaps and costs, and systemic risk. With respect to the harmonization model, the finding was that this model reduces transaction costs for cross-border securities deals. The other finding was that harmonization reduces regulatory gaps and costs, as well as systemic risk. In this respect, the author argued that the high transaction and regulatory costs associated with the current regulatory competition model are likely to discourage cross-border dispositions of securities. As a possible way of encouraging cross-border trade in securities in the region, it was proposed that the regulatory competition model be replaced with the harmonization model. The author argued that although harmonization is likely to sterilize competition, the introduction of the proposed international passport is likely to retain competition. As a possible way of ensuring issuer and investor protection in this hybrid scheme for ISM regulation, it was proposed in chapter 3 that key regional institutions such as a RCF, a RSE and a RSEC be introduced. The author argued in chapter 6 that by clothing DSECs with power to take civil recovery action on behalf of market participants, and to act in support of foreign regulators and the regional bodies, legislators will be enhancing issuer and investor protection in ISMs.

In Chapters 2, 3, 4 and 5, we made proposals for creation of an effective legal, regulatory and institutional framework for cross-border disposition of securities. In Chapter 6, we examined threats on issuer and investor protection in ISMs in the COMESA Region. The main finding of

chapter 6 was that the legal, regulatory and institutional framework does not provide adequate issuer and investor protection in ISMs in the region. As a possible way of enhancing the said protection, the following proposals were made, namely:

i) Increasing the scope of SEC's power to commence civil recovery actions on behalf of issuers and investors. The author argued that issuer and investor protection in ISMs in the region could be enhanced by extending such a power to other causes of action than those arising out of misrepresentation in prospectuses;

ii) Criminalizing extra-territorial securities market misconduct. The author argued that this measure is likely to increase investor protection in ISMs in the region;

iii) Enacting an effective disclosure regime with the following characteristics, namely:

- only material information should be disclosable;
- also, generally available price sensitive information should be exempt from disclosure;
- Further, detrimental and confidential information should be exempt from continuous disclosure;
- furthermore, an international passport to multi-jurisdiction disclosure should form part and parcel of the regime; and

iv) Ensuring that [all] domestic regulators in the region have the power to act in support of foreign domestic regulators and the RSEC. The author argued that enhanced regulatory cooperation among DSECs and, between these DSECs and the RSEC is likely to ensure effective enforcement in ISMs in the region. The author also argued that effective enforcement in ISMs is likely to enhance issuer and investor participation in ISMs.

In Chapter 7, the legal arguments made in the thesis were put in proper socio-economic context. This was achieved by introducing empirical evidence on constraints which affect the efficacy of the legal, regulatory and institutional framework in increasing cross-border trade in securities in the COMESA Region. The main finding of chapter 7 was that the said framework is hindered by various constraints in its application. Notable among such constraints are:

i) Constraints relating to poor intermediary competence to handle cross-border securities deals;
ii) Low institutional presence on securities exchanges and in cross-border trade;
iii) High transaction costs for cross-border securities deals;
iv) Poor institutional enforcement capacity of the Zambian SEC; and
v) Lack of judicial independence on the part of the Zambian Capital Markets Tribunal.

As a possible way of overcoming these constraints, the following proposals were made, namely:

i) Special intermediary education and capacity building;
ii) Qualitative regulation of cross-border investment of pension assets through the prudent-person rule;
iii) Harmonization of regulatory rules;
iv) Enhancing the institutional enforcement capacity of the Zambian SEC; and
v) Ensure judicial independence of the Zambian Capital Markets Tribunal.

In chapter 8, the allocative effectiveness of some of the proposed remedial reforms was examined. The main finding of chapter 8 was that the proposed international passport, harmonization of legal and regulatory rules, HSC PRIMA rule, and regional integration of securities markets and domestic

payment systems are likely to serve as effective measures once implemented. The following section makes the conclusion of the thesis.

9.3. CONCLUSION OF THE THESIS.

The preceding section has made the general conclusions of the thesis. This section draws those conclusions together and makes the conclusion of the thesis. Thus, the conclusion of this thesis is that the legal, regulatory and institutional framework for public distribution of securities has been driven by various factors in its formulation, and hindered by various constraints in its application thereby exerting only limited influence on the growth of cross-border trade in securities in the region. The thesis also concludes that the said framework does not provide adequate incentives for growth of liquidity in securities markets in the region. Underpinning this conclusion is the fact that the political economy which drove the formation of most securities exchanges and pension schemes in the region has continued to shape the inward-focus of many such institutions. And, the legal and regulatory frameworks have also evolved following the same pattern. Also, the constraints within and on the efficacy of the legal, regulatory and institutional framework in promoting cross-border trade in securities, as identified and understood in this study, lend support to the conclusion of the thesis.

9.4. RECOMMENDATIONS FOR LEGAL, REGULATORY, INSTITUTIONAL AND POLICY REFORM.

The preceding section has made the conclusion of the study. This section makes recommendation for legal, regulatory and institutional reform in the area of securities markets regulation in the COMESA Region.

As a possible way of enhancing the effectiveness of the legal, regulatory and institutional framework, and promoting cross-border trade in securities in the COMESA Region, it is recommended as follows:

1) **Recommendations for the enhancement of supply of securities to securities markets.**
    a) Provide attractive tax incentives for domestic and foreign issuers;
    b) Recognize other styles of issuer than companies as listable entities;
    c) Develop Alternative Investment Markets and encourage the listing of SMEs;
    d) Redefine the word 'prospectus' as a document under which 'securities' of an issuer may be distributed;
    e) Recognize securities of other entities than companies as listable;
    f) Recognize and treat as listable securities, all financial assets which are recognized and treated listable securities in other COMESA jurisdictions;
    g) Redefine the word 'issuer' as an established or proposed entity which has issued or has proposed to issue securities;
    h) Implement the international passport to multi-jurisdiction disclosure/cross-listing;
    i) Develop domestic central securities depositories and promote the issue of dematerialized (uncertificated) securities; and
    j) Establish a mechanism for the conversion of certificated securities into dematerialized form; and
    k) Create linkages among domestic central securities depositories.
2) **Recommendations for the enhancement of demand for listed securities.**
    a) Create incentives for institutional investor participation by encouraging remittance of pension contributions by employers, and promoting capacity building;

b) Promote the securities investment culture among pension funds and other institutional investors;

c) Replace the quantitative restrictions with qualitative regulation through the prudent-person rule;

d) Promote the participation of small investors such as Collective Investment Schemes;

e) Enhance the capacity of securities exchange intermediaries and ensure their financial education;

f) Ensure investor financial education. Concentrate on the youth and the female folk. Such education should be incorporated into the curriculum of primary and secondary schools, and colleges and universities;

g) Develop bond markets. Pay particular attention to the corporate bond segment;

h) Promote domestic, and cross-border securities advertisement by implementing an international passport to multi-jurisdiction securities advertisement.

3) Recommendations for effective/efficient Cross-border disposition of securities.

a) Implement/domesticate the HSC 2006 and the GSC 2009;

b) Modernize domestic securities and property laws;

c) Remove exchange controls;

d) Integrate domestic payments systems; and

e) Create effective linkages among domestic central securities depositories.

4) Recommendations for the enhancement of Issuer and Investor protection in ISMs.

a) Enhance the regulatory enforcement capacity of DSECs by ensuring that they have adequate funds, skills and personnel for effective enforcement;

b) Ensure functional independence of DSECs by insulating them from political and other pressures;

c) Ensure security of tenure for personnel of DSECs especially those dedicated to compliance and enforcement. Ensure that the CEOs of DSECs serves on the same conditions as the Director of Public Prosecution;

d) Ensure capacity building through continuing education;

e) Ensure functional and financial independence of domestic Capital Markets Tribunals by providing sufficient operational funds and insulating personnel, especially those tasked with adjudication, from political and other pressures;

f) Ensure security of tenure of members of domestic Capital Markets Tribunals by ensuring that they serve on the same conditions as judges of superior courts;

g) Ensure extra-territorial criminalization of securities markets misconduct;

h) Sign extradition treaties with fellow COMESA Member States, and other cooperating states, and ensure that securities market misconduct is included in the Schedule to domestic Extradition Acts as 'an extraditable offence';

i) Introduce key regional institutions such a RSE, a RCF and a RSEC;

j) Introduce a power on the part of domestic regulatory bodies to act in support of each other, and the regional regulatory bodies; and

k) Ensure that DSECs have power to take civil recovery action on behalf of market participants who fail or neglect to take such action.

5) **Recommendations for the development and implementation of the proposed remedial measures.**

   a) The proposed legal and regulatory instruments and institutions should be developed and implemented following a careful study of the peculiar needs, culture, beliefs, economic practices and preferences of domestic markets, in line with North's New Institutional Economics Theory; and

   b) The final product—the legal, regulatory and institutional framework—should reflect the peculiar needs, culture, economic practices, beliefs and preferences of COMESA securities markets.

6) **Recommendations for an appropriate Enforcement Philosophy.**

   a) Securities markets regulators and adjudicative bodies should adopt the Hodges Ethical Theory of Enforcement as supplemented in this study. Using a cooperative approach to regulation, they should:

      i) In appropriate circumstances such as the case of first and remorseful offenders, issue reprimands and warnings as opposed to naming and shaming them or imposing stiff punishments;

      ii) Ensure that regulatory rules have an input from the regulated market;

      iii) Study the causes of market misconduct before formulating regulatory rules, and ensure that market participants understand the importance of clean securities markets; and

      iv) Promote self-regulation.

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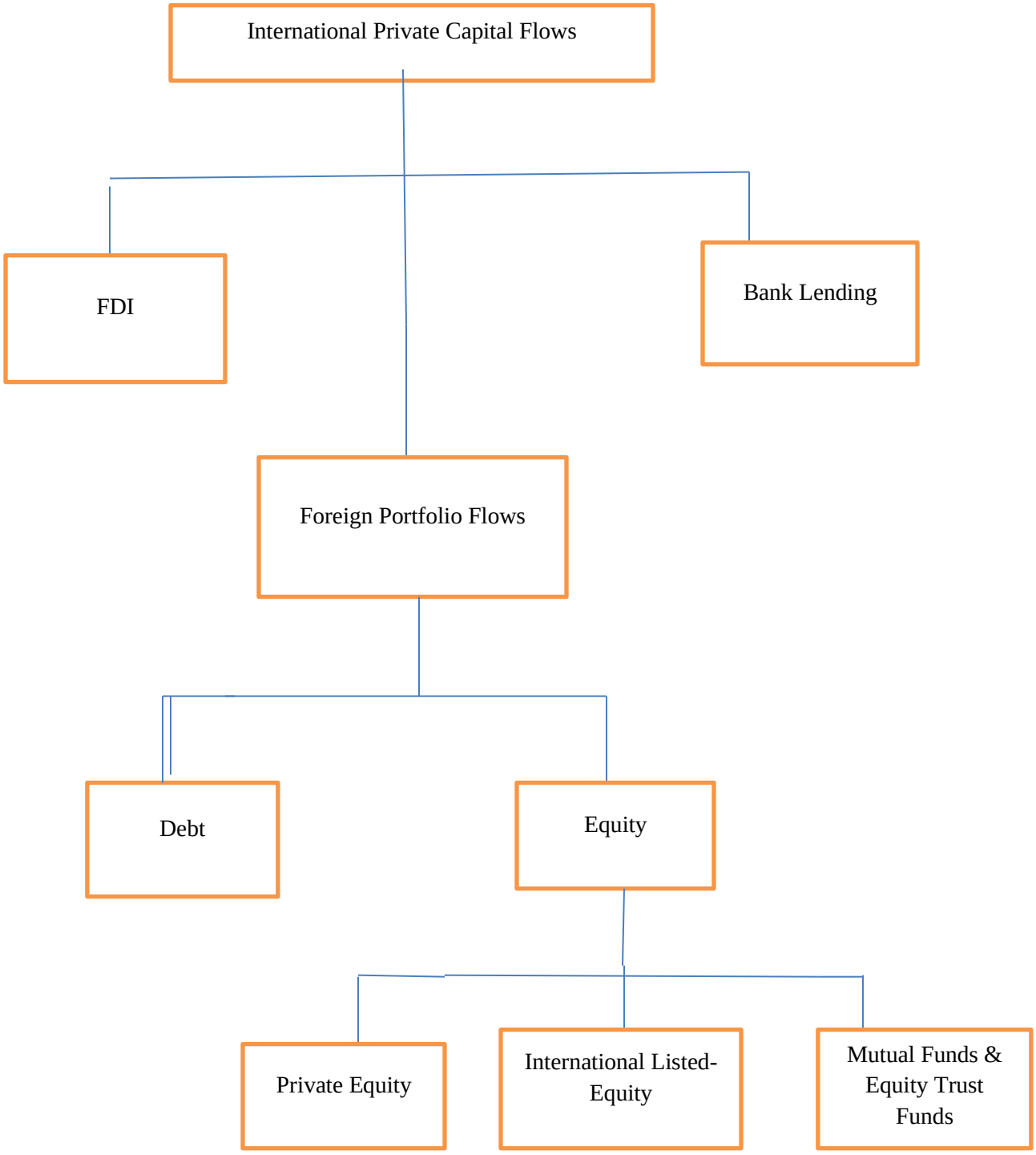
APPENDICES

AN ILLUSTRATION OF THE COMPONENTS OF INTERNATIONAL PRIVATE CAPITAL FLOWS.



INTERVIEW WITH DR. EVANS DAVID WALA CHABALA, THE THEN SECRETARY AND CHIEF EXECUTIVE OF THE ZAMBIA SECURITIES AND EXCHANGE COMMISSION (SEC).

24th October, 2014

Dr. Evans David Wala Chabala was interviewed about the current state of the capital markets in Zambia and the opportunities available both for investors to trade at the Lusaka Stock Exchange (LuSE) and for companies to list.

Question 1: How would you describe the evolution and performances of the Zambian capital markets since their establishment?

Evans David Wala Chabala (EDWC): *The Lusaka Stock Exchange has been in existence for just over 20 years. We have 22 listings, so that's an average of one listing per year, although the bulk of the listings happened at the beginning of the stock markets during the privatization of 11 state-owned companies. Between August 2012 and August 2013 the LuSE All Share Index grew by 41% and performance could be even better if there was more liquidity. Between August 2012 and August 2013 the LuSE All Share Index grew by 41% and performance could be even better if there was more liquidity. Liquidity remains a challenge as few investors want to sell shares because most of the accounts at LuSE yield good dividends. There seems to be a new trend in the market these days as enterprises are beginning to brag about paying dividends. In fact, there seems to be a new trend in the market these days as enterprises are beginning to brag about paying dividends. The Zambia National Commercial Bank (ZANACO), which was formerly wholly state-owned, was partially publicized [privatized] in 2008. Since then, the taxes the company pays have increased by 800% annually and their dividends have also gone up like crazy. The last buy one company to list was Prima Reinsurance Company in 2013. With this listing, shareholders saw the opportunity to use the local capital markets to raise the required capital for their reinsurance business in Zambia, a capital hungry business. On the back of the listing, the company did a rights offer, which is a very rare thing to do at this stage, and which was fully subscribed. Usually a company first gets listed, generates a track record and then makes a rights offer. So that's a good story to tell about the Zambian capital markets. For me, the future of Zambian capital markets will see other entities like Prima Reinsurance appreciating the use of capital markets to propel their businesses forward.*

Question 2: What are the advantages of investing at the LuSE?

EDWC: *The attractiveness of the LuSE is obvious from an investor's point of view. Once again, remember that between August 2012 and August 2013, the LuSE All Share Index grew by 41%. Shares are indexed in Kwacha (ZMW) so you have to take into account inflation and the exchange rate. But the exchange rate over time has been very stable and inflation is single digit at 7%. So taking both into account you still have a return on investment in the region of 25% to 30%. There are zero capital gains taxes and dividends are treated depending on the recipient. There are zero capital gains taxes and dividends are treated depending on the recipient.*

Question 3: What are the advantages of listing on the LuSE?

EDWC: *By listing, a company can access cheaper capital, and grow much more rapidly. Also, listed companies actually have a much better chance to survive way beyond the horizons of its original shareholders as the shares remain on the market beyond the lifespans of these shareholders. So from a sustainability point of view and from a success point of view, it is much wiser to make a business public. As we speak, we have a couple of companies that have shown a strong interest in listing.*

Question 4: Shareholders can be reluctant to list a company because they may be afraid of losing control over that company, which is often family owned. What are your comments on that?
EDWC: *What is control? Is control only when you own 100% of the shares of a company? Even if you give up 25% to the public, you will still have more than enough control. What is being asked for in terms of listing on the market here is a minimum of 25% but really, what is being asked for in terms of listing on the market here is a minimum of 25%. So you have 100% of a company and you give up 25%. Does that mean you lose control? If a shareholder owns 100% of a business, it will always be small. By opening it up and having other investors participate, this shareholder will still own a small part of the business, but will also be richer.*

Question 5: What other reason do you identify that would account for the reluctance of companies to list at the LuSE?

EDWC: *Most entities shy away from using capital markets because they perceive the cost of listing as being too high due to the small club structure of the Zambian licensed stockbrokers who own the LuSE. Once the LuSE is demutualized, we will see more listing on the LuSE and increased participation in the capital markets from the general public. I'm convinced that once the LuSE is demutualized, we will see more listing on the LuSE and increased participation in the capital markets from the general public. At the moment, there only 29, 000 Zambian retail investors who invest in the stock exchange.*

Question 6: At what stage is the demutualization process of the LuSE?

EDWC: *It's happening as we speak. The parameters and dimensions of a demutualised entity have been defined including the model we want you to use, the holding that current brokers are going to have, etc. That's the first phase and that has already been done. That is now being put into a technical or steering committee which will actually work through the implementation aspects. And once that's done, we'll open up the LuSE. By opening up the LuSE to other investors, the actual issues of conflict of interest are going to be very clearly delineated and managed. At the moment, the same stockbrokers if they are supposed to be disciplined, also sit on the board of LuSE and decide to adjudicate on the matters. But the club-like ownership and structure it is not the only issue: the other big challenge that we've had is the limited knowledge and reach. It is easy to understand this. You have a small number of stakeholders who have all the knowledge about capital markets and they literally choose with whom this knowledge is shared. We need to change*

this behaviour with much more deliberate dissemination of information and knowledge about the Capital Markets to all and sundry.

Question 7: Are there plans to list the Lusaka Stock Exchange itself?

EDWC: *That's one option, but the current shareholders, the Zambian licensed stockbrokers, can still open themselves up to participation from other shareholders, without necessarily being listed. They may not want to list now but may prefer to instead build a proven track record because obviously the valuation would be different were the market to become more buoyant.*

Question 8: President Sata has given Zambia Agriculture Minister, Wylbur Simuusa, a directive to "expeditiously operationalize" the Agricultural Credits Act and reopen the country's agricultural commodities market for trade following a three-year break. Why did the previous commodities market fail and what are the benefits of restarting another?

EDWC: *Previously, there was the Zambia Markets for Agricultural Commodities Exchange (ZAMACE), but it was a private entity. It was operating without a regulator and with future contracts on that exchange having no guarantee that delivery would happen. When this happens, people lose faith in trading on the exchange. We at the SEC are pushing for the commodities bill because, at the moment, we don't have a commodities exchange Act and it can revolutionize trading of both agricultural and mining commodities. There will now be a different exchange altogether. We at the SEC are pushing for the commodities bill because, at the moment, we don't have a commodities exchange Act and it can revolutionize trading of both agricultural and mining commodities. For instance, we never used to trade emeralds in Zambia; all emeralds used to be traded in India and in Europe. This new government has changed that. As a result, we have prices of emeralds and revenue from emeralds that we've never seen before. The company that mines and trades emeralds, KAGEM, of which the government is major shareholder, has declared dividends for the first time. So having more commodities trading here would certainly benefit the economy. But over and above trading, we think that we should deliberately push for public ownership in some of the sectors of the economy, through the exchanges. Furthermore, entities that are on the capital markets platform are readily marketed and traded way beyond the borders of the country. Listing a company on the exchange forces it to undergo due diligence, and with subsequent adherence to on-going obligations and makes it investable to global investors beyond borders of the country. So, capital markets also generate big publicity for the country. If the government were to be receiving dividends and proper taxes from most of the entities that are operating in this country, it would need to borrow less and issue fewer bonds. If government borrows less, the bond market of private businesses would be stimulated, because investors are still going to lend to somebody. It would also be a good thing for the stabilization of interest rates.*

Question 9: All in all, what's the outlook of capital markets in Zambia?

EDWC: *We know we're small. We understand the constraints that make us remain small and we are doing something about those constraints, like the establishment of an alternative market and*

the demutualization of the LuSE. So we're actually doing something about addressing those constraints that have confined us to being a small player in the capital markets and an anaemic leg of the financial markets. I think the future of capital markets in Zambia can only be very bright.

QUESTIONNAIRE FOR FINANCIAL INTERMEDIARIES:

THE UNIVERSITY OF LUSAKA

SCHOOL OF POSTGRADUATE STUDIES

NAME OF RESEARCHER: SAMAMBA, LENNOX TRIVEDI

SID: PHDITL1511023

CELL No.:096-1-077 798

READING FOR: DOCTOR OF PHILOSOPHY OF LAW/DOCTOR OF LAWS.

RESEARCH FIELD: CROSS-BORDER SECURITIES TRADE AND INVESTMENT

TOPIC: LEGAL ASPECTS OF CROSS-BORDER TRADE AND INVESTMENT IN SECURITIES: THE CASE OF EASTERN AND SOUTHERN AFRICA

ETHICAL CONSIDERATIONS FOR THE RESPONDENT:

Kindly note that information provided by you in this questionnaire shall be used solely for academic purposes.

1. (a). Are you a broker or dealer or financial institution licensed to do business on the Lusaka Stock Exchange? Broker/dealer

(b). Are you licensed to conduct business as an intermediary on any foreign stock market within the COMESA Region? Yes

(ii). On which foreign stock market(s) in the COMESA Region do you conduct business as intermediary? Johannesburg Stock Exchange

2. How long have done business on the LuSE? Since inception

3. (a). Have you bought or sold securities outside Zambia within the COMESA Region? Yes

(ii) In what kind of securities have you dealt outside Zambia within the COMESA Region? Shares

(b). (i). Have you bought or sold securities beyond the COMESA Region? Yes

(ii). In what kind of securities have you dealt on Stock Markets beyond the COMESA Region? Shares

4. (a). Have you or did you experience any constraints on the speedy, effective and efficient purchase or sale of securities outside Zambia within the COMESA Region? Yes

(b). What kind of constraints did you encounter? Delayed settlement of trades, high transaction costs and fragmentation of capital markets in southern and eastern Africa.

(c). Between domestic and cross-border purchasing or selling of listed securities, which one would you say has higher transaction costs? International acquisitions and sales

(ii). What do you think is the cause for lower or higher transaction costs for either class of securities? Domestic markets only have single law making settlement quicker and easier within a single jurisdiction. On the contrary, in foreign markets, other laws than the domestic market's intrude. This lengthen the duration for settlement of trades.

iii). What do you think should be done in order to reduce transaction costs for the class of securities identified in paragraph (c) above as having higher transaction costs? Interconnection of trading platforms and securities markets in southern and eastern Africa, and harmonization of laws.

5. (a). Did you encounter any operational challenges in relation to activities referred to in Question 3 above? Yes

(b). What kind of operational challenges did you face? The new infrastructural features which have been introduced by the Securities Act 2016 need familiarizing with.

6. What do you think is the cause of the legal and operational challenges inherent in investing in securities outside Zambia within the COMESA Region? Lack of continuing intermediary training, and fragmentation of operational platforms and securities exchanges.

7. What do you think should be done to overcome these legal and operational challenges associated with cross-border securities buying and selling of listed securities in the COMESA Region? Regulators and governments should undertake continuing training and system familiarization of brokers, advisors and dealers, and facilitate interconnectedness of operation systems and stock exchanges.

END OF QUESTIONNAIRE (THANK YOU FOR YOUR PRECIOUS TIME).

QUESTIONNAIRE FOR BANKS AND INSURANCE COMPANIES:

THE UNIVERSITY OF LUSAKA

SCHOOL OF POSTGRADUATE STUDIES

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READING FOR: DOCTOR OF PHILOSOPHY OF LAW/DOCTOR OF LAWS

RESEARCH FIELD: CROSS-BORDER SECURITIES TRADE AND INVESTMENT

ETHICAL CONSIDERATIONS FOR THE RESPONDENT:

Kindly note that information provided by you in this questionnaire shall be used solely for academic purposes.

1.(a).Do you invest in securities on the Lusaka Stock Exchange? No

(b).Why? The Lusaka Stock Exchange is too small, volatile and illiquid

2.(a).Do you invest in securities on other stock markets within the COMESA region?

(b).Why? Yes, at the Johannesburg Stock Exchange

3.(a).Do you invest in securities on other stock market beyond the COMESA region?

(b).Why? Yes, on the London stock exchange, and the Amsterdam Stock Exchange

4.(a).(i).Do you as a bank or other financial institution lend money specifically purchases of securities on stock markets? Not at all

(ii).Why? As stated earlier, the LuSE is very small, volatile and illiquid. Its state does not guarantee a good return so that lending for investment in securities is perceived risky.

(b).(i).Do you as an insurance company provide insurance specifically for securities (such as shares) investment risk? No we do not extend financial risk insurance share trading.

(ii).Why? Due to high risk and volatility on small stock markets, losses are frequent and that's not good for profitability of insurance business since the insurer will have pay out indemnity frequently.

QUESTIONNAIRE FOR THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA):

THE UNIVERSITY OF LUSAKA

SCHOOL OF POSTGRADUATE STUDIES

NAME OF RESEARCHER: SAMAMBA, LENNOX TRIVEDI

SID: PHDITL1511023

CELL No.:096-1-077 798

READING FOR: DOCTOR OF PHILOSOPHY OF LAW/DOCTOR OF LAWS.

RESEARCH FIELD: CROSS-BORDER TRADE AND INVESTMENT IN SECURITIES.

TOPIC: LEGAL ASPECTS OF CROSS-BORDER SECURITIES TRADE AND INVESTMENT: THE CASE OF EASTERN AND SOUTHERN AFRICA

ETHICAL CONSIDERATIONS FOR THE RESPONDENT:

Kindly, note that information provided by you in this questionnaire shall be used solely for academic purposes.

1.(a).What would you say is the state of regional integration of stock markets through cross-listings in Eastern and Southern Africa? The COMESA region is the least integrated on the African continent, although it is the largest economic bloc.

(b). What would you say is the cause for this level of regional integration of these stock markets through cross-listings? The poor state of domestic companies, restrictive national securities laws and listing laws, divergent national securities laws and listings rules.

(c).What factors affect the growth of cross-listings of stocks on stock markets in eastern and southern Africa? The poor performance of most stock markets in the region, poor corporate governance of listed firms, and lack of a regional laws and institutions.

2.(a).What would you say are the major legal, regulatory and operational constraints to the cross-border buying and selling of securities (investing in listed securities) within the COMESA Region? The burden of cost and time of complying with the regulatory requirements of each and every country in which the firm

desires to cross-list their securities. Poor inter-linkages between the primary exchange and the secondary exchanges is also a constraint.

(b). What do you think should be done to overcome the legal and operational constraints referred to in paragraph (a) above? Domestic stock exchange should introduce effective corporate governance systems for listed firms and ensure enforcement of those rules, demutualize the exchanges, and ensure inter-linkages in the operational systems of domestic exchanges.

3. Would you say cross-border trade in listed securities has been growing in the last ten (10) years in the COMESA Region? Yes Why? The Trade and Investment Growth Indexes for the COMESA region over the years have shown a steady rise in foreign investor participation in securities markets within the region. (b).What in your opinion has been constraining or promoting the growth of cross-border trade in listed securities in the COMESA Region? The increasing growth in GDP in most COMESA countries, regional integration of securities markets, the gradual realization of the importance of international portfolio diversification, and harmonization of regulatory laws by COMESA members under the SADC framework. Some of the hindrances to growth of international trade in securities in the COMESA region are very high transaction costs, lengthy durations for settlement of trades, fragmented payment systems that take too long to clear international payments, prevalent exchange controls and lack of effective regulation at regional level.

(c). What do you think should be done in order to overcome some of the constraints on the growth of cross-border trade in securities in the COMESA Region? Harmonization of securities laws and corporate laws, ensure anti-double taxation agreements, integrate national payment systems, and remove exchange controls, and promote participation of pension funds in securities markets.

END OF QUESTIONNAIRE (THANK YOU FOR YOUR PRECIOUS TIME)

QUESTIONNAIRE FOR THE LuSE/LISTING MANAGERS:

THE UNIVERSITY OF LUSAKA

SCHOOL OF POSTGRADUATE STUDIES

NAME OF RESEARCHER: SAMAMBA, LENNOX TRIVEDI

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READING FOR: DOCTOR OF PHILOSOPHY OF LAW/ DOCTOR OF LAWS.

RESEARCH FIELD: CROSS-BORDER TRADE AND INVESTMENT IN SECURITIES

TOPIC: LEGAL ASPECTS OF CROSS-BORDER TRADE AND INVESTMENT IN SECURITIES: THE CASE OF EASTERN AND SOUTHERN AFRICA.

ETHICAL CONSIDERATIONS FOR THE RESPONDENT:

Kindly note that information provided by you in this questionnaire shall be used solely for academic purposes.

1. How many entities are currently listed on LuSE? 22 companies

2. Is the LuSE integrated through Cross-Listings onto other Stock Markets within the COMESA Region? Yes

(i). Which Stock Exchanges within COMESA? Johannesburg Stock Exchange

(ii).Any Stock Exchanges beyond the COMESA Region? Not at all

(iii). How many stocks are cross-listed on stock markets in Eastern and Southern Africa? Only Shoprite Checkers Pty Limited of South Africa

(iv). What would you say is the cause of this level of cross-listings on the LuSE? The club-like structure of the LuSE, and the poor performance of the LuSE over the years.

(b). Do you have MoUs for information sharing or other purposes with the stock markets referred to in paragraph (a) above? Yes, with Nairobi Stock Exchange

5. Have you recorded any cases of price manipulation, insider dealing and other forms of market abuses perpetrated by foreign intermediaries? No

6. Would you state the number of Zambian pension schemes that invest on the LuSE? Extremely few pension schemes, and mostly private, invest in securities on the Lusaka Stock Exchange. Even so, private pension schemes rarely invest on the Lusaka Stock Exchange for institutional reasons.

7. Between natural persons and artificial persons such as companies and parastatals, which group participates more on the LuSE? Artificial persons. Most individuals do not seem to have adequate knowledge on the importance of investing in securities on the LuSE.

8. What do you think should be done to promote participation of a cross-section of participants on the LuSE? Promotion of Collective Investment Schemes so that small and medium-sized investor companies and individuals can increase participation. The SEC should also ensure financial education for potential investors. Further, the existence of the LuSE, its business and financial products that are listed and traded on it must be advertised to the general public so as to raise awareness.

END OF QUESTIONNAIRE (THANK YOU FOR YOUR PRECIOUS TIME)

QUESTIONNAIRE FOR THE ZAMBIAN SECURITIES AND EXCHANGE COMMISSION

THE UNIVERSITY OF LUSAKA

SCHOOL OF POSTGRADUATE STUDIES

NAME OF RESEARCHER: SAMAMBA, LENNOX TRIVEDI

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READING FOR: DOCTOR OF PHILOSOPHY OF LAW/ DOCTOR OF LAWS.

RESEARCH FIELD: CROSS-BORDER TRADE AND INVESTMENT IN SECURITIES

TOPIC: LEGAL ASPECTS OF CROSS-BORDER TRADE AND INVESTMENT IN SECURITIES: THE CASE OF EASTERN AND SOUTHERN AFRICA.

ETHICAL CONSIDERATIONS FOR THE RESPONDENT:

Kindly note that information provided by you in this questionnaire shall be used solely for academic purposes.

1. Do you conduct routine investigations on listed entities to see if they are complying with regulatory requirements? Yes

2. Do you receive misconduct reports from the LuSE? Yes

3. Do you receive reports of misconduct from members of the public? Yes, but such incidences are extremely rare. Some of the reports we are frivolous and baseless to investigate. In some case we discover along the way that there is not enough evidence to warrant further investigation.

4. (a). (i) How many cases of securities market misconduct have you investigated and prosecuted in the past five (5) years? *(No response)*

(ii) Have you ever engaged in the investigation and enforcement of multi-jurisdiction securities market misconduct? No

(b). Would you say the forms of market malpractices referred to in paragraph (a) above are easier to contain/curb with regard to domestic participants than foreign ones? No Why? Although the SEC has

not been engaged in multi-jurisdiction misconduct investigation lately, such cases would need far more resources—such as money, expertise, foreign assistance, memoranda of understanding, and some regional institutions to adequately foil.

5. What are some of the challenges you face in enforcing regulatory rules for capital markets in Zambia? We face a number of challenges including inadequate staffing, centralized presence, lack of specialist training in securities enforcement, especially international securities enforcement, poor financial capacity which is partly attributed to late release of government grants, interference with enforcement by politicians, few memorandum of understanding among stock exchanges and SECs in the COMESA region, and poor informational exchanges in the said respect.

6. What do you think should be done to enhance the institutional enforcement capacity of the SEC? Employ for staff, especially enforcement staff, ensure continuing specialist training including international securities enforcement, increase legal assistance between jurisdictions as well as memoranda of understanding among SECs, ensure institutional and functional independence of SECs, ensure adequate funding of the SEC and strive towards financial independence of the SEC. Information exchange among regulatory bodies is also required.

END OF QUESTIONNAIRE (THANK YOU FOR YOUR PRECIOUS TIME)

QUESTIONNAIRE FOR THE PENSIONS AND INSURANCE AUTHORITY:

THE UNIVERSITY OF LUSAKA

SCHOOL OF POSTGRADUATE STUDIES

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READING FOR: DOCTOR OF PHILOSOPHY OF LAW/ DOCTOR OF LAWS.

RESEARCH FIELD: CROSS-BORDER SECURITIES TRADE AND INVESTMENT

TOPIC: LEGAL ASPECTS OF CROSS-BORDER SECURITIES TRADE AND INVESTMENT: THE CASE OF EASTERN AND SOUTHERN AFRICA.

ETHICAL CONSIDERATIONS FOR THE RESPONDENT:

Kindly note that information provided by you in this questionnaire shall be used solely for academic purposes.

1.(a). As the regulatory authority for pensions and insurance, do you face any challenges in enforcing pension regulations? Yes

(b). What kind of challenges do you face in your enforcement activities? The number of staff is quite not enough for meaningful enforcement. Besides low staffing, because of lack specialized training in enforcement, we rely on the state police for enforcement of criminal sanctions relating to violations of pension operations. Political interference makes it difficult to ensure even-handed enforcement. That makes very difficult to enforce regulatory rules against public schemes, as well as those private schemes which enjoy the support of central government and the ruling party. This leaves us with a small segment of the market to regulate...politically-unconnected private pension schemes.

2. What do you think should be done to increase the institutional enforcement capacity of the PIA? There is need to free the institution from political interference with its enforcement endeavours. Ensure financial independence and functional independence, adequate staffing of staff dedicated to enforcement as well as support administrative staff. Further, continuing education for investigators and enforcers, continuing regulator visits to pension funds, and a cooperative regulatory approach are crucial components of a regulatory approach that inspires compliance.

QUESTIONNAIRE FOR THE PUBLIC (POTENTIAL INVESTORS):

THE UNIVERSITY OF LUSAKA

SCHOOL OF POSTGRADUATE STUDIES

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READING FOR: DOCTOR OF PHILOSOPHY OF LAW/DOCTOR OF LAWS

RESEARCH FIELD: CROSS-BORDER SECURITIES TRADE AND INVESTMENT

TOPIC: LEGAL ASPECTS OF CROSS-BORDER TRADE IN SECURITIES: THE CASE OF EASTERN AND SOUTHERN AFRICA.

ETHICAL CONSIDERATIONS FOR THE RESPONDENT:

Kindly note that information provided by you in this questionnaire shall be used solely for academic purposes.

1.Basic Information

(a).Level of formal education: University education (Degree)
(b).Age: 65 years
(c).Sex: Male
(d).Do you know a stock exchange exists in Zambia? Yes. If the answer is 'Yes', what is its name? Lusaka Stock Exchange
(e). What kind of financial products are sold on a stock exchange? Shares and stocks

(f). If your answer is 'yes' to question 1(d), have you bought any financial products on the Zambian stock exchange, then? No

(g). Have you bought any financial products on a stock exchange in other countries in eastern and southern Africa? No. Why? Lack of enough money to put aside for investment due to low salary and lack of extra means of income. The government has taken too long to pay my pension package, so I can't invest. The other challenge is lack of sufficient knowledge and experience of investment in stock exchanges.

(h). What do you think should be done to increase public participation on the Zambian stock exchange? The government must sensitize the public on the existence of the stock exchange what products are sold on it. Government must ensure decent wages for employees and promote employee share compensation or qualification schemes. The Public must also be enlightened on the importance of saving some money for investment shares and stock so that their future is secure.

2. Basic Literacy Questions

1) Numeracy

Suppose you had K9000 in a savings account and the interest rate was 2.5% per year. After 5 years, how much do you think you would have in the account if you left the money to grow?
(i) More than K10125; (ii) Exactly K10125; (iii) Less than K10125; (iv) Do not know; (v) Refusal.

2) Interest compounding

Suppose you had K10000 in a savings account and the interest rate is 20% per year and you never withdraw money or interest payments. After 5 years, how much would you have on this account in total? (i) More than K20000; (ii) Exactly K20000; (iii) Less than K20000; (iv) Do not know;(v) Refusal.

3) Inflation

Imagine that the interest rate on your savings account was 2% per year and inflation was 4% per year. After 1 year, how much would you be able to buy with the money in this account?
(i) More than today; (ii) Exactly the same; (iii) Less than today; (iv) Do not know; (v)Refusal.

4) Time value of money

Assume a friend inherits K100,000 today and his sibling inherits K10,000 five (5) years from now. Who is richer because of the inheritance? (i) My friend; (ii) His sibling; (iii) They are equally rich; (iv) Do not know; (v) Refusal.

5) Money illusion

Suppose that in the year 2020, your income doubles and prices of all goods double also. How much will you be able to buy with your income? (i) More than today; (ii) The same; (iii) Less than today; (iv) Do not know; (v) Refusal.

2. Advanced Literacy Questions

6) *Which of the following statements describes the main function of the stock market?* (i) The stock market helps to predict stock earnings; (ii) The stock market results in an increase in the price of stocks; (iii)The stock market brings people who want to buy stocks together with those who want to sell stocks; (iv) None of the above; (v) Do not know; (vi) Refusal.

7) *Which of the following statements is correct? If somebody buys the stock of firm B in the stock market:* (i) He owns a part of firm B; (ii) He has lent money to firm B; (iii) He is liable for firm B's debts; (iv) None of the above; (v) Do not know; (vi) Refusal.

8) *Which of the following statements is correct?* (i) Once one invests in a mutual fund, one cannot withdraw the money in the first year; (ii) Mutual funds can invest in several assets, for example invest in both stocks and bonds; (iii) Mutual funds pay a guaranteed rate of return which depends on their past performance; (iv) None of the above; (v) Do not know; (vi) Refusal.

9) *Which of the following statements is correct? If somebody buys a bond of firm B*: (i) He owns a part of firm B; (ii) He has lent money to firm B; (iii) He is liable for firm B's debts; (iv) None of the above; (v) Do not know; (vi) Refusal.
10) *Considering a long time period (for example 10 or 20 years), which asset normally gives the highest return*? (i) Savings accounts; (ii) Bonds; (iii) Stocks; (iv) Do not know; (vi) Refusal.
11*) Normally, which asset displays the highest fluctuations over time*? (i) Savings accounts; (ii) Bonds; (iii) Stocks; (iv) Do not know; (v) Refusal.
12) *When an investor spreads his money among different assets, does the risk of losing money:* (i) Increase; (ii) Decrease; (iii) Stay the same; (iv) Do not know; (v) Refusal.
13) *If you buy a 10-year bond, it means you cannot sell it after 5 years without incurring a major penalty. True or false*? (i) True; (ii) False); (iii) Do not know; (iv) Refusal.
(14) *Stocks are normally riskier than bonds*. True or false? (i) True; (ii) False; (iii) Do not know; (iv) Refusal.
(14a) *Stocks* are normally riskier than *bonds*. True or false?
(14b) *Bonds* are normally riskier than *stocks*. True or false?

(15) *Buying a company stock usually provides a safer return than a stock mutual fund. True or false?* (i) True; (ii) False; (iii) Do not know; (iv) Refusal.
(15a) Buying a *company stock* usually provides a safer return than a *stock mutual fund*. True or false?
(15b) Buying a *stock mutual fund* usually provides a safer return than a *company stock*. True or false?
(16) *If the interest rate falls, what should happen to bond prices*? (i) Rise; (ii) Fall; (iii) Stay the same; (iv) None of the above; (v) Do not know; (vi) Refusal.

(16a) If the interest rate *falls*, what should happen to bond prices? Rise/fall/stay the same/none of the above?
(16b) If the interest rate *rises*, what should happen to bond prices? Rise/fall/stay the same/none of the above?

END OF QUESTIONNAIRE (THANK YOU FOR YOUR PRECIOUS TIME).

QUESTIONNAIRE FOR PENSION FUNDS:

THE UNIVERSITY OF LUSAKA

SCHOOL OF POSTGRADUATE STUDIES

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READING FOR: DOCTOR OF PHILOSOPHY OF LAW/ DOCTOR OF LAWS.

RESEARCH FIELD: CROSS-BORDER SECURITIES TRADE AND INVESTMENT

TOPIC: LEGAL ASPECTS OF CROSS-BORDER SECURITIES TRADE AND INVESTMENT: THE CASE OF EASTERN AND SOUTHERN AFRICA.

ETHICAL CONSIDERATIONS FOR THE RESPONDENT:

Kindly note that information provided by you in this questionnaire shall be used solely for academic purposes.

1. Are you a public or private Pension Scheme? Public Pension Scheme

2.(a). Have you experienced employer consistency with regard to remittance of pension contributions? No Why? Before the creation of the Pension and Insurance Authority (PIA) in 1996, it was very difficult to compel remittance of employees' contributions to pension schemes. However, even after the establishment of the PIA, contributions remittance still remains a challenge. The major culprit is the Central Government and Local Authorities and parastatals. The poor remittance culture by Central Government appears to discourage them from undertaking a crusade for better and timely remittance of pension contributions since government would be preaching what they don't practice. In a nutshell, government seems to be the bad example for private employers, especially those that are politically connected to the ruling party.

(b). What do you think should be done to incentivize or force prompt remittance of pension contributions by employers? Ensure institutional and functional independence of the PIA. Such independence would ensure that the pension regulations are enforced against any entity (public or private) falling behind on pension contributions. Sensitise employers on the significance of timely payment of pension contributions (such as availability of funds for prompt

payment of pensions and investment for re-investment purposes so as to secure future payment of pensions) and social security and welfare. Also educate employers on the adverse socio-economic effects of delayed payment of pension such as broken homes, marriages, education drop-outs, crime, etc.

3. (a). Do you invest in securities on the Lusaka Stock Exchange? No at all, investment on the LuSE is perceived as risky and unprofitable due to low liquidity and high volatility. We prefer to put our surplus money in capital projects such as the National Pension Scheme Authority (NAPSA) multi-million housing and shopping complex project launched in 2017.

(b). Do you invest in securities on other securities markets within the COMESA Region? No

(c). In what kind of securities do you invest on Stock Markets outside Zambia within the COMESA Region? N/A

(d). Do you invest in Stock Markets beyond the COMESA Region? No

(e). What kind of securities do you invest in on Stock Markets in Europe? N/A

5. (a). What legal, regulatory and operational constraints, if any, do you encounter investing in securities outside Zambia within the COMESA Region? If we desired to invest in securities in other markets, the statutory limits would of course need to be observed. However, the so-called exchange controls, have been cited by other pension funds in the region at regional conferences as a big obstacle to international investment by pension schemes.

(b). What do you think should be done to overcome the constraints referred to in paragraph (a) above? Remove exchange controls

END OF QUESTIONNAIRE (THANK YOU FOR YOUR PRECIOUS TIME).