

**EXTRA-TERRITORIAL CRIMINALIZATION OF
MARKET MISCONDUCT—THE CHALLENGE OF
ENFORCEMENT**

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ABSTRACT

Given the ever-increasing remote participation of issuers, intermediaries in foreign securities markets, extra-territorial criminalization of securities market misconduct—market misconduct committed wholly outside one jurisdiction but harmful effect on that market—appears to be the effective device for preserving the cleanliness and integrity of securities markets in the region. The study examines the legal and institutional framework for enforcement of international crimes so as to establish whether or not it has provided adequate incentive for effective enforcement of extra-territorial securities market crimes. The study employs the doctrinal approach to evaluation of legal rules. The main findings of the study were that: (a) the Zambian law and policy provides for extradition of offenders, (b) notwithstanding such a position, the legal framework does not recognize securities market offences as extraditable, (c) apart from non-recognition of securities market offences as extraditable, the legal framework does not impose an obligation on requested States to surrender such offenders, (d) the Zambian legal framework provides for statutory power to act in support of foreign regulators, and that (e) notwithstanding this power on the part of the Zambian regulator, foreign regulators do not have

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such a power. As possible solution to these shortcomings in the legal framework, the study makes the following recommendations (a) the Zambian Government should include securities market offences in the Schedule containing extraditable offences in the Zambian Extradition Act, (b) the Zambian Government should sign bilateral extradition treaties with other COMESA countries as a way of imposing an obligation on those other States to surrender securities market offenders, (c) the Zambian Government and other COMESA countries should enhance mutual legal assistance with other States by domesticating the SADC Mutual Legal Assistance Treaty, and (d) enjoy other COMESA countries to make provision for the statutory on the part of their regulators to act in support of foreign regulators in the region.

1.INTRODUCTION

In my earlier article², it was established that the widespread participation of foreign issuers, investors and financial intermediaries in securities markets of other jurisdictions has increasingly posed a regulatory challenge to regulatory authorities in the COMESA region. The resulting regulatory challenge was attributed to the territorial character of the regulatory legal and institutional framework. In this regard, proposals were made for extra-territorial criminalization of market misconduct committed wholly outside one jurisdiction(s) in the COMESA region but having adverse effects in securities markets of other jurisdiction(s) within the region.

This article is second in a series of two articles on regulation of extra-territorial market misconduct.³ The object of this article is to examine challenges that are inherent in enforcing extra-territorial market misconduct. An argument is made that extra-territorial criminalization of market misconduct is not self-executing; it needs supporting institutional and legal framework to effectuate its object. In this regard, extradition treaties, mutual cooperation among regulators in the region, and existence of statutory power on the part of regulatory authorities to act in support of other regulatory authorities in the region, come to the fore.

²Samamba, Lennox Trivedi, 'Non-Criminalization of Extra-territorial Market Misconduct as a Constraint on Cross-border Securities Trading,' 2017. This paper (the first in this series) was presented and received a paper publication award at the 2017 International Multi-Disciplinary Conference held at Radisson Blue Hotel in Lusaka from 23rd to 25th August, 2017. Published in *The International Journal of Multi-Disciplinary Research*, 2017

³This paper (the second in this series) was also presented at the 2017 International Multi-Disciplinary Conference held at Radisson Blue Hotel in Lusaka from 23rd to 25th August, 2017. Its foundation is a segment of my PhD research work revolving around "Legal Aspects of Cross-border Trade in Securities in Eastern and Southern Africa". The segment examines challenges inherent in enforcement of extra-territorial securities market misconduct.

2.BACKGROUND TO THE PROBLEM

Under customary international law, there is no rule of law that imposes an obligation on states to surrender an offender to the requesting state. Besides, this constraint, most extradition laws (Acts and regulations) were enacted at before the human rights movement gathered the force it has today. The state was the source of rights of men and not the constitution as is the case today—the state could surrender an offender to the requesting state notwithstanding violation of certain constitutional and human rights guarantees. Thus, most jurisdictions did not give thoughtful consideration to certain human rights and constitutional guarantees—which are pre-conditions to effective extradition of offenders who committed extra-territorial market misconduct—at the time of enacting regulatory rules.

Further, the regulatory framework for the regulation of securities market misconduct was enacted at the time when securities markets in the region were not so internationalized as they are today. Thus, legislators did not give thoughtful consideration to international legal concepts such as ‘extra-territorial criminalization of securities market misconduct.’ Likewise, consideration of how best to enforce extra-territorial crime could not possibly be entertained.

2.1.STATEMENT OF THE PROBLEM

Technological advancement has made it possible for investors and securities market intermediaries alike to participate on foreign securities markets remotely. Given the ever-increasing remote participation of investors and financial intermediaries on foreign securities markets, effective regulation of extra-territorial improper securities market practices is critical to the very survival of these markets. If extra-territorial market offences remained un-regulated, the increasing remote participation of investors and intermediaries on foreign securities market is likely to dampen confidence of participants and stain the integrity of the market. Against this position and the background to the problem given above, the statement of the problem may be stated as follows:

“Has the legal framework for the regulation of extra-territorial securities market misconduct provided adequate incentives for effective regulation of extra-territorial securities market offences?”

3.0. METHODOLOGY

This research falls into the qualitative research category. It focuses on answering specific questions relating to the problem under investigation by using both primary and secondary data. The research is underpinned by a doctrinal approach to evaluating legal rules. This method was used in analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law touching on the subject/problem were used. Secondary sources such as journals and other written commentaries on primary sources were also used.

A checklist of documentary sources was used. The study employed non-probability sampling method in the selection of documents which were used in the analysis—purposive sampling. Both primary and secondary sources of data were used as aids to drawing inferences, making deductions and comparisons.

The main objective of the study is to answer the question whether or not the legal framework for the public distribution of securities across international borders has provided adequate incentives for effective regulation/enforcement of extra-territorial securities market offences. The study also sets out to flesh out some shortcoming in the regulatory framework currently in force and make necessary proposals for reform as a possible solution to those shortcomings.

The research questions used were:

- a) Does the law and policy provide for extradition of offenders;
- b) Does the law impose an obligation on the State to surrender to Requesting States in the region?
- c) Does the law and policy recognize securities market offences as extraditable?
- d) Does law provide for power for the regulator to act in support of foreign regulators?
- e) Does the law of other COMESA states provide for power for their regulator to act in support of the Zambian regulator?

4.0. RESULTS OF THE STUDY

QUESTION	ANSWER	
	International law & policy	National law & policy
1.Does law and policy provide for extradition of offenders?	YES	YES
2.Does law and policy impose an obligation on the State to surrender offenders to the requesting State?	NO	NO
Does the law and policy recognize securities offences as extraditable?	YES	NO
Does the law provide for power for the regulator to act in support of foreign regulators?	NO	YES
Does the law of the requesting States (other COMESA states) provide for power for their regulator to act in support of the Zambian regulator?	NO	NO

5.DISCUSSION

5.1.CONSTRAINTS RELATING TO THE CHALLENGE OF ENFORCING EXTRA-TERRITORIAL OFFENCES

Criminal law is usually territorial—it is a matter of the law of the place where it occurs.⁴ Thus, extra-territorial application of criminal law is generally a question of legislative intent—

⁴ Charles Doyle, 2012, at p. 1, op.cit

expressed or implied.⁵ Thus, effective criminalization of improper market practices committed wholly outside Zambia turns on legislative intent expressed in the criminalizing Act of the Zambian Parliament.

Enforcement of crimes over which a particular country has extra-territorial jurisdiction is fraught with challenges. For instance, for both practical and diplomatic reasons, criminal investigation, service of documents, location of property and offenders in another country requires the acquiescence, consent or preferably the assistance of the authorities of the host country. There is thus, strong need for effective legal and institutional framework for extradition of offenders and general mutual legal assistance. An argument is made that without the aforesaid features, effective enforcement of improper market practices committed wholly outside a particular jurisdiction in the region is unlikely to be achieved. Consequently, challenges associated with enforcement of extra-territorial crimes relate to extradition and mutual legal assistance—rendition may not always be made nor legal assistance and cooperation received from the requested country.

The following sub-section briefly considers these challenges, in turn.

5.1.1. CHALLENGES RELATING TO EXTRADITION.

At international law, there are three basic conditions for effective extradition, namely:

- a) existence of an extraditable offence;
- b) the principle of ‘double criminality’; and
- c) existence of an extradition treaty between the requesting state and the requested state.⁶

The efficacy of national extradition Acts of Parliament to promote effective extradition is measured against its compliance with the three basic conditions outlined above. Existence of an extraditable offence implies that a particular improper market practice must be defined as an offence and the penalty thereof prescribed in a written law. This aspect would be satisfied by implementing the proposed extra-territorial criminalization of improper market practices.

⁵ Ibid

⁶ See, Malcolm Shaw, *International Law*, 6thed, (2008), at p. 686-94

Constraints Relating to the Narrow Class of Securities in respect of which Extradition is Available

Perusal of schedule stipulating extraditable offences under the *Zambian Extradition Act* and Extradition Acts of most of the key jurisdictions such as Kenya, Malawi, Namibia, Tanzania and Uganda, reveals that offences relating to securities market misconduct are not extraditable. Only offences committed in respect of companies have been recognized as extraditable.⁷ As has been argued above, it is not enough to criminalize extra-territorial market misconduct. The matter must be taken a little further by making sure that the offence finds expression in the Schedule containing extraditable offences. An argument is made that the exclusion of securities market offences from Schedule is likely to serve as a constraint on effective enforcement of extra-territorial offences.

It could be argued that that the expression ‘offences relating to companies’ may be construed as reference to ‘securities market offences misconduct committed in respect of company securities’. If this view were to be accepted, securities market offences committed in relation to company securities would be extraditable. However, this view would only go a short way in remedying the shortcoming in the law. Given that in all these key jurisdictions, other issuers than companies are eligible to list under the rules of various securities exchanges in the region,⁸ an argument is made that such a shortcoming in the law is likely to compromise the regulation of extra-territorial market misconduct. This view is supported by the position earlier advanced that effective extradition of an offender depends on existence of an extraditable offence as stipulated in the said schedules.

A question may be asked, in the event that market misconduct is committed wholly outside Zambia in respect of securities of a *Zambian local authority* (other than a council), parastatal, cooperative society, trust or collective investment scheme, how would Kenya comply with a request for extradition when in fact the offence is one that is not included in the Schedule of her Extradition Act? Would it not be open to the offender (otherwise accused) to apply to the Kenyan High Court or Constitutional Court for a Prohibitive Order or other restraining Orders?

⁷Only offences committed against the law relating to companies are extraditable: See, Paragraph 23 of the First Schedule to the *Zambian Extradition Act*.

⁸ More so in COMESA countries who are also SADC Members under the Harmonized Listing Rules 2012

Of course it would be. As a possible solution to this shortcoming in the law, proposals are made for the inclusion of committed under various Securities Acts of COMESA Member States in respect of securities of an issuer/company. For the purposes of such a provision, ‘issuer’ and ‘company’ should mean “issuer as defined under the Listings Rules of an admitting securities exchange”.⁹

The principle of double criminality implies that not only should the extra-territorial improper market practice be an offence in the requesting state but also in the requested state. This aspect would be satisfied by implementing the region-wide criminalization of extra-territorial improper market practices and adoption of uniform securities laws. The existence of an extradition treaty between a requesting state and the requested state is only significant in the event that latter state refuses surrender the offender. In this regard a question may be asked, in the event that rendition is refused, would an Extradition Act of Parliament ipso facto give rise to an obligation at international law so as to compel the refusing state to comply with the request? An argument is made that a Presidential Order made under the Extradition Act and declaring a certain country as an extradition source or destination does not of itself give rise to an enforceable obligation on the country therein named to surrender an offender. Such an Order is merely a unilateral expression of one state’s willingness to have bilateral or mutual cooperation with the country or countries named in the Order. For an enforceable obligation to arise at international law there must be something more—bilateral or multi-lateral extradition treaties must be signed between Zambia and all COMESA Members who wish to have cooperation. As Steenberghe (2011) observes:

“The [obligation] to extradite or prosecute is found in numerous treaties. Such an obligation is not to be found under customary international law.”¹⁰

The United States Supreme Court has also made an observation to the same effect. The Court observes:

“Apart from them (Treaties)...there is no well-defined obligation to

⁹ It has been established in Chapter 3 of the thesis that under the SADC Harmonized Listings Rules 2012 as adopted by LuSE, both companies and other entities incorporated or un-incorporated that issue securities as defined under the Zambian Securities Act 2016 are listable. Under the SADC harmonized Listing Rules, ‘Issuer’ and ‘company’ denote listable entities incorporated or un-incorporated.

¹⁰ Raphael van Steenberghe, ‘The Obligation to Extradite or Prosecute, Clarifying its Nature,’ 9 Journal of International Criminal Justice 1089 (2011), at p. 1092

deliver up a fugitive to another and it has never been recognized as being among those obligations of one government towards another which rests upon established principles of international law.”¹¹

However, that is not to suggest a trifle that a state cannot surrender a fugitive in the absence of an extradition treaty between it and the requesting state. That may still be done purely out of comity of states. As Green (1953) observes:

“It is fully compatible with state sovereignty for a State to surrender a fugitive even though no extradition treaty exists.”¹²

Items (a) and (b) above are usually satisfied under national extradition laws.¹³ The major challenge usually consists in the absence of an extradition treaty between the requesting state and the requested state. At the time of writing this article, research revealed that Zambia had only three bilateral extradition treaties signed two of which were in force. The said treaties have been signed with United States of America¹⁴, United Kingdom¹⁵ and South Africa¹⁶. Zambia has no bilateral extradition treaty with any COMESA country either and so does Kenya. South Africa boasts a much brighter record.¹⁷ This state of affairs is likely to affect the efficacy of provisions of the Extradition Act to promote effective extradition of stock market participants who commit extra-territorial improper market practices in the COMESA region. An argument is made that imposition of an enforceable obligation—by way of extradition treaties—on COMESA countries is likely to compel compliance with requests for extradition of extra-territorial improper market practice offenders. It would therefore, be prudent for Zambia to sign bilateral extradition treaties with fellow COMESA Members.

5.1.2. CHALLENGES RELATING TO MUTUAL LEGAL ASSISTANCE

There are certain procedural matters which need to be done before or after the extradition of an accused. These include location and identification of the offender and property the subject of the

¹¹ United States vs Rauscher, 119 U.S. 407, at pp. 411-412

¹² L.C. Green, ‘Recent Practice in the Law of Extradition: 6 Current Legal Problems,’ 1953, at p. 287

¹³ See sections 4(1), 13, 16(1) and 25 of the Zambian Extradition Act

¹⁴ Signed in 1931 and entered into force in 1935

¹⁵ Signed in 1931 and entered into force in 1935

¹⁶ Signed but not yet in force

¹⁷ South Africa has bilateral extradition treaties in force with (i) Malawi, (ii) Swaziland, (iii) Botswana, (iv) Lesotho, and (v) Egypt. She has also signed treaties with Zambia and Namibia though these treaties are yet to enter into force.

offence or bought with proceeds of offence, service of documents, delivery and receipt of information, documents and records, execution of search warrants, taking witness depositions, and persuading foreign nationals to come and testify in the requesting state.

The said procedural matters doubtless need increased bilateral and sometimes, multi-national cooperative efforts. One way of putting in place a supporting framework for such cooperation is signing bilateral or multi-lateral mutual legal assistance treaties or agreements. In this regard the SADC Protocol on Mutual Legal Assistance in Criminal Matters 2002 comes in handy for those COMESA Members who are also SADC Members.

Mutual legal assistance is defined as “any assistance given by the Requested State in respect of investigations, prosecutions or proceedings in the Requesting State in criminal matters, irrespective of whether the assistance is sought or is to be provided by a court or some other competent authority.¹⁸ Criminal matters [include] investigations, prosecutions, proceedings relating to offences concerning transnational organized crime, corruption, taxation, custom duties and foreign exchange controls.¹⁹

Legal assistance to be provided includes:

- a) location and identification of persons, property, objects and items;
- b) service of process and documents;
- c) delivery and receipt of documents and records;
- d) execution of warrants and seizures;
- e) taking evidence or obtaining statements or both;
- f) securing attendance of witnesses in before authorities of the Requesting State; and
- g) taking possible measures for location, restraint, seizure, freezing or forfeiture of proceeds of crime.²⁰

It is worth noting, however, that the SADC Protocol MLA 2002 does not apply to the arrest or detention of a person with the view to the extradition of that person.²¹ It does not apply to the

¹⁸ Article 2(2) of the SADC protocol MLA 2002

¹⁹ Article 2(3) of the SADC Protocol MLA 2002

²⁰ Article 2(5) of the SADC Protocol MLA 2002

²¹ Article 2(7) (a) of the SADC Protocol MLA 2002

transfer of persons in custody to serve sentences, either.²² Such matters have been deliberately left to the realm of extradition treaties. This position seems to lend support to the proposal earlier herein made for efforts aimed at increasing bilateral extradition treaties among eastern and southern African countries as a tool for effective extradition of stock market participants who commit extra-territorial improper market practices. As has been argued in respect of the Zambian Extradition Act, a declaratory order by the Minister under section 5 of the Zambian Mutual Legal Assistance in Criminal Matters Act²³ and specifying a certain country in the region as entitled to mutual legal assistance does not ipso facto give rise to an obligation on the part of that other State to undertake investigations on behalf of Zambia and vice versa. Such an obligation derives from bilateral or multilateral mutual legal assistance treaties.

In order to ensure effective mutual legal assistance among all COMESA Members (as opposed to the current situation whereby only those Members who are also SADC Members have the privilege of enjoying this facility) proposals are made for the adoption and implementation of the SADC Protocol on MLA 2002 under the COMESA legal framework. Further the SADC Protocol should be domesticated in Zambia and other COMESA Members.

An argument is made that with extra-territorial criminalization of improper market practices, increased extradition treaties for effective extradition of offenders, and enhanced mutual legal assistance in extra-territorial criminal matters, effective enforcement of extra-territorial improper market practices is likely to be achieved. A further argument is made that with effective enforcement of such improper stock market practices which have the potential of hurting the integrity of the market, investor confidence is likely to increase in the cross-border securities market. Increasing investor confidence in the cross-border securities market is likely to incentivize and increase foreign participation. The growth in foreign participation is likely to lead to increased cross-border trade in listed securities in the region.

²² Article 2(7) (c) of the SADC Protocol MLA 2002

²³ Chapter 98 of the Laws of Zambia

5.2. CONSTRAINTS RELATING TO THE POOR REGULATORY CAPACITY OF THE ZAMBIAN SECURITIES AND EXCHANGE COMMISSION

Constraints inherent in the traditional direct securities holding system include increased transportation and insurance costs of paper certificates, delayed settlement of trades and reduced volume of securities that could be traded across international borders within the region. Conversely, the indirect securities holding system which has been introduced in Zambia to run side-by-side with the direct securities holding system has the potential of cutting out the said costs and speed up the settlement of trades and increase the volume of securities that could be traded across international borders at minimal transaction costs. Against this backdrop, the introduction of an indirect securities-holding system and dematerialized securities in Zambia is seen as having the potential of incentivizing trade in huge volumes of securities both locally and across the Zambian borders. However, indirect securities holding systems cast additional burdens on the regulatory capacity of the securities exchange commission in terms of enforcement in that its integrity and that of the entire market depends on effective enforcement of fiduciary duties of stock market intermediaries, and other regulations and rules.²⁴

The introduction of dematerialized securities also depends on effective enforcement of regulatory rules governing the conduct of central securities depositories (CSD) and participants participating on a particular market. Further the concept of indirect holding of securities through intermediaries normally imports the participation of foreign intermediaries and CSD on local stock markets. This also poses additional burdens on the regulatory capacity of the Securities and Exchange Commission to effectively regulate activities of such external intermediaries and CSDs on account of its territorial jurisdiction. The Zambian SEC has no financial and statutory capacity to effectively regulate intermediaries located in other countries in eastern and southern Africa.²⁵ Thus, given the poor statutory regulatory capacity of the Zambian Securities Exchange

²⁴ Increasing trading activities are likely to serve as a catalyst for improper market practices.

²⁵ Sources of monies for operations of the Zambian SEC are as follows: (i) monies appropriated by Parliament for that purpose; due to frequently unfulfilled commitment to fund the appropriations coupled with capricious changes in budgetary priorities funds originally meant for the SEC never actually reach the institution, (ii) monies levied by the SEC from licences—exchange licenses, and clearing and settlement agencies licenses: section 21 of the Zambian Securities Act 2016, dealers, investment advisors, agents and representatives: sections 32, 33 and 34 of the Zambian Securities Act 2016; not enough money can be raised from seven brokers (dealers) and five investment advisors to sustain the regulatory mandate of the Zambian SEC as stipulated under section 9 of the Securities Act 2016, and (iii) such other monies as may be payable to the SEC, and (iv) grants: section 8(1) (a)-(d), and 2(a) of the First Schedule to the Zambian Securities Act 2016; in the absence of power on the part of the Zambian SEC to fine erring market

Commission coupled with constraints relating to funding, embracing an indirect securities holding system and introducing dematerialized securities is likely to do more harm than good. It is in this context that the poor regulatory capacity of the Zambian SEC presents itself as a constraint on the efficacy of the Zambian legal framework to promote local and cross-border trade in securities.

As a possible way of overcoming this constraint, it is proposed as follows: First, the regulatory capacity and funding of the Zambian Securities and Exchange Commission should be improved. This could be achieved by making the administrative penalties regime effective so that the Zambian SEC can rake in funds in fines. As a possible way of achieving this end, it is proposed that proposals for reform proposed in **Sub-sections 4.1** and **4.2** herein below be implemented.

5.2.1. CONSTRAINTS RELATING TO UNCONSTITUTIONALITY OF SEC'S ADMINISTRATIVE PENALTIES

With the underlying objective of beefing up the financial capacity of the Zambian SEC, section 218(1) of the Securities Act 2016 introduces imposition of administrative penalties by the SEC. Given the introduction of participation of external credit rating agencies²⁶, foreign collective investment schemes²⁷ and other 'licensed persons',²⁸ in the Zambian securities industry, there is dire need to increase the financial capacity of the SEC. How could the Zambian SEC effectively police these foreign-based entities without enough financial capacity?

The Zambian SEC could impose an administrative fine if:

- (i) it is satisfied, after due investigation, that a person has committed an offence under the Securities Act or regulations or rules made under it; or
- (ii) a person admits to having committed an offence under the Securities Act or regulations or rules thereunder made.²⁹

The following administrative penalties may be imposed by the Zambian SEC, namely:

- (a) a public or private censure or reprimand;

participants for improper market practices or failure to continually communicate price-sensitive information to the SEC or the general public, it is quite difficult to see how extra monies can come into the SEC—the power to do so vesting in the State.

²⁶ See section 60(1)(2) of the Zambian Securities Act 2016

²⁷ See section 125(1) of the Zambian Securities Act 2016

²⁸ See the definition of 'licensed person' in section 2 of the Securities Act 2016, and generally Part V of the said Act

²⁹ Section 218(1) of the Zambian Securities Act 2016

(b) where a fine is provided for an offence, an amount of money not exceeding fifty per cent of the maximum of the fine; or

(c) where no penalty is provided for an offence, an amount of money to be determined by the Commission but not exceeding double the monetary gain to the person for each contravention.³⁰

Section 218(1) attempts to introduce establishment of criminal liability solely on the finding of an investigation or ex curia admission of guilt. A question may be asked, ‘does the Zambian Constitution allow condemnation of persons in fines (money which is property) without breach of law being established by a court of competent jurisdiction or in the case of admission of guilt, a conviction entered by a court of law?’

In Zambia a person cannot be condemned to a fine or forfeiture of property the proceeds of crime except after conviction for a criminal offence by a court of competent jurisdiction.³¹ Otherwise, the action of authorities would amount to compulsory acquisition of property in which it could only be done under the authority of an Act of Parliament which provides for payment of adequate compensation.³² That Act of Parliament should also provide that failing agreement as to the amount of compensation, the amount shall be determined by a court of competent jurisdiction.³³ Absent such safeguards, property of any description in Zambia cannot be compulsorily taken possession of or right or interest there-over or therein acquired.

It is clear from the foregoing that section 218 of the Securities Act 2016 attempts to divert from the constitutional order. What then is the effect of such inconsistency? Article 1(1) of the Zambian Constitution provides as follows:

SUPREMACY OF CONSTITUTION

1. (1) This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice

³⁰ See section 218(2)(a)(b)(c) of the Zambian Securities Act 2016

³¹ See Article 16(2)(b) of the Zambian Constitution. It should be noted also that the applicability and quantum of administrative fines under section 218(2)(b)(c) is dependent on the existence, quantum and validity of the fine for the offence in the Securities Act. Absent express provision for a fine or quantum thereof, administrative fines cannot competently apply: section 218(2)(b)(c) of the Securities Act 2016 as read in light of Article 18(8) of the Zambian Constitution.

³² See Article 16(1) of the Zambian Constitution

³³ See Article 16(3) of the Zambian Constitution

that is inconsistent with its provisions is void to the extent of the inconsistency.

It is submitted that section 218 of the Securities Act 2016 is unconstitutional to the extent that it empowers the SEC to impose administrative fines solely on an investigation result or an ex curia admission of guilt without breach criminal law established by a competent court and conviction recorded. It is further submitted that section 218 is void and as such of no effect both at law and in equity.

Constraints Relating to the Unconstitutionality of Imposition of Administrative Fines for Offences-Without-Penalties

Section 218(2)(c) of the Securities Act 2016 attempts to give power to the SEC to retrospectively fix penalties for offences which do not carry penalties. The purpose of carrying out investigations by the SEC is to gather proof of commission of offences under the Act. Once proof is gathered charges may be preferred against the accused. Since the rules of fair play dictate that one cannot be both player and referee, the breach of the Securities Act or the regulations or rules thereunder made should be done by a neutral body. For the purposes of the Securities Act this could be the Capital Markets Tribunal.

In light of this ambitious attempt to fix penalties retrospectively, Article 18(8) of the Zambian Constitution provides that “a person shall not be convicted of a criminal offence unless the offence is defined and the penalty prescribed in a written law.” Thus, paragraph (c) of section 218(2) of the Securities Act 2016 is unconstitutional to the extent that it attempts to prescribe penalties retrospectively.³⁴ It is therefore, of no effect whatsoever.

The resulting inability on the part of the Zambian SEC to impose administrative fines robs it of capacity to grow its financial base for effective enforcement of regulatory rules of the Zambian securities industry. As a possible solution to this shortcoming, proposals for reform have been made in the following sub-section.

³⁴ Such an attempt could only hold where the very section defining the offence also expressly prescribes imposition of administrative penalties by the SEC as a penalty for the offence.

5.2.2. CONSTRAINTS RELATING TO UNCONSTITUTIONALITY OF THE ROLE OF THE CAPITAL MARKETS TRIBUNAL

The Capital Markets Tribunal (CMT) is established pursuant to section 184(1)(2) of the Securities Act 2016 as a superior court of record. The CMT has 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.³⁵

Thus, the CMT has jurisdiction to hear and determine appeals from the decision of the SEC to impose administrative penalties or suspend or revoke license of a licensed person. It also has original jurisdiction to hear and determine whether a person has committed any offences under the Securities Act 2016.³⁶

After the SEC concludes its investigations and proof of commission of an offence under the Securities Act is gathered, it will prefer a charge against the accused person. As a matter of course, the trial date will be set before the CMT. A question may be asked, ‘is the CMT constitutionally recognized as a court of competent jurisdiction to hear and determine distinct breach of criminal law (improper market practices) under the Securities Act and imposition of fines?’

Article 18(1) of the Zambian Constitution provides that “if a person is charged with a criminal offence, the case is to be fairly heard within a reasonable time by an independent and impartial court of law.” ‘Court’ is defined as “a court of competent jurisdiction established by or under the Constitution.”³⁷ The Zambian judicature consists of superior courts³⁸, the subordinate courts, small claims courts, local courts and other lower courts as may be by an Act of Parliament, be

³⁵ Section 184(3)(a)-(c) of the Securities Act 2016

³⁶ See definition of ‘market misconduct’ in section 2 of the Securities Act 2016, particularly paragraph (d) of the definition

³⁷ See definition of the term in Article 266 of the Zambian Constitution

³⁸ See the definition of ‘superior court’ in Article 266 of the Zambian Constitution

prescribed.³⁹ The following courts have been recognized as ‘superior courts’, namely (i) the Supreme Court, (ii) the Constitutional Court, (iii) the Court of Appeal, and (iv) the High Court.

An argument is made that though the CMT is established as a superior court of record under the Securities Act 2016, it is not so recognized under the Zambian Constitution let alone as part of the judicature. Thus, it has no constitutional mandate to hear and determine breach of criminal law (offences under the Securities Act) for the purposes of imposing penalties therein prescribed.⁴⁰

It would follow that the unconstitutionality of the mandate of the CMT to establish distinct breach of criminal law (offences under the Securities Act 2016) defeats the power of the CMT to order payment of fines by a convicted insider trader to the SEC.⁴¹ This state of affairs is likely to further weaken the capacity of the Zambian SEC to mobilize funds for effective discharge of its regulatory role which has been gradually going cross-border.

As a possible solution to these shortcomings, the following proposals are made:

Firstly, there is need to amend the definition of ‘court’ and ‘superior court’ in Article 266 of the Zambian Constitution as follows:

“**Court** means ‘a court of competent jurisdiction established by or under this Constitution or a Tribunal established under an Act of Parliament.’”

“**Superior Court** means ‘the Supreme Court, the Constitutional Court, the Court of Appeal, the High Court, and the Capital Markets Tribunal established under the Securities Act.’”

Secondly, every section or selected sections in the Securities Act 2016 should expressly provide for imposition of administrative fines by the SEC.

Thirdly, section 218(1) of the Securities Act should be repealed and replaced with the following section:

s. 218(1). Where a person is convicted of an offence under this Act or regulations or rules thereunder made or admits to having committed an

³⁹ See Article 120(1)(a)-(d) of the Zambian Constitution

⁴⁰ In form of Fines and terms of imprisonment

⁴¹ The Capital Markets Tribunal is to determine how much to be paid on application of the SEC: See section 140, 141(1)(2) of the Securities Act 2016

offence as aforesaid, the Commission shall have power to impose administrative penalties as provided in subsection (2).

Implementation of these proposed measures is likely to clothe the CMT with power to determine breach of criminal law under the Securities Act and impose fines. The measures are also likely to constitutionalize the imposition of administrative fines by the SEC. Given the growing number of foreign-based participants in the Zambian securities industry, a financially and institutionally capable SEC is likely to ensure protection of interests of all participants. It is also likely to foster investor confidence and enhance the overall integrity of the Zambian securities market. An argument is made that such a positive feature is likely to stimulate increased foreign participation. With increased foreign participation, cross-border trade in securities is likely to increase in the region.

5.3. CONSTRAINTS RELATING TO LACK OF POWER BY MOST REGIONAL REGULATORS TO ACT IN SUPPORT OF FOREIGN REGULATORS

This sub-section departs in the notion that increased assistance and cooperation among securities market regulators in the region is likely to enhance enforcement of market regulations, foster investor confidence and the growth of the overall integrity of the market. Such increased assistance and cooperation among regulators in the region is necessary given the increasing participation of foreign-based or external entities on local markets.

Perusal of Part II of the Zambian Securities Act 2016 reveals that the Zambian SEC has express power to act in support of foreign regulators in the region or beyond if so requested.⁴² That could be the case where the Zambian SEC is requested by a foreign regulator to investigate a local person specified in the request as having contravened the regulatory rules, enforced by the requesting regulator, in relation to a securities transaction.⁴³

Where the Zambian SEC is satisfied that it is desirable or expedient to render assistance as requested in the public interest or pursuant to a bilateral mutual legal assistance treaty, or that

⁴² See, section 165(2) of the Zambian Securities Act 2016

⁴³ See, paragraphs (a) and (b) of section 165(2) of the Zambian Securities Act 2016

such assistance would enable the requesting regulator perform its functions under their law, it may give the assistance requested.⁴⁴ For the purpose of giving the requested assistance, it would be lawful for the Zambian SEC to exercise its power over the assets of a licensed person in aid of investigation or prosecution by foreign regulators?⁴⁵ But for express provision for power to act in support of foreign regulators, the exercise of this power would have been limited to offences committed under the Zambian Securities Act and regulations thereunder made.⁴⁶

An argument is made that availability of such power on the part of the Zambian SEC is likely to ensure that erring authorized participants who cannot be punished or receive adequate punishment under the laws of their home countries or other COMESA countries receive the same. It would also ensure that the Commission exercises its power in aid of investigations or prosecution by foreign regulators or indeed litigation involving a licensed or authorized person in other COMESA States. It is submitted that such a power is likely to enhance investor protection and the overall integrity of the regional securities market against the challenge of increasing foreign participation on local securities exchanges.

Constraints Relating to Lack of Power By Most SECs In The Region To Act In Support Of Foreign Regulators

Most jurisdictions in the region have not made provision for the power on the part of their securities regulators to act in support of foreign regulators.⁴⁷ Such a state of affairs is unacceptable given the obligation on the part of COMESA Members to promote an enabling environment for the growth of cross-border trade in securities in the region.⁴⁸ For lack of space, only three jurisdictions will be considered here, namely (i) Zimbabwe, (ii) Kenya, and (iii) Mauritius.

⁴⁴ See, section 165(3)(a)(b) of the Zambian Securities Act 2016

⁴⁵ 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: section 12(1)(a)-(c) of the Zambian Securities Act 2016

⁴⁶ See, section 9(2)(a) of the Zambian Securities Act 2016

⁴⁷ Jurisdiction such as, Egypt, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Seychelles, and Zimbabwe

⁴⁸ See, Articles 3(c) and 81(b)(c) of the COMESA Treaty 1993

The Zimbabwean Securities Commission is established pursuant to section 3 of the Securities Act of 2004. It has express power to appoint investigators for the purpose institute investigations against a licensed person.⁴⁹ The Commission has also power to demand certain information from investigated licensed person under investigation.⁵⁰ There is however, no express provision that such powers could be exercised in aid of regulatory efforts of a foreign regulator.⁵¹

The Kenyan Capital Markets Authority is established pursuant to section 5(1) of the Capital Markets Act of 2000. It has power to appoint investigators, enter upon premises and conduct a search and demand production of certain records and documents during investigation of a licensed person.⁵² It also has power to intervene in the management of a licensed person for purposes of ensuring compliance with the regulatory rules. There is however, no express provision to the effect that such powers could be expressed in support of a foreign regulator.⁵³

The Mauritian Securities Commission is established pursuant to section 6 of the Securities Act 2005. The Commission has power to appoint investigators for purposes of investigation a licensed person.⁵⁴ It also has power to direct a licensed person to do a specific act or refrain from doing a specific act for the purpose of compensating persons injured by the act.⁵⁵ The Commission also has power to issue cease-trading orders for purposes of ensuring market integrity.⁵⁶ However, there is no express stipulation that such powers could be exercised in support of a foreign regulator.

In this regard a question may be asked, ‘would it be competent for a foreign regulator to exercise its power over the assets of a licensed person in aid of on-going investigations or prosecution by

⁴⁹ See, section 101 of the Zimbabwean Securities Act 2004

⁵⁰ See, section 100 of the Zimbabwean Securities Act 2004

⁵¹ 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 thereunder made, and offences thereunder committed. Thus, the jurisdiction of the Commission is restricted to Zimbabwe: See, section 4(2)(d)(f) of the Zimbabwean Securities Act 2004

⁵² See, sections 13A and 33D of the Kenyan Capital Markets Act 2000

⁵³ The mandate of the Capital Markets Authority is restricted to enforcement of the Capital Markets Act and regulations thereunder made, and offences thereunder committed: See, section 11(3)(cc)(i)-(iv) of the Kenyan Capital Markets

⁵⁴ See, section 124 of the Mauritian Securities Act 2005

⁵⁵ See, section 126(a)(b) of the Mauritian Securities Act 2005

⁵⁶ See, section 133 of the Mauritian Securities Act 2005

Zambian SEC in the absence of express provision to that effect? No, it would not be competent since the power of the Zambian SEC revolves around breach of the Securities Act of that regulator's jurisdiction and, regulations and rules made thereunder. Yet another question may be asked in this respect, would it be proper for a foreign regulator to suspend a license for an authorized or licensed person who found guilty of fragrant market misconduct in other COMESA countries? Would the erring participant not run the argument that the foreign regulator could only suspend its license or revoke the same for breach of local law? A further question may be asked, 'would it be competent for a foreign listing exchange to suspend or cancel a listing of a Zambian issuer, at the request of the Zambian SEC, who is found guilty of fragrant breach of Zambian laws or listing rules or those of another COMESA State? Would it not be open to the cross-listing issuer to argue that its listing could only be suspended or cancelled for breach of Listing Rules or the Securities Act, regulations and rules thereunder made in the jurisdiction of the foreign regulator—jurisdiction of cross-listing? Of course the lack of express provision for power to act in support of foreign regulators and shortcomings highlighted in the questions posed above, make for good ground for commencing judicial review proceedings against the foreign regulator on the ground of 'illegality' and 'irrationality'.

An argument is made that given the ever-increasing foreign participation on local securities exchanges in the region, such a negative feature is likely to compromise the regulation of foreign-based participants. Consequently, investor protection and the overall integrity of the regional market is likely to be compromised. An argument is made that the falling local and foreign investor participation is likely to hurt the growth of local and cross-border trade in securities in the region.

In order to fix such shortcomings in the law, the following proposals are made:

- (i) First, there is need to clothe the foreign regulators with own-initiative power exercisable in respect of authorized person and or their assets, at the request of , or for the purposes of assisting foreign regulators;
- (ii) Secondly, there is need to empower the foreign regulators to suspend or revoke the license or authority of a licensed or authorized person in aid of foreign proceedings or where the misconduct complained of hurts or is likely to hurt the integrity of the regional market; and

(iii) Stipulate in the LuSE Listing Rules 2012 and those of foreign exchanges that the Board may suspend or terminate a listing of an issuer if that issuer is found guilty of an offence in another COMESA country. Such power should be exercisable with proviso that the offence hurts or is likely to hurt the integrity of the regional market.

Given the increasingly growing international character of securities services and markets, implementing such provisions are important especially as a complement to the earlier proposed extra-territorial criminalization of improper market practices. On the need for increased cooperation among regulators in response to the increasing internationalization of securities markets, Mann and Barry (2005) observe:

“In today’s global marketplace, cross-border securities transactions have become routine: firms and investors frequently undertake activities in one jurisdiction that impact the laws and regulations of other jurisdictions. In response, efforts to formalize cooperation among regulators have redoubled. Whereas in the past authorities paid polite lip service to cooperation, today it is real. Indeed, the scope of cooperation has developed and expanded over time, from requests under the Hague Convention and pursuant to Letters Rogatory, to the implementation of Mutual Legal Assistance Treaties (MLATs) among governments and less formal bilateral and multilateral Memoranda of Understanding (MOUs) among securities regulators. With each new development, international regulatory authorities have enhanced their ability to investigate and prosecute activities that cross into another regulator’s jurisdiction.”⁵⁷

Power To Act In Support Of Overseas Regulators By United Kingdom and United States Securities Market Regulators

The United Kingdom Financial Services Authority(FSA) has own-initiative power to undertake certain actions or implement certain measures in support of foreign regulators. Such power is exercisable whether or not the FSA has power which is exercisable in relation to authorized

⁵⁷Michael D. Mann and William P. Barry, ‘Developments in the Internationalization of Securities Enforcement,’ *The International Lawyer*, Vol. 39, No. 3 of 2005, 667-696, at p. 667

persons by virtue of any provisions of Part VIII of the Financial Services and Markets Act 2000.⁵⁸ Further, this power may be exercised either on request of a foreign regulator or of the Authorities own motion in support of such foreign regulator.⁵⁹

The exercise of the power on the part of the FSA to act in support of foreign regulators is illustrated by *Financial Services Authority (FSA) & Others vs Amron International SA & Others*.⁶⁰ The brief facts of the case were that in July of 2009 the United States SEC (SEC) instituted market misconduct proceedings against a Mr Badain and others for fraudulent trading and market manipulation in respect of shares of a United States company. In the same month the SEC sought assistance from the 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 FSA sought clarification from the SEC regarding the scope of the request. This was necessary since under English law it was necessary to show that instituting investigations in support of foreign proceedings was reasonable and necessary under the circumstances. The SEC gave an explanation to the satisfaction of the FSA. Thereafter, the FSA appointed investigators for the purposes of securing production of documents by the accountants of the targeted firms as specified in SEC's request. The respondent firms challenged the propriety of the decision of the FSA by commencing an action against the FSA in the English High Court of Justice. The High Court held that the FSA had acted improperly in requesting London-based firms to produce documents in aid of an on-going civil action by the United States SEC in New York. The FSA appealed the decision to the Court of Appeal. The Court of Appeal reversed the decision of the High Court. The Court held that there was no error of law or principle in FSA's decision to appoint investigators. The Court further held that while it was proper for the FSA to consider the request and seek clarification from the SEC, it was not required to second guess the SEC regarding the position of the US laws on the matter, the correctness of what they were being asked for or the basis of the investigation in the United States. The Court, however, held that the exercise of their investigative powers, investigators appointed by the FSA needed to satisfy themselves that the exercise of the power was reasonable and proportionate.⁶¹ The Court found

⁵⁸ Section 47(1)(a)(b) and (2) of the United Kingdom Financial Services and Markets Act 2000.

⁵⁹ *Ibid*

⁶⁰ [2010] EWCA Civ 123

⁶¹ As is required by Article 8 of the English Human Rights Act

that this test was satisfied in casu as is the case in any case where the documents sought are relevant to the allegations of financial malpractice or crime.

An argument is made that such a provision is likely to ensure effective enforcement of regulatory rules between the United Kingdom and the European Union Members whose financial systems are no doubt connected to the former's system.

Similarly, in the United States of America, the Securities and Exchange Commission (hereinafter 'US SEC') has statutory power to take certain measures against any licensed or authorized person or that person's property in support of foreign regulators.⁶² In addition to this power, the US SEC is clothed with extra-territorial jurisdiction over transactions in securities listed in foreign countries.⁶³

In underscoring the need to delimit or define the extent of the extra-territorial reach of United States securities law, Justice Steven in the United States Supreme Court decision in *Morrison vs National Australia Bank*⁶⁴, observes:

“Whereas a narrow application of United States securities law could turn the United States into ‘Barbary Coast’ for malefactors perpetrating fraud in foreign markets, an expansive application could make the United States ‘a Shangri-La’ for class action litigation for lawyers representing those

⁶²Section 21(a)(2) of the Securities Exchange Act of 1934, authorizes the SEC to conduct investigations on behalf of foreign securities authorities (as defined by the Exchange Act) and compel the production of documents and testimony from any person and entity, irrespective of whether that person or entity is regulated by the SEC. Section 21(a)(2) provides: On request, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States.

⁶³ See, section 10b of the United States Securities Act 1934 (The Exchange Act). This section makes it unlawful for any person to ‘commit fraud in respect of US-listed securities or those listed elsewhere, by use of any means, or instrumentality of interstate commerce, or any mails, or any facility of any national securities exchange.’

⁶⁴ 130 S. Cir. 2869, (2010)

allegedly cheated in foreign securities markets.”⁶⁵

The United States Supreme Court rejected the conduct test and the effect test earlier laid down in the Berger case⁶⁶ and replaced them with a transactional test. The Court held that section 10b of the Securities Act 1934 applies only to (i) transactions in securities listed on domestic exchanges, and (ii) domestic transactions in securities listed elsewhere. In a recent decision in *Absolute Activist Value Master Fund Ltd vs Ficeto*⁶⁷, the Second Circuit put the second leg of the Morrison test into proper perspective. The Court held that a transaction in securities listed elsewhere is treated as ‘domestic’ and therefore subject to United States securities law if (i) the parties incur irrevocable liability in respect of the transaction (i.e. the parties become bound to perform the transaction in the United States), or (ii) title to the securities passes within the United States.⁶⁸ It would follow that where either or both of the legs of the Absolute Activist test is/are satisfied, the US SEC could exercise its power under United States securities law in support of a requesting foreign regulator or in aid of United States investors.

6. CONCLUSION

The conclusion reached in this article is that the regulatory framework for the regulation of extra-territorial securities market misconduct has not provided adequate incentive to ensure effective regulation of extra-territorial securities offences in the region—enforcement of extra-territorial criminal law.

This article has shown that extra-territorial criminalization of market misconduct is not self-executing at all. There is need to put in place supporting legal and institutional framework. In particular, it has been established that the existence of a comprehensive Extradition Act does not of itself warrant effective compulsory extradition of market participants who commit extra-territorial market misconduct in one jurisdiction but having adverse effects in another jurisdiction. For an obligation to surrender an offender or fugitive to arise on the part of COMESA member states there is need to put in place extradition treaties. It has also been

⁶⁵ Ibid, at p. 2886

⁶⁶ The case is fully cited as *Securities and Exchange Commission (SEC) vs Berger*, 322 F.3d, 187. The conduct test looks at whether and to what extent the wrongful conduct complained of occurred in the United States. The effect test looks to whether or not the wrongful conduct complained of had a substantial effect in the United States or its citizens: See p. 192 of judgement.

⁶⁷ 677 F.3d 60 (2d Cir. 2012)

⁶⁸ Ibid, at p. 69

established that contrary to this requirement, there is paucity of extradition treaties among COMESA member states.

The article has also established that there is need to put in place bilateral and multilateral mutual legal assistance treaties. Such treaties or agreements would help spell out and streamline areas of mutual legal assistance among COMESA member states. Such mutual legal assistance is crucial to effective enforcement of extra-territorial market misconduct.

It has also been established herein that the Zambian SEC has poor regulatory capacity to ensure effective policing and enforcement of extra-territorial market misconduct. The poor regulatory capacity has been attributed to (i) poor financial capacity, (ii) unconstitutionality of the imposition of administrative fines by the SEC, and (iii) the unconstitutionality of the adjudicative role of the Capital Markets Tribunal. Necessary proposals for reform have been made to remedy this shortcoming.

Further, the article has established that the conferment of power on the Zambian SEC to act in support of foreign regulators is a positive feature that is likely to enhance enforcement of extra-territorial market misconduct in the COMESA region. It has also been established that most regulators in the region do have such power. An argument has been made that this negative feature is likely to compromise enforcement of extra-territorial market misconduct between Zambia and those other COMESA member states which have not conferred such power on their securities market regulators.