UNIVERSITY OF ZIMBABWE

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ENVIRONMENTAL, SOCIAL, AND GOVERNANCE: A NEW IMPERATIVE FOR DIRECTORS IN ZIMBABWE

BY EDMORE NGWEREWE
REGISTRATION NO.R027453Y

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SUPERVISOR: MR. P. JONHERA

DECLARATION

I, **EDMORE NGWEREWE**, Registration No. R027453Y, declare that this dissertation is my original work. Where I have used other people's work, whether from printed material, the internet or any other source, I have properly acknowledged and referenced it in accordance with academic practice and requirements.

Signed…………………………………………………………………

DEDICATION

This dissertation is dedicated to my wife Abbie, and my three daughters, Eliana, Celeste, and Serene.

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Special acknowledgment to my Lord and Saviour Jesus Christ who allowed me to pursue this study. His loving-kindness is better than life to me.

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ABSTRACT

The ESG movement has invaded the corporate landscape with such earthshattering velocity. ESG entered into the corporate space through both legal and non-legal initiatives. Increasingly, directors are no longer seen as delegates of shareholders whose primary objective is to pursue the interests of shareholders of profit-maximization. Rather, under the ESG lens, directors have a responsibility to pay due regard to environmental, societal, and governance concerns as they lead their companies. Some of the key characteristics of ESG include stakeholder governance and sustainability. The jurisdictions that have been in the lead on the ESG movement include the European Union, the United Kingdom, France, and the USA. Zimbabwe has not been left out of the ESG movement. The Companies and Other Business Entities Act [Chapter 24:31], the Public Entities Corporate Governance Act [Chapter 10:31], and the Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019 ushered in a new era as far as ESG is concerned in Zimbabwe. Directors need to be cognizant of the interplay between their duties and ESG concerns. Directors may be found in breach of their fiduciary and other obligations for failure to pay due regard to material ESG issues. By paying due regard to material ESG issues, directors harvest a plethora of benefits for their companies. Among other benefits, ESG ensures that risks are tracked, opportunities are maximized and the creation of value is optimized. However, the Zimbabwean ESG legal framework is not without its shortcomings. This study exposes some of the shortcomings and makes the necessary recommendations.

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CHAPTER 1: INTRODUCTION

1.1 Background & Introduction

There has been extensive debate on corporate purpose. Two prominent theories emerged from debates on corporate purpose, namely, the profit maximization theory and the stakeholder theory. The profit maximization theory holds that companies exist for one primary objective, that is, to promote the interests of shareholders in maximizing profits. The primacy of shareholder interests is central in terms of this theory. Directors are viewed as delegates of the shareholders whose prime role is that of promoting the success of the company for the benefit of shareholders as a whole and to generate maximum value for shareholders.[1] Conversely, the stakeholder theory recognizes that a company is a corporate citizen formed not only for the benefit of the shareholder. According to this theory, directors should consider the interests of other stakeholders apart from the shareholder. These other stakeholders include the customers, employees, suppliers, the environment, and the local community. Thus, directors are expected to balance the divergent interests of these stakeholders and enhance their benefits as a whole.

In the 1950s, economist Howard R. Bowen coined the term "corporate social responsibility" (CSR) which principle emphasizes the need for companies to be responsible towards society.[2] He defined CSR as *"the obligations of businessmen to pursue those decisions, or follow those line of action which are desirable in terms of the objectives and values of our society."*[3] CSR is based on the notion that a company is a citizen of the society in which it exists and operates, hence, it should act as a responsible citizen. CSR initiatives were largely seen as "nice to have" at a company. The idea of CSR has in recent times been largely replaced with environmental, social, and governance (ESG)[4]. The phrase ESG was first coined by the United Nations (UN) in 2005 following its conference "*Who Cares Wins*". Soon after, in cooperation with a group that represented institutional investors worldwide, the UN launched at the New York Stock Exchange the "*Principles for Responsible Investment*,"

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[1] I. Esser & P. Delport, Esser & Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1', 2017 *De Jure*, 101, Accessed on 22 April 2022. http://dx.doi.org/10.17159/2225-7160/2017/v50n1a6

[2] D.S. Lund & E. Pollman, The Corporate Governance Machine, *Columbia Law Review*, December 2021, Vol. 121, No. 8 (December 2021), 2612

[3] Ibid

[4] Lund & Pollman, (n 2 above), 2613

which advanced the integration of ESG issues within the investment industry.[5] ESG dovetails with the stakeholder theory. When looking at directors' responsibilities and duties from an ESG perspective, directors should not merely pursue the profit maximization approach for the benefit of shareholders. Rather, directors are bound to comprehensively and systematically consider environmental, societal, and governance concerns.[6] Environmental concerns include climate change and environmental sustainability. Societal concerns include diversity, human rights, consumer protection, and welfare. Corporate governance concerns include management structure, employment relations, and employee compensation.

Despite being a recent concept, ESG has grown to be a global phenomenon. Investors worldwide are increasingly looking at ESG compliance before injecting capital. This is called sustainable investing, impact investing, or socially responsible investing (SRI). SRI integrates ESG criteria into investment decisions as opposed to the traditional focus on financial risk and return.[7] Many investors favour ESG funds, not for moral considerations or pro-social reasons but because it is believed that ESG provides sustainable long-term value or higher risk-adjusted returns for all stakeholders.[8] According to the Global Sustainable Investment Alliance, approximately US$23 trillion in total global assets were being managed using ESG strategies in 2016.[9] This figure represented a 25% increase compared to 2014 statistics.[10] The megatrend continued to grow rapidly. Bloomberg Intelligence estimated global assets managed using ESG strategies at US$35 trillion as of February 2022.[11] It further projected the assets to reach US$50 trillion by 2025.[12]

There is increased recognition of ESG concerns globally. Recently, the US Supreme Court in ***Jam v International Finance Corp***[13] delivered a bombshell when it ruled that international organizations like International Finance Corporation, the financing arm of the World Bank, can be sued in the US

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[5] Ibid

[6] F. Donnelly & K Bowers, Fiduciary duties - ESG and the risk of director negligence Accessed on 23 April 2022.https://www.redlinks.com.hk/post/esg-and-the-risk-of-director-negligence.

[7] J. Sandberg, Socially Responsible Investment and Fiduciary Duty: Putting the Freshfields Report into Perspective, *Journal of Business Ethics* , June 2011, Vol. 101, No. 1 (June 2011), 143

[8] Lund & Pollman (n2 above), 2566

[9] B. Haddock , *et al*, Why Corporate Attorneys and Other Gatekeepers Should Consider ESG and Sustainability Principles ,*Fordham Environmental Law Review* , Vol. 30, No. 1, Symposium: Corporate Sustainability in the Era of Shifting Federal Priorities (2018), 2

[10] Ibid

[11] S. Kishan, ESG by the Numbers: Sustainable Investing Set Records in 2021, Accessed on 21 April 2022.https://www.bloomberg.com/news/articles/2022-02-03/esg-by-the-numbers-sustainable-investing-set-records-in-2021

[12] Ibid

[13] 586 US (2019)

Federal Courts for conduct arising from their commercial activities and particularly in *casu,* where the actions of the IFC had caused harm to local communities. In this case, the IFC had provided a US$450 million loan to Coastal Gujarat Power Ltd for the construction of the Tata Mundra Coal Power Plant in Kutch District, Gujarat, India. Although the construction of the power plant and its operation was commercially viable, its construction resulted in both physical and economic displacement of local fishing communities and the plant had also serious health and environmental issues for the local communities. Local communities and farmers represented by EarthRights International sued the IFC in the Federal Court of Washington DC over the destruction of their livelihoods, loss, and damage of property, and threats to their health. The IFC argued to the US Supreme Court its defense of immunity. Although accepted in lower courts, the defense could not stand in the US' highest court. In a landmark decision, the US Supreme Court ruled that the IFC could be sued in the Federal Courts for acts arising from its commercial activities. Although the matter later faced further jurisdictional hurdles in the lower courts after it was remitted back by the Supreme Court for determination, the pronouncement by the US Supreme Court placed the need for corporates to respect environmental and societal concerns on a higher footing. Recently, in March 2022, ClientEarth instituted legal proceedings against Shell's directors for breach of the directors' duties on allegations that they have failed to adequately prepare for a net-zero transmission.[14] This has been regarded as the first attempt in the US to hold directors personally responsible for poor management of climate risk.[15] Some leading companies are now linking employment compensation to meeting ESG Goals. For instance, in April 2022, Mastercard Inc resolved to tie all employee bonuses to meeting ESG Goals of reducing carbon emissions, improving financial inclusion, and reaching gender-pay parity.[16]

ESG has managed to take root in the corporate landscape through both non-legal and legal initiatives. Non-legal initiatives include the championing of ESG issues by international organizations such as the United Nations and the Organisation of Economic Cooperation and Development (OECD). The legal initiatives enabled ESG concerns to enter the mainstream of corporate law. The legal initiatives include the legal construct initiative and legislative interventions. The legal construct initiative involved the alteration or modification of the duty to act in the "best interests of the company" or

[14] R. Eng & Y.P. Yin, The impact of ESG on directors' duties: Accessed on 23 April 2022. https://www.iflr.com/article/b1xh9hrkf2mg51/the-impact-of-esg-on-directors-duties
[15] Ibid
[16] J. Surane, Mastercard to Tie All Employee Bonuses to Meeting ESG Goals, Accessed on 21 April 2022. https://www.bloomberg.com/news/articles/2022-04-19/mastercard-will-tie-all-employee-bonuses-to-meeting-esg-goals

another aspect of the legal construct of the company to include ESG issues.[17] For instance in ***BCE Inc v 1976 Debentureholders [2008]***[18], the Supreme Court of Canada held that the fiduciary duty of directors is owed to the company but when considering the "best interests" of the company, the directors may need to consider the interests of other stakeholders to achieve good business decisions. The legislative initiative involved promulgating legislation or codes and regulations which embraced ESG issues. For instance the French Code Civil [C.CIV] [Civil Code) art 1833 (Fr) obligates each French Company to be managed "in furtherance of its corporate interest" whilst also taking into consideration the social and environmental issues of its activities.[19] The English Companies Act, 2006 embraced ESG considerations in section 172 by expressly requiring directors to pay due regard to the long-term consequences of their decisions and the interests of various stakeholders such as the company's employees, suppliers, customers, the community, and the environment. In terms of the Companies (Miscellaneous Reporting) Regulations of the UK, it requires large and medium companies to provide a director's report on the company's approach and engagement with various stakeholders such as employees, suppliers, customers, the community, and other stakeholders.[20] The European Union, through Directive 2014/95/EU of 22 October 2014 introduced the Non-Financial and Diversity Disclosure Directive that requires large companies to publish information related to ESG issues.[21] In the United States of America, at the Federal level, the Dodd-Frank Act[22] requires companies purchasing certain minerals to conduct 'due diligence investigations relating to the source of the minerals to ensure that they are not purchasing "conflict minerals"[23].

Zimbabwe has not been left out of the ESG movement. Recently, Zimbabwe enacted the Companies & Other Business Entities Act [Chapter 24:31] (COBE Act or the Act), which was gazetted on 15 November 2019. In a progressive development, the Act embraced ESG concerns in tandem with the global movement. Some of the key provisions on ESG in the Act include sections 195 (4) and (5) which require directors to pay due regard to the interests of various stakeholders as they carry out their duties and responsibilities. The stakeholders listed include employees, suppliers, customers, the community, and the environment. Key ESG provisions also include various sections that deal with disclosure, financial reporting, and board accountability. Disclosure is now

[17] S. J. Turner, Corporate Law, directors' duties and ESG interventions: Analysing pathways towards positive corporate impacts relating to ESG issues. (2020) 4 *Journal of Business Law*, 6
[18] 3 S.C.R 550.
[19] P. Rose, Catalyzing Sustainable Investment, *Environmental Law*, 2021, Vol. 51, No. 4 (2021), 1223
[20] Ibid
[21] Turner,(n 17 above), 7
[22] The Dodd Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203).
[23] Ibid @ 8

a new buzzword in the Act. Provisions dealing with disclosure include s73 which prohibits concealment of beneficial ownership, s132 which deals with disclosure by a company of purchase of own shares, and s235 which deals with disclosure on potential control of acquisition. Other essential ESG provisions include s220 which proscribes corporate governance guidelines for public companies and the need for public companies to establish and implement policies to promote gender balance and diversity. Other essential legislation that provides for material ESG issues in Zimbabwe includes the Public Entities Corporate Governance Act[Chapter 10:31], and the Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019.

It is trite that the duties of directors are not stagnant, they continue to evolve in line with changes in laws, regulations, policies, and market demands.[24] As corporate law embraced ESG, directors have a new area to deal with. The boards of directors play a very central role in steering companies to address ESG issues.[25] As directors carry out their duties and responsibilities, they need to be cognizant of the interplay between their fiduciary and other obligations and ESG issues. Directors may be found in breach of their duties and responsibilities if they fail to comprehensively and systematically observe ESG considerations as they carry out their duties.[26] As part of their fiduciary duties, directors have a positive obligation to tackle ESG issues.[27] It is thus necessary to explore the provisions embracing ESG issues in the COBE Act and the interplay between such ESG issues and the duties of directors in the COBE Act. However, the Zimbabwean ESG legal framework may not have embraced ESG issues in the best way as advocates of ESG would advocate for. An investigation of possible deficiencies of the legal framework on ESG issues in Zimbabwe is thus necessary as well as making the necessary recommendations.

1.2 Statement of the Problem

ESG is a fairly novel concept in the field of corporate law. In various jurisdictions, ESG sneaked into the mainstream through legislation. The principal legislation that introduced the concept for all companies in general in Zimbabwe is the COBE Act. Other legislative instruments that embrace the concept include the Public Entities Corporate Governance Act and the ZSE Listing Rules. Under soft law, the National Code on Corporate Governance, 2014 also embraces all three dimensions of ESG. Many directors in Zimbabwe may still be unaware of the positive obligations towards ESG issues placed upon them by legislation. Similarly, directors may not be aware that ESG issues have

[24] Eng & Yin (n 14 above)
[25] Ibid
[26] Donnelly & Bowers (n 6 above)
[27] Ibid

a direct impact on their duties and responsibilities. Thus, ignoring ESG issues may constitute a breach of fiduciary obligations by directors. By ignoring ESG matters, directors expose their companies to legal suits as well. Directors also risk personal liability if they fail to accord ESG issues their rightful position in the new legal regime. However, the COBE Act may also have its deficiencies in properly embracing ESG in the manner that proponents of ESG would advocate for. The Act is inclined towards the traditional shareholder-centric approach where the interests of other stakeholders may be peripheral. The interests of other stakeholders were made subservient to the interests of the shareholders. To exacerbate the problem, the shareholders were equipped with an enforcement premium. If aggrieved, shareholders can utilize various provisions in the COBE Act to protect their rights. However, other stakeholders like the community, customers, employees, suppliers, and environmentalists have limited room to enforce their rights under the COBE Act. It is, therefore, essential to unveil any deficiencies of the COBE Act and make necessary recommendations.

1.3 Research Questions

The research questions are:

1.3.1 What is the purpose of companies?

1.3.2 How did ESG manage to enter into the field of corporate law and what is the relationship between directors' duties and ESG?

1.3.3 Which are the key provisions on ESG issues in the COBE Act?

1.3.4 How do ESG considerations affect the duties of directors as embraced in the COBE Act?

1.3.5 What are other key provisions on ESG issues in other legislation in Zimbabwe?

1.4 Methodology

In this study, the researcher shall carry out secondary or desk research whereby existing information from previous writers and/or researchers shall be utilized. The researcher shall adopt a qualitative approach to track the history of ESG, how it grew to be a global phenomenon, and to unpack the interplay between the duties of directors *vis-a-vis* ESG considerations.

A descriptive research design shall be used to comprehensively and systematically describe how the issue of ESG became a global phenomenon and how it came into the mainstream in various jurisdictions including Zimbabwe. Since this area of study is new in Zimbabwe, an exploratory research design shall be adopted to explain how directors in Zimbabwe should be cognizant of the new global phenomenon of ESG and how they are now legally bound to observe ESG matters under the new COBE Act and other legislation. An

exploratory research design shall also be utilized in unveiling any deficiencies of the COBE Act concerning ESG matters and suggest how the loopholes can be plugged.

In data collection, the action research method shall be used by the researcher where information shall be collected from both secondary and primary sources. On primary sources, the information shall be collected from legislation critical to the area of ESG and directors' duties in Zimbabwe. The most essential piece of legislation for this study is the COBE Act. Legislation from other selected countries shall also be utilized to explore how other countries have embraced ESG issues in their corporate codes. On secondary sources, the researcher will utilize various textbooks, journal articles, and various publications on directors' duties and ESG. Materials shall be obtained from the University of Zimbabwe library and the internet. Various research databases shall be utilized to obtain essential information in the field of study and, in particular, directors' duties and responsibilities towards ESG matters. Court judgments shall also be of particular importance.

1.5 Literature Review

Various authors have written extensively on the duties of directors and ESG. J.T.R. Gibson & R.G. Comrie wrote on the traditional fiduciary obligations of directors. They asserted that directors or individual directors duly authorized are agents of the company and stand in a fiduciary relationship.[28] They further argued that a duly authorized director has all common law duties of agents, which include the obligation to act in "utmost good faith".[29] This is in tandem with M. Bekink's view who asserted that significant powers are conferred upon directors and by law, they are duty-bound to exercise such powers as fiduciaries.[30] M. Havenga proffered the view that fiduciary obligation, as a legal principle, originated from the English rules of equity.[31] I. Esser advanced the view that the traditional approach has been that companies should be managed for the benefit of shareholders.[32] In this regard, the duties of directors would be exercised to maximize the profits of the shareholders. She however warned that bad corporate citizenship and actions based on a pure (especially short-term) profit maximization approach negatively affect the company's long-term

[28] J.T.R Gibson & R.G, Comrie , Mercantile & Company Law, 5th Edition, Juta & Co, 1983, 417

[29] Eng & Yin (n 14 above)

[30] M. Bekink, A historical overview of the Directors' duty of care and skill: From the 19th Century to the Companies Bill of 2007, (2008) 20 *South African Mercantile Law Journal*, 95

[31] M. Havenga, Breach of Directors' Fiduciary Duties: Liability on What Basis? (1996) (2008) *South African Mercantile Law Journal*, 366

[32] I. Esser, Corporate Social Responsibility : Company Law Perspective (2011) *23 South African Mercantile Law Journal*, 322

profits.[33] She advanced the view that companies should be socially responsible and hence she advocated for CSR. Lund and Pollman however advanced the view that the idea of CSR in recent times has been largely replaced with ESG. R. Eng & Y.P. Yin argued that the duties of directors are by no means stagnant. They proffered the view that the traditional fiduciary obligations should now be exercised in line with new developments necessitated by changes in laws, regulations, policies, and market demands.[34] They asserted that there is a growing trend toward enlightened shareholder value, where the "best interest of the company" should be construed in line with the long-term instead of the short-term notion of shareholder value.[35] They further argued that this approach corresponds with the pressing need for companies to account for ESG matters to achieve sustainable commercial activity.[36] They further advanced the view that directors play a crucial role in steering the company to address ESG issues and thus directors must increasingly be mindful of the interplay between their fiduciary duties and ESG matters. F. Donnelly and K. Bowers argue that the need for directors to give due consideration to ESG matters is not a matter of choice but it is now an integral part of being a member of the board of directors.[37] They argue that as part of their fiduciary obligations directors have a responsibility to material ESG issues, to ensure that risks are tracked, opportunities are maximized and the creation of value is optimized. They further advanced the view that directors who fail to systematically and comprehensively tackle ESG issues may as well be found in breach of their fiduciary obligations, including the duty of care.[38]

S. J. Turner wrote extensively on the various global initiatives that have been used to incorporate ESG concerns into the field of corporate law.[39] He classified the initiatives into two broad classes namely, non-legal initiatives and legal initiatives.[40] Non-legal initiatives include the various programmes and initiatives by international organizations to push for consideration of ESG issues by corporates.[41] Legal initiatives include the promulgation of legislation or codes that specifically require companies to comply with certain ESG considerations as well as the legal construct initiative which involved the alteration or modification of the duty to act in the "best interests of the company" or another aspect of the legal construct of the company to include

[33] Ibid @ 317
[34] Ibid
[35] Ibid
[36] Ibid
[37] Donnelly & Bowers (n6 above)
[38] Ibid
[39] S.J. Turner (n 17 above) 1-14
[40] Ibid @ 1
[41] Ibid @9

ESG issues.[42] P. Rose asserted that most jurisdictions have nudged companies towards a socially-focused stakeholder approach through their various codes.[43] He further asserted that there is an increased focus on ESG issues and more particularly on the kind of investment that dovetails with the United Nations' Sustainable Development Goals(SDGs). He argued that if SDGs are to be met, the bulk of financing for green and sustainable projects must come from private markets. Similarly, the World Business Council for Sustainable Development (WBCSD) argued that there is one area where laws of various countries are starting to converge and that is through recognition of the importance of stakeholder governance for the success of the business and longevity.[44] It argued that failure to address stakeholder issues can seriously threaten a company's licence to operate.[45] The WBCSD further asserted that debates and scrutiny on how fiduciary and other duties of directors apply in the context of ESG considerations, and in particular, climate change has increased.[46] It further asserted that directors are obliged to approach ESG matters in the same way they would handle any other financial risk, especially in respect of environmental issues like climate change.[47] It further opined that with the developments in stakeholder governance, the duties and responsibilities of directors continue to evolve and it is thus essential for that directors to understand the nature of their fiduciary obligations in light of ESG and seek advice in circumstances where they are in doubt.[48]

B. Haddock argued that ESG embodies a conceptual paradigm that can be effected across asset classes and investment strategies to improve risk-adjusted outcomes.[49] He further argued that sustainable governance programmes under ESG approach does not only protect companies from risks but also add bottom value as an essential component of business evaluation.[50] C.E Dawkins wrote on SRI where he opined that socially responsible investors integrate ESG criteria into investment decisions and enables investors to reflect individual standards in their portfolio choices, and enhance ethical corporate

[42] Ibid @ 5 & 7
[43] Rose, (n19 above), 1222
[44] WBCSD, Board directors' duties and ESG considerations in decision-making, Accessed on 23 April 2022.
https://www.wbcsd.org/eng/Programs/Redefining-Value/Making-stakeholder-capitalism-actionable/Governance-and-Internal-Oversight/News/Board-directors-duties-and-ESG-considerations-in-decision-making:
[45] Ibid
[46] Ibid
[47] Ibid
[48] Ibid
[49] B. Haddock (n 9 above) 2
[50] Ibid

behavior.[51] He further opined that ESG criteria are employed to both generate competitive returns on investment and positive social impacts.[52]

1.6 Chapter Synopsis

1.6.1 Chapter 1- Background & Introduction

This chapter commenced with a background and introduction to this research. It highlights how the stakeholder-oriented ESG has grown into a global phenomenon, largely replacing CSR. It further highlights how ESG sneaked into the field of corporate through various legal and non-legal initiatives. It further highlighted how Zimbabwe decided to join the global movement on ESG when by embracing the concept in the newly promulgated COBE Act, the Public Entities Corporate Governance Act[Chapter 10:31], and the Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019. The Chapter further highlighted that directors are now required to take into consideration ESG issues as they execute their duties and responsibilities. The chapter further contains the research questions as well as the literature review. Lastly, the chapter contains this synopsis and provisional bibliography.

1.6.2 Chapter 2- Theoretical Perspectives on Corporate Purpose

This chapter will explore the theoretical perspectives relevant to this study. The chapter will explore various theories on corporate, purpose like shareholder primacy theory, the stakeholder theory, and enlightened shareholder value. It will further explore how these theories are being treated in various jurisdictions and where Zimbabwe is on the continuum. The Chapter will also highlight how ESG fits into the stakeholder theory approach and how the stakeholder theory is increasingly replacing the traditional profit maximization theory. In addition, this chapter will also discuss how theoretical perspectives on corporate purpose influences the content of directors' duties.

1.6.3 Chapter 3- Embracing ESG and interplay between ESG and Duties of Directors

This chapter will highlight the various initiatives for the recognition of ESG in the field of corporate law. It will extensively explore both non-legal and legal initiatives. It will further explore the interplay between the duties of directors and ESG in general. The chapter will highlight how directors are now being required to observe ESG matters in jurisdictions like the UK, USA, and France.

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[51] C.E Dawkins, Elevating the Role of Divestment in Socially Responsible Investing, *Journal of Business Ethics*, Vol. 153, No. 2 (December 2018), 465
[52] Ibid

1.6.4 Chapter 4- Legal Framework on ESG issues in Zimbabwe

This Chapter will provide a detailed examination of the ESG legal regime in Zimbabwe. It will explore the legal provisions on ESG in the COBE Act and the nexus between ESG and the duties of directors in Zimbabwe. It will explore also any shortcomings in the manner ESG issues are covered under the COBE Act. This Chapter will also look at other material ESG provisions in other legislation in Zimbabwe as well as under soft law.

1.6.5 Chapter 5- Conclusion and Recommendations

This chapter will contain the conclusion to the study and provide necessary recommendations for any areas deserving recommendations.

CHAPTER 2: THEORETICAL PERSPECTIVES ON CORPORATE PURPOSE

2.1 Introduction

A comprehensive discussion on directors' obligations and responsibilities towards ESG issues would be premature without probing corporate purpose. The corporate purpose debate is a long-standing and fundamental worldwide question in the field of corporate law.[53] The concept of corporate purpose is centrally tied with the functions, duties, and responsibilities of directors.[54] Directors occupy an essential position in a company and corporate scholars are divided on the fundamental question of what the board of directors should do with the corporates they command. The following questions arise when dealing with the subject of corporate purpose concerning directors: Whose interests must the board consider when making decisions? What does it mean to say that corporate directors owe a fiduciary duty to the corporation? Does the fiduciary duty owed to the corporation by directors mean that directors must prioritize the interests of shareholders at the expense of non-shareholding stakeholders? To what extent should directors consider the interests of non-shareholding stakeholders?[55] Scholars have divergent answers to these questions. D.G. Yosifon asserts that the confusion in the literature on corporate purpose is not just embarrassing, but is disempowering.[56]

In the USA, the debate on corporate purpose stretches back at least to the 1930s, as illustrated by a series of articles by Professors Adolf Berle and Merrick Dodd. Professors Adolf Berle and Merrick Dodd famously debated corporate purpose. Berle's view was that managers should exercise power *"only for the ratable benefit of all the shareholders,"* while Dodd argued that the corporation "has a social service as well as a profit-making function."[57] Thus two main theories emerged from the various debates on corporate purpose, namely, the profit maximization theory and the stakeholder theory. The profit maximization theory, which is also called shareholder primacy theory, holds that companies exist for one primary objective, that is, to promote the interests of shareholders to maximize profits. The primacy of shareholder interests is central in terms of this theory. Directors are viewed as delegates of the shareholders whose prime role is that of promoting the success of the company for the benefit of shareholders as a whole and to generate maximum

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[53] A. Afsharipour, "Redefining Corporate Purpose: An International Perspective, "*Seattle University Law Review,* 40, No. 2 (Winter 2017), 470

[54] Ibid

[55] Ibid

[56] D.G Yosifon. "The Law of Corporate Purpose." *Berkeley Business Law Journal,* (Vol.10), No. 2, 2013, 183

[57] Lund & Pollman (n 2 above), 2612

value for shareholders.[58] Conversely, the stakeholder theory recognizes that a company is a corporate citizen formed not only for the benefit of the shareholder. According to this theory, directors should consider the interests of other stakeholders apart from the shareholder. These other stakeholders include the customers, employees, suppliers, local community, the environment, and the public at large. Thus, directors are expected to balance the divergent interests of these stakeholders and enhance their benefits as a whole.[59]

The content of the directors' duties is heavily influenced by the corporate purpose model adopted in a particular jurisdiction. For instance, directors in a country that pursue the shareholder primacy model are primarily expected to advance the interests of shareholders of maximizing profits. For instance, shareholder primacy is regarded to be prevalent in the USA. P.J. Allegaert states that in modern US corporate law, a corporation's directors have a fiduciary duty to maximize shareholder wealth.[60] It follows that from a shareholder primacy perspective, the duties of directors are primarily aimed at maximizing shareholder wealth. However, in jurisdictions that take the stakeholder approach, directors are expected to balance the divergent interests of all stakeholders. Thus, directors have obligations toward a wider spectrum of stakeholders.

However, the profit maximization theory in its strictest sense has lost grip, world over, including in the US where it was regarded to be the primary model. Scholars are even now at odds on whether or not shareholder primacy is still the law in the USA. S.M Bainbridge states that "*shareholder wealth maximization norm…indisputably is the law in the United States*."[61] However, L. A. Stout states that "*the notion that corporate law requires directors …to maximize shareholder wealth, simply isn't true*".[62] Thus, maximization of profits is no longer the primary lens in decision-making on corporate boards.[63] Boards of directors are increasingly required to consider several non-shareholder interests in the running of a company. The stakeholder theory has been given effect through various interventions and models in various jurisdictions. These include corporate social responsibility (CSR), codetermination, benefit corporations, enlightened shareholder value (ESV), and environmental social governance (ESG).

[58] Esser & Delport (n 1 above) 101
[59] Ibid
[60] P. J. Allegaert, 'Codetermination and ESG: Viable Alternatives to Shareholder Primacy?' *New York University Journal of International Law and Politics*, Vol. 52, No. 2, Winter 2020, 642
[61] Yosifon (n 56 above) 183
[62] Ibid
[63] Afsharipour (n 53 above), 467

2.2 Profit Maximization Theory

The profit maximization theory advances the view that a corporation exists for the sole and primary purpose of advancing the interests of shareholders of maximizing profits. J. Bakan wrote:

> *"The corporation's legally defined mandate is to pursue relentlessly and without exception its own economic self-interest, regardless of the harmful consequences it might cause to others..."*[64]

According to him, the corporation is a pathological institution and a dangerous possessor of power in the society whose sole purpose is to make profits, no matter what.[65] Thus according to this viewpoint, directors have no obligation to consider the interests of the non-shareholding stakeholders.

In terms of the profit maximization theory, directors have a fiduciary obligation to maximize shareholder wealth. The case of ***Dodge v. Ford Motor Company***[66] is recognized as one of the leading cases to have outlined the profit maximization theory. In this case, the company had resolved to withhold the payment of dividends and channel the funds towards "charitable works". The Michigan Court intervened and took the extraordinary step of compelling the company to distribute dividends. It held that:

> "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes."[67]

Milton Friedman, who has also been one of the fiery defenders of shareholder primacy argued that:

> "The only social responsibility" of a business is "to make much money for their stockholders as possible" for reasons that include the fact that "the corporation is an instrument of the stockholders who own it."[68]

Milton Friedman advanced the view that the corporate executive is the agent of the owners of the corporation, namely the shareholders. Under, the agency model, the corporate executive's primary responsibility is to the shareholder, and the executives' capability to create wealth for the shareholder would be regarded as the primary yardstick to measure the performance of the executive.

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[64] I. Esser, (n 32 above), 317

[65] Ibid

[66] 170 N.W. 668, 684 (Mich. 1919).

[67] Dodge v Ford Motor Company 170 N.W. 668, 684 (Mich. 1919).

[68] I. B. Lee, Corporate Law, Profit Maximization and the "Responsible" Shareholder, *Stanford Journal of Law, Business & Finance* 10, No. 2 (Spring 2005), 39

Shareholder primacy can also be illustrated by the English case of ***Parke v Daily News Ltd***[69] In this case Daily News Ltd controlled two major newspapers. The copyright of these two newspapers was owned by two subsidiaries of Daily News Ltd. Due to major losses incurred by the company, the board decided to sell the copyright and distribute the proceeds of the sale, after deducting transaction costs, to employees. The court held that the payments were *ultra vires* as they were not for the benefit of the company as a whole. I. Esser asserts that this case illustrates the common law position of South Africa, where the interests of shareholders should be given primacy by the board and management of a company.[70]

The profit-maximization model has been criticized for having its weaknesses. Firstly, it is asserted that corporations are not legally bound by shareholder primacy and need not pursue profit maximization at all costs. Secondly, it is argued that directors owe the fiduciary duty to the company and not to shareholders. A company is represented by several interests including those of shareholders, employees, its customers, the local community, the general public, and the environment. It is thus argued that it would be misguided to assert that the directors owe a duty to primarily pursue shareholder interests when a company is represented by various other interests. One of the critics of the shareholder primacy model, R.E Freeman, wrote:

> "The idea that business is about maximizing profits is outdated and doesn't work well, as the recent global financial crisis has taught us. The 21st century is one of managing for stakeholders….Great companies endure because they manage to get stakeholder interests aligned."[71]

The WBCSD opines that there is one area where the laws of various jurisdictions are beginning to converge and that is because of the recognition of the importance of stakeholder governance for business success and longevity. It is generally believed that a company cannot survive or prosper without the input of other stakeholders such as employees, creditors, suppliers, customers, and the community.[72]

2.3 Stakeholder Theory

The stakeholder theory recognizes that companies do not exist in a vacuum. It finds its roots in the philosophy that a corporation and various stakeholders thereof work together for a common objective and obtain shared benefits.

[69] ([1962] Ch 927)

[70] I. Esser, The Protection of Stakeholder Interests in Terms of the South African King III Report on Corporate Governance: An Improvement on King II (2009) 21 *South African Mercantile Law Journal*, 191

[71] The Stakeholder Theory Summary, Accessed 04 June 2021 https://www.lawteacher.net/free-law-essays/business-law/chapter-the-stakeholder-theory-summary-law-essays.php.

[72] WBCSD (n 44 above)

Thus, the corporate objective would be to create optimal value for all stakeholders. In terms of this theory, directors of a company should not only consider the interests of the shareholders, but also the interests of other stakeholders. Stakeholders can be defined as a group or individuals who can affect or be affected by the company's objectives, operations, activities, or course of action.[73] In other words, these are parties interested in or affected by the operations of the company. These include customers, employees, suppliers, the local community, the general public, and the environment. These stakeholders should be considered by directors as they make their decisions. Thus, shareholders are seen as one constituency among many other stakeholders. Directors are expected to balance the divergent interests of these various stakeholders. Thus, a company is expected to be a responsible corporate citizen, recognizing the interests of all stakeholders. The theory recognizes that a company cannot survive or prosper without the input of other stakeholders such as employees, creditors, suppliers, customers, and the community. One of the leading case authorities supporting this theory is the case of ***Shlensky v Wrigley***.[74] In this case, contrary to the interests of shareholders, directors of National League Ball Inc refused to install lights at Wrigley Field Stadium citing adverse effects of night games on the neighborhood. The court found that the directors were justified in making that decision as they had the discretion to give up shareholder benefits to advance other interests.

Thus under the stakeholder theory, *"the corporation has both public and private roles"*.[75] Directors do not only manage companies for the benefit of shareholders, but rather for the benefit of all stakeholders. Many countries have more readily embraced the stakeholder approach than the shareholder-oriented approach. Various international organizations have also been lobbying for a stakeholder approach by corporations in their principles. For instance, the Organisation for Economic Co-operation and Development (OECD) in its principles of corporate governance asserts that "boards should take into account the interests of stakeholders" and should *"take due regard of and deal fairly with other stakeholder interests including those of employees, creditors, suppliers, and local communities."*[76] The stakeholder theory has been criticized for failure to give guidance on how directors or management should prioritize between stakeholders when their interests conflict. This may pose challenges in reality as prioritization of interests would be left to the discretion of directors which may open room for abuse of power. Be that as it may, the stakeholder approach has been given effect through various

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[73] Ibid

[74] 237 NE 2d 776 (Ill. App. 1968)

[75] Afsharipour (n 53 above) 471

[76] Ibid 471-472

mechanisms, policies, and legal interventions in various jurisdictions. Some of these interventions shall be discussed below in detail.

2.3.1 Corporate Social Responsibility (CSR)

As indicated in Chapter 1, the term "corporate social responsibility" (CSR) was coined by the economist Howard R. Bowen in the 1950s. He defined CSR as *"the obligations of businessmen to pursue those decisions, or follow those line of action which are desirable in terms of the objectives and values of our society."*[77] The European Commission defined CSR as the voluntary integration of social and environmental concerns into the operations of a business and the business's interaction with stakeholders.[78] CSR is based on the concept of good citizenship. A company is viewed as a citizen of the society that should act in a socially responsible manner. According to this model, due to the enormous power wielded by corporations and special privileges associated with separate legal personality, companies have a special role and duty to society beyond that of an ordinary citizen. CSR occurs when in a bid to protect public interests, a company does more than what the law requires. Thus, under the CSR model, a company should voluntarily expend its resources towards social objectives without being required by the law to do so and without immediate economic benefits. However, it is believed that CSR has long-term benefits for the company. I. Esser however cautions that viewing CSR under the prism of voluntarism may no longer be suitable in South Africa due to various legislative and policy interventions requiring companies to take positive steps towards CSR issues.[79] She argues that CSR relates to important social, safety, health, and environmental issues to which the management of a company must pay due regard to.[80] As the corporate acts in a more responsible manner, it approaches what is called corporate citizenship. Corporate citizenship can be described as a *"business taking greater account of its social, environmental and financial footprints."*[81] It is seen as a progression from CSR. Thus, CSR advances the view that companies do not have an obligation to pursue solely the interests of shareholders. Rather, companies have a greater role in serving the interests of an important stakeholder, namely the society. The moral and ethical case for CSR has been viewed as the "pure" case for businesses acting responsibly.[82]

[77] Ibid

[78] M. Stuebs & L. Sun, "Corporate Governance and Social Responsibility," *International Journal of Law and Management* Vol 57, No. 1 (2015), 39

[79] Esser (n 32 above) 320-321

[80] Ibid, 320

[81] Ibid, 319

[82] J.S. Hiller, The Benefit Corporation and Corporate Social Responsibility, *Journal of Business Ethics* , December 2013, Vol. 118, No. 2, 296

Simply, put: it is the right thing to do for a business as a member of society. In comparison, the "business case" for CSR, also called the instrumental view of CSR includes consideration of the effect that CSR has on business profitability.[83] In addition to ethical reasons, CSR can be a useful strategy to bolster the reputation of a business and thus may lead to financial benefits.[84] However, in modern times, the idea of CSR has been largely replaced by ESG.[85] ESG has invaded the field of corporate law with an earthshattering force worldwide.

2.3.2 Codetermination

Codetermination is a model that is prevalent in Germany. Codetermination grew out of the 19th Century welfare state in Germany in a bid to stem labour unrest.[86] In terms of this model, firms of a certain size must maintain codetermined boards, where the interests of two major stakeholders should be represented namely, shareholders and employees. The Codetermination Act of 1976 requires companies that employ more than 2000 employees to have half of their supervisory boards chosen by employee vote.[87] The requirement is compulsory regardless of whether or not the company is private or public. Public corporations are obligated to maintain a two-tiered board in Germany namely, the executive management board and non-executive supervisory board. Half of the members of the non-executive supervisory board are labour representatives. Stakeholder interests, past profit maximization, delineate the power of the supervisory board and lay at the core of codetermination in general. However, the chairman of the supervisory board who always represents shareholders wields a tie-breaking vote. Thus, the interests of shareholders may end up taking precedence in case of a deadlock.

2.3.3 Benefit Corporations

There has been an emergence of a new form of business entity in the United States called benefit corporations. Benefit corporations are entities established for two prime objectives, namely to pursue public benefit and to attain profit for the shareholders. According to J.S. Hiller, a benefit corporation is a legally *“for-profit socially obligated, corporate form of business”* with all the traditional characteristics of a

[83] Ibid
[84] Ibid
[85] Lund & Pollman (n 2 above) 2613
[86] Allegaert (n 60 above) 652
[87] Ibid @ 650

corporation coupled with the objective to pursue public benefit.[88] Thus, benefit corporation directors have a fiduciary obligation to make decisions that enhance the two-pronged objectives of the corporation of generating a profit and fostering positive social or environmental impact. According to A. Afsharipour, benefit corporations have three fundamental characteristics addressing corporate purpose, the accountability of the board, and reporting.[89] Firstly, the prime purpose of the corporation is to create a material positive impact on society and the environment. Secondly, benefit corporations have expanded the duties of directors to include the requirement for directors to consider the interests of non-financial stakeholders in addition to those of shareholders. Thirdly, directors are obligated to report their overall performance in social and environmental objectives using a comprehensive and independent third-party standard. He further emphasizes the position that the benefit corporations are tailor-made to have a corporate purpose broader than maximizing shareholder value, but to be responsible for maximizing benefits to all stakeholders. Benefit corporations statutes have been adopted in over 30 states in the United States and legislation is still being debated in several other states.[90] The emergence of benefit corporations has challenged the long-held view that the purpose of corporations is to primarily maximize shareholder wealth. In fact, the emergence of benefit corporations flies in the face of the long-standing belief that corporations are not able to have social or moral obligations. J.S Hiller opines that considering the history and perception of profit maximization in US law, benefit corporations are an ethical step towards empowering socially committed commercial entities.[91]

2.3.4 Enlightened Shareholder Value (ESV)

Under the enlightened shareholder value (ESV) model, the primary duty of directors is to promote the success of the company as a whole and to generate maximum profit for shareholders.[92] Acting in a manner that promotes the success of the company is accepted in general terms to mean securing the company's long-term financial success or increase in value.[93] In this regard, boards are required to put into consideration present and future shareholders and strive to balance short-term and long-term interests. Under the ESV model, the interests of other

[88] Hiller, (n 82 above) 287
[89] Afsharipour (n 53 above) 474
[90] Ibid, 474
[91] Hiller (n 82 above) 288
[92] Esser & Delport (n 1 above) 101
[93] WBCSD (n 44 above)

stakeholders are considered but their interests are subordinate to those of shareholders. In other words, as directors pursue profit maximization, they should pay due regard to the interests of other stakeholders like the employees, customers, the community, the general public, and the environment. The ESV model transcends the shareholder-stakeholder divide.[94] The United Kingdom settled for the ESV model in its Companies Act, 2006. Section 172 defines the duties of directors as follows:

> "[A] director . .. must act . . . in good faith . . . to promote the success of the company for the benefit of its members as a whole, and in doing so have regard to . .. the likely consequences of any decision in the long term[;] the interest of the company's employees[;] the need to foster the company's business relationships with suppliers, customers and others[;] the impact of the company's operations on the community and the environment[;] the desirability of the company maintaining a reputation for high standards of business conduct[;] and the need to act fairly as between members of the company."[95]

It is clear from this section that when executing their duties and responsibilities, directors must take into consideration the interests of other non-shareholding stakeholders like the employees, suppliers, customers, the community, and the environment. However, it is evident that in terms of this section directors must prioritize the interests of shareholders above those of non-shareholding stakeholders. In contrast, India's, Companies Act, 2013, recognizes both shareholder and stakeholder interests *"without necessarily indicating a preference to either*."[96] Section 172 of the UK's Companies Act has been criticized on the basis that it only requires directors to pay due regard to the interests of non-shareholding stakeholders in so far as such interests are paramount in advancing the interests of shareholders. However, other scholars argue that the ESV framework goes beyond just paying lip service to the interests of other stakeholders.[97] Directors are obliged to take into consideration the interests of non-shareholding stakeholders in good faith. According to this perspective, if the board of directors makes decisions that opportunistically benefit shareholders at the expense of other stakeholders, they may be found in breach of their fiduciary duties towards the company as such decisions do not promote the success of the company as a whole. Thus, the concept of ESV ensures that directors engage in responsible behavior and that directors take decisions that are sustainable as it enjoins directors to take into cognizance the long-term consequences of their decisions.

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[94] Afsharipour (n 53 above) 473

[95] Section 172 of Companies Act, 2006 of United Kingdom

[96] Afsharipour (n 53 above) 469

[97] Ibid @ 473

2.3.5 Environmental, Social, and Governance (ESG)

As outlined in the previous Chapter, ESG is a recent concept but has grown to be a global phenomenon. ESG dovetails with the stakeholder theory. When looking at directors' responsibilities and duties from an ESG perspective, directors should not merely pursue the profit maximization approach for the benefit of shareholders. Rather, directors are bound to comprehensively and systematically consider environmental, social, and governance concerns. Environmental concerns include climate change and environmental sustainability. Societal concerns include diversity, human rights, consumer protection, and welfare. Corporate governance concerns include management structure, sound financial management, disclosure requirements, employment relations, and employee compensation. Although ESG, is a worldwide movement that has generated much steam, there is no agreed definition of what constitutes ESG. Deloitte asserts that although the meaning of "environment" and "governance" may be obvious, "social" may not be.[98] It asserts that "social" refers to a broad swath of matters, including human capital management, employment issues, human rights, and a company's role in society.[99] However, it is evident that ESG moves away from the traditional profit maximization approach as enunciated in ***Dodge v Ford Motor Company***.[100] Directors are bound to take into consideration a bevy of ESG considerations when steering their companies. Some of the ESG issues that directors should pay due regard to as they lead their companies include, climate change, reduction of waste, managing reputational risks, promoting environmentally friendly production, improving workplace health and safety, fostering decent employee relations, building symbiotic community relations, respecting human rights at the company, promoting diversity at the company, building good relationships with suppliers, customers, and contractors, reforming board structures to increase accountability, promoting robust and sound disclosure and audit practices and promotion of sustainable business environment.

It is worthy of note that although ESG moves away from the traditional shareholder-centric approach, it does not necessarily involve the board's abandonment of its duties towards the shareholders in favour of "high idealism" where the ultimate goal of the company would be to attain

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[98] Deloitte, On the board's agenda | US, July 2020 , Accessed on 22 June 2022. https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-deloitte-ESG-corporate-purpose-in-disrupted-world.pdf

[99] Ibid

[100] note 67 above

social or economic objectives.[101] Instead, ESG emphasizes the need for firms to create a sustainable business environment. Although "sustainability" is often used to refer solely to environmental matters such as climate change, the term has a broader meaning. It also refers to what it takes for a business to achieve long-term existence, profitability, and growth. The term "sustainability" is not synonymous with ESG. However, it encompasses ESG, since all three elements of ESG contribute to the sustainability of a business.[102] Thus ESG is linked with long-term as opposed to short-term shareholder returns and it is believed that benefits from pursuing ESG measures may start to be realized in the range of six to seven years.[103] Thus, ESG measures benefit both the shareholders and non-shareholding stakeholders. Global financial institutions such as BNP Paribas, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, and Morgan Stanley, which hold assets under management totaling over US$6 trillion developed guidelines for integrating ESG issues into finance on the basis that corporations that adopt the measures can increase both shareholder value and social benefits.[104] ESG measures that foster proper management of risks, the anticipation of regulatory action, or enhance access to new markets inevitably enhance shareholder value while social and environmental measures promote the sustainable development of the societies in which the corporations operate.

Some critics argue that given the breadth and malleability of ESG, it may struggle to influence directors.[105] As indicated above, despite being a global phenomenon that has caused much steam, ESG does not have a globally accepted definition. Deloitte asserts that since ESG is such a broad term, some have suggested adding "E" for "employees" or "D" for "diversity."[106] It is common cause that there is no consensus on the company's overall role in society. Critics also further argue that if directors are free to select which ESG measure to adopt, then the ESG model can be open to abuse. Measures can be adopted depending on the preferences of directors or management. P.J. Allegaert, argues that ESG-based conduct could function as a *"façade for illegitimate accumulation and exercise of managerial prerogatives"*.[107] The board may also ignore the preferences of important stakeholders or face

[101] Allegaert (n 60 above) 673
[102] Deloitte (n 98 above)
[103] Allegaert (n 60 above) 677
[104] Ibid @ 667
[105] Ibid @668
[106] Deloitte (n 98 above)
[107] Allegaert (n 60 above) 674

difficulties in balancing conflicting stakeholder interests. Some also argue that investors may not be attracted to a company's engagement on social or environmental issues, but its profitability.[108] The last argument has however lost grip in recent times. Several global financial institutions are now concerned with the social or environmental impacts of particular projects before injecting capital. A 2015 meta-study by Oxford University and Arabesque Partners, an asset management firm, entitled "Integrating ESG big data with quantitative Investment Strategies" found sustainability to be one of the most essential trends in the financial markets.[109] Financial leaders like BlackRock's Larry Fink now recognize that society is demanding that corporates, both public and private, must serve a social purpose.[110] In this regard, ESG has managed to penetrate the field of corporate law with an earthshattering force. It has managed to find firm ground through both legal and non-legal initiatives.

2.4 Where is Zimbabwe in the continuum?

The Companies and Other Business Entities Act, (the Act) does not define corporate purpose. It simply states that any one or more persons associated with a lawful purpose can form a company.[111] However, the Act's various provisions regarding the board's duties and responsibilities are clear that Zimbabwe adopted the UK's model of Enlightened Shareholder Value (ESV) as well as the ESG model. Section 195 (4) and (5) are almost a replica of s172 of the UK's Companies Act, 2006. Section 195 (4) and (5) of the Act provides that:

> […]"Each or every director (as the case may be) shall exercise independent judgment and shall act within the powers of the company in a way that he or she considers, in good faith, to promote the success of the company **"for the benefit of its shareholders"** as a whole.[112] (my emphasis).
>
> […]For **"the purpose of subsection (4)",** every director shall have regard to, among other things- (a) the long-term consequences of any decision; (b) the interests of the company's employees; (c) the need to foster the company's relationships with suppliers, customers, and others; (d)the impact of the company's operations on the community and the environment; (e)the desirability of the company maintaining a reputation for high standards of business conduct and the need to act fairly as between shareholders of the company;(f) the need to act fairly as between shareholders of the company.[113](my emphasis).

[108] Ibid
[109] Ibid @ 677
[110] Ibid
[111] s76 of the COBE Act
[112] s195 (4) of COBE Act
[113] s195(5) of COBE Act

Thus, in terms of these sections, the primary obligation of the director is to promote the success of the company for the benefit of shareholders. Interests of shareholders are given eminence above interests of the non-shareholding stakeholders. In terms of the said s195(5) of the Act, interests of non-shareholding stakeholders like employees, suppliers, and customers, and the community are only observed by directors in pursuance of the director's obligation to promote the success of the company for the benefit of the shareholders. It can thus be argued that the interests of other stakeholders are only important in so far as they promote the interests of shareholders. This has been the criticism against the ESV model.

Section 54 places upon directors the duty to act *"in good faith, in the best interests of the registered business entity"*[114] (my emphasis). It can be argued that the term "best interest of the registered business entity" is so broad to the extent that it incorporates the interests of other stakeholders. King IV states that:

> …the company is represented by several interests of shareholders, employees, consumers, the community, and the environment. Thus, requiring directors to act in good faith in the interests of the "company" cannot nowadays mean anything other than a blend of all these interests, but first and foremost they must act in the best interests of the company as a separate legal entity.[115]

A company cannot survive and prosper without the input of the other stakeholders. Hence, the interests of these stakeholders should be considered by directors as they make decisions since the interests of these stakeholders may invariably be in the bests interests of the company.

Section 55 (2) of the Act, places upon the directors the duty to act with loyalty to a company and towards any subsidiary. Thus, the Act adds another stakeholder (the subsidiary company) towards whom the director should act with loyalty. Thus, the Act places a direct obligation on a director, not only to recognize the interests of the company but also of its subsidiaries concerning the duty of loyalty. In terms of section 84 of the Act, directors can make provisions for the benefit of employees or former employees on the cession of business. This is a clear recognition of employees as important stakeholders. The directors' fiduciary duties in part IV of the Act are primarily designed inclining toward protecting the interests of the shareholders. Section 38(1) of the Act states the purpose of investigations and inspections by the Registrar of registered business entities as to *"promote good corporate governance"* and to *"inspire confidence in investors in such entities that their investments are safe and are being dealt with transparently."* This may be interpreted to incorporate other stakeholders as good corporate governance does not only

[114] s54 of the COBE Act.
[115] I Esser & P. Delport (note 1 above)106.

benefit shareholders. It has wider societal benefits. Further, the use of the word "investors" does not only mean shareholders but other non-shareholding investors like financiers, lenders, and debenture holders.

The Corporate Governance Code of Zimbabwe (the Code) requires companies to pay due regard to the interests of other stakeholders as they carry out activities. Sections 393, 394, and 394 are worth quoting. They provide as follows:

> "[…]A company is a multi-interest enterprise. It binds itself to contracts and can be held legally responsible for its actions. It has many stakeholders who have vital interests in its operations and results. Its operations have consequences beyond itself as they always affect, in one way or another, the community in which it carries on business, the national economy, and society in general. In the governance of a company, therefore, a balance has to be maintained between the maximization of shareholder value and interests and the protection and promotion of the interests of other stakeholders.[116]
>
> […]A stakeholder can affect or can be affected by a company's operations. "Stakeholder" includes shareholders, institutional investors, creditors, lenders, suppliers, customers, regulators, employees, trade unions, the media, analysts, consumers, society in general, communities, auditors, and potential investors.[117]
>
> […]Stakeholders are the *raison d'etre* for corporate governance and the prime constituency of the company. The relationship between a company and its stakeholders is regulated by law and by best practice codes."[118]

The Code thus takes uncompromisingly a stakeholder-centric approach. Chapter 8 of the Code is dedicated to stakeholder relationships. Sections 396 through 406 require interests, rights, and legitimate expectations of all stakeholders to be identified, promoted, and protected by the company and/or the company's boards. Sections 407 through 436 contain recommendations meant to bolster the protection and promotion of rights of all stakeholders. The need to pay due regard to the interests of all the stakeholders is a running theme in the Code. For instance, section 8 of the Code emphasizes the need for a balance of power to ensure the success of the company and for the benefit of all stakeholders. Section 17 of the Code provides that shareholders, the board, and the management of the company must protect and promote the interests of the company and its stakeholders. Section 23 requires companies to conduct business in a manner that benefits all stakeholders. Sections 54 (e), 57, 58, 99, 100, 109,120(r), 121(b), and 121(j) require boards and/or the chairman of the board to *inter alia* promote the interests of all stakeholders, while s55(f) requires that the boards be accountable, *inter alia,* to all stakeholders. Section 60 requires boards to put in place systems, procedures, and policies to resolve conflicts of interest among and between directors,

[116] s393 of the Corporate Governance Code, Zimbabwe
[117] s394 of the Corporate Governance Code, Zimbabwe
[118] s395 of the Corporate Governance Code, Zimbabwe

management, shareholders, the company, and other stakeholders. Section 60 (i) requires boards to ensure that the company's major stakeholders are identified and a clear policy on communicating with and relating to them is formulated. Section 70 places a moral duty upon the board to consider the legitimate interests and expectations of the company and all its stakeholders in decision-making and strategy. Sections 262, 265, 266, 276, 277, and 292 emphasize the need for disclosure for the benefit of all stakeholders. However, it must be emphasized that the Code has a soft-law status in Zimbabwe. It does not have a binding effect. It, however, can play a very essential role when interpreting legislation and also provides a useful pad for law reform and development.

Although sections 64, 84, 38, and the Corporate Governance Code discussed above recognize the interests of other stakeholders, section 195 is clear on the ranking of stakeholder interest when directors carry out their duties and responsibilities. The Act takes an ESV approach where the interests of shareholders take precedence over all other interests. Directors are given a positive duty to enhance shareholder value and in doing so should pay due regard to the interests of other stakeholders in so far as they may be necessary for enhancing the interests of the shareholders or promoting the success of the company.

The COBE Act by requiring companies to take due regard to environmental, social, and governance concerns also clearly adopts the ESG model apart from the ESV model. The ESG provisions in the Act shall be discussed in detail in Chapter 4. Suffice to mention that some of the key provisions of ESG include s195(4) which requires directors to take due regard for the interests of various stakeholders as they carry out their duties and responsibilities. The stakeholders listed include employees, suppliers, customers, the community, and the environment. ESG provisions also include various sections that deal with disclosure, financial reporting, and board accountability. Disclosure is now a new buzzword in the Act. Some of the sections dealing with disclosure include s73 which prohibits concealment of beneficial ownership, s132 which deals with disclosure by a company of purchase of own shares, and s235 which deals with disclosure on potential control of acquisition. Other essential ESG provisions include s220 which proscribes corporate governance guidelines for public companies, s218 which deals with board roles and responsibilities, and Part III, Sub-Part C of the Act which deals with accounts and audits.

2.5 Conclusion

In this Chapter, the study focused on research on the theoretical and philosophical underpinnings of corporate purpose. The primary question investigated was whose interests do corporations serve? In other words, whose interests must the board consider when making decisions? As highlighted above, two dominant theories have emerged from the debates on corporate purpose, namely the profit maximization theory and the stakeholder theory. The profit maximization theory in its traditional meaning has lost grip across the world. Corporates are increasingly required to pay due regard to the interests of several non-shareholding stakeholders as they carry out their activities. Directors, who are central in steering the operations of companies are expected to balance the divergent interests of the various stakeholders. The stakeholder theory has been given effect through various interventions and/or models in various jurisdictions which include CSR, benefit corporations, codetermination, ESV, and ESG. ESG is a modern concept that has grown to be a global phenomenon. Apart from shareholder interests, directors should comprehensively and systematically pursue material environmental, social, and governance issues under the ESG model. In the new COBE Act, Zimbabwe adopted the ESV model, patterning after UK's Companies Act, 2006. The Act also embraced ESG considerations as shall be discussed in detail in Chapter 4.

CHAPTER 3: EMBRACING ESG AND THE INTERPLAY BETWEEN ESG AND THE DUTIES OF DIRECTORS

3.1 Introduction

In recent times, ESG has become the new buzzword and the enticing way in which corporates try to woo millennial and value-oriented investors.[119] Although the term ESG is a recent concept, the past forty to fifty years have witnessed the emergence of various initiatives that had the purpose of influencing the decision-making by corporates on ESG matters.[120] These initiatives include legal and non-legal initiatives. Non-legal initiatives include various initiatives by international organizations and non-governmental organizations to push for greater responsibility by corporates on ESG issues. The legal initiatives involved the promulgation of legislation, codes, and regulations requiring companies to take positive steps towards recognition of ESG issues, and also modification of some elements of the legal construct of a company by courts to incorporate ESG considerations. There are always pacesetters in every movement. Some of the jurisdictions that have been at the forefront of the ESG movement include the European Union, the United Kingdom, France, and the United States. To better understand and analyze Zimbabwe's ESG legal framework, it is essential to briefly examine the ESG regimes of the pacesetters. The Zimbabwean legal framework will be discussed in detail in the next Chapter.

In the ESG global movement, directors have an essential role to play. The board of directors or individual directors duly authorized are agents of the company and stand in a fiduciary relationship to it.[121] The board of directors has three key roles in a company.[122] Firstly, the board has the primary role to initiate strategy and establish goals, objectives, and key policies of the company.[123] Secondly, the board exercises approval power-accepting and rejecting proposals raised by executive management.[124] Under this role, the board also hires and fires executive management. Thirdly, the board carries out an evaluation of the overall performance of the company and reviews the performance of the chief executive officer and executive management.[125] From this vantage viewpoint, the board plays a key role in addressing material ESG

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[119] C. Hasz, "The U.S. Oil and Gas Industry Should Be a Leader and Follow the EU's Lead on ESG Disclosure," *Tulane Journal of International and Comparative Law* 29, No.1 (Winter 2021), 137

[120] Turner, (n17 above), 1

[121] Gibson & Comrie (n28 above) , 417

[122] G. Chitayat, The Role of the Board of Directors in Practical Terms, *Management International Review* , 1984, Vol. 24, No. 1 (1984), 71

[123] Ibid

[124] Ibid

[125] ibid

issues. In recent times, directors may be found in breach of their fiduciary obligations if they fail to comprehensively and systematically address ESG issues. With the increased pressure on ESG issues, and in particular sustainability, boards are now required to pay due regard to ESG issues in various jurisdictions. Sustainability has gone mainstream in the field of corporate law in various jurisdictions.[126] Boards are increasingly required to manage their companies for long-term success.[127] Apart from legislative imperatives, value-oriented investors and other stakeholders like customers, environmentalists, and the community are increasingly demanding boards to account for material ESG issues.

3.2 Initiatives to advance ESG concerns

3.2.1 Non-Legal Initiatives

ESG issues have managed to enter the field of corporate law through various non-legal initiatives. The work of international organizations stands out as one of the most essential initiatives for advancing ESG concerns. The initiatives of international organizations can be traced back to the 1970s when the United Nations started to respond to the unwanted ESG impacts of transnational corporations.[128] Attempts were made in that period to come up with an operational code of conduct for transnational corporations. In 2000, the United Nations launched its Global Compact, which required corporates to report on actions that they have taken on ESG issues.[129] This was a voluntary membership scheme where corporates could subscribe. The initiative was widely accepted by various non-governmental organizations. Shortly after that, the United Nations Sub-Commission on the Promotion and Protection of Human Rights of the Economic and Social Council (UN Sub-Commission) appointed a working group to come up with a set of norms that transnational corporations would be obliged to follow. The norms were approved by the UN Sub-Commission. However, these norms did not get the approval of many governments and were criticized for failing to address the legal complexities of trying to introduce international human rights and international environmental law norms on non-state actors like corporations.[130] Following the rejection of the norms, Professor Ruggie was appointed as a Special Representative of the UN Secretary-General to come up with

[126] R.G Eccles *et al*, The Board's Role in Sustainability, Havard Business Review. Accessed on 11 July 2022. https://hbr.org/2020/09/the-boards-role-in-sustainability
[127] Ibid
[128] Turner (n 17 above), 6
[129] Ibid
[130] Ibid

recommendations on how ESG concerns, and in particular human rights, could be incorporated into business. In his report, Professor Ruggie advocated for a "protect, respect and remedy" approach. This meant that the obligation to protect human rights was placed upon State parties, whilst business was expected to respect human rights and judicial and non-judicial remedies be put into place for victims of human rights abuses arising from business activities. J.S Turner commented that this approach had a remarkable noticeable influence on business activities.[131] In 2005, the then Secretary General of the United Nations, Kofi Annan, invited a group of the largest institutional investors to develop Principles for Responsible Investment (PRI). The Principles were launched in 2006 at the New York Stock Exchange. The PRI are based on the notion that ESG issues such as climate change, diversity, and human rights can affect investment portfolios and should equally be considered alongside financial factors if investors are to fulfill their fiduciary obligations.[132] The six principles for responsible investment drawn by the institutional investors were as follows: Firstly, ESG issues must be incorporated into investment analysis and decision-making process.[133] Secondly, investors undertook to be active owners and incorporate ESG issues into ownership policies and practices.[134] Thirdly, there must be appropriate disclosure on ESG issues by entities where investors put their funds.[135] Thirdly, investors undertook to promote acceptance and implementation of the principles within the investment industry.[136]Fifthly, the investors undertook to work together for the successful implementation of the principles.[137] Sixthly, the investors undertook to report on their progress in the implementation of the principles.[138] The said PRIs are voluntary and aspirational. F. Lopez De-Silanes asserted that the UN PRI spearheaded global efforts for investors to incorporate ESG into their investment decisions and to actively consider ESG components of their investments.[139]

Another international organization that had a tremendous influence on ESG issues is the Organization of Economic Cooperation and

[131] Ibid @ 7
[132] Principles of Responsible Investment (UNPRI), Accessed on 11 July 2022, www.unpri.org
[133] Ibid
[134] Ibid
[135] Ibid
[136] Ibid
[137] Ibid
[138] Ibid
[139] F. Lopez-De-Silanes, "ESG Performance and Disclosure: A Cross-Country Analysis." Singapore Journal of Legal Studies, Vol. No. 1, (March 2020), 220

Development (OECD). This organization developed guidelines addressed to governments which multi-national corporations should follow. The guidelines are meant to, *inter alia,* create a conducive investment environment and ensure that multinational enterprises incorporate ESG issues in the countries they operate. In 1999 the OECD also developed Principles on Corporate Governance. The principles were endorsed by the G20 leaders in 2015. The principles recommend the need for businesses to consider material ESG issues in their activities. For instance, Article IV of the OECD Corporate Governance Code provides, *inter alia*, that a corporate governance framework should recognize the rights of stakeholders like employees, creditors, customers, and suppliers and that there should be a legal framework to address violations of rights of stakeholders. The OECD principles are regarded as the international standard for corporate governance and help governments to evaluate and improve their legal and regulatory frameworks on corporate governance.[140]

One of the non-binding ESG initiatives worth noting is the Equator Principles on Environmental and Social Guidelines for Financial Institutions (EPs). These principles guide financiers to ensure that "projects they finance and advise on are developed in a manner that is socially responsible and reflects sound environmental management practices."[141] The EPs were initially launched in 2003 and were based on the existing environmental and social framework of the International Finance Corporation. They have been constantly updated. As of 11 July 2022, 134 financial institutions in 38 countries had formally adopted the EPs.[142] These institutions provide more than 70% of project finance in emerging markets.[143] The EPs are aimed at serving as the baseline and risk management framework for "financial institutions to identify, assess and manage environmental and social risks when financing projects."[144] The principles apply globally to all industry sectors and five financial products namely, project finance advisory services, project-related corporate loans, bridge loans, and project-related refinance, and project-related acquisition finance.[145] For institutions that have adopted the EPs, financing of projects is

[140] OECD, G20/OECD Principles of Corporate Governance, Accessed on 11 July 2022, https://oecd.org/corporate

[141] Equator Principles, Accessed on 11 July 2022.https://equator-principles.com/

[142] Ibid

[143] J.M. Balzac, 'Corporate Responsibility: Promoting Climate Justice through the Divestment of Fossil Fuels and Socially Responsible Investment', Environmental Law Reporter News & Analysis, (2017) Vol.47, 10160

[144] Ibid

[145] Equator Principles (n141 above)

conditional on compliance with the EPs. If a company fails to comply with the principles, no project finance or loans will be availed. In terms of the principles, borrowers must, *inter alia,* fully disclose all environmental and social risks and provide a comprehensive plan on how the risk would be mitigated. Borrowers must also disclose to affected communities a mechanism for addressing grievances. Some of the notable signatories of the EPs are Bank of America, Wells Fargo, JP Morgan Chase, and Citibank which all survived the 2008 financial crisis. J.M. Balzac opines that this shows that incorporating ESG principles in lending practices helps in the management of risks and opportunities.[146] Thus, there are opportunities to seize from the ESG movement.

The works of non-governmental organizations and other national institutions cannot be ignored in the ESG movement. Various organizations around the world have been pushing for corporations to take positive steps toward the recognition of ESG issues. For instance, the Forest Stewardship Council developed voluntary standards for businesses dealing with timber that they should comply with.[147] These standards, *inter alia,* require the business to take into consideration material ESG issues. EarthRights, an NGO based in the United States has been extensively pushing for greater recognition of ESG issues by corporations. The organization has been in the lead in the landmark case of ***Jan v International Finance Corp.***[148] In this case, the IFC was accused of causing harm to local communities after it injected a US$450 million loan to Coastal Gujarat Power Ltd for the construction of the Tata Mundra Coal Power Plant in Kutch District, Gujarat, India. In the UK, the Task Force on Climate-Related Financial Disclosures (TCFD) was established in 2015 to develop voluntary climate-related financial risk disclosures by companies. These disclosures assist investors and members of the public on the risks they may face related to climate change. J.M Balzac opined that impacts of climate change are the biggest threat in modern times imperiling both natural resources and human rights.[149] Hence, climate risk disclosure has increasingly become a common talk in investment circles. In addition stock exchanges in various jurisdictions have not been left out of the ESG movement. Stock exchanges in various jurisdictions have developed indices and listings for companies that comply with ESG criteria.

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[146] Balzac (n 143 above) 10161
[147] Turner (n 17 above), 9
[148] 586 US (2019)
[149] Balzac (n 143 above) 10161

3.2.2 Legal Initiatives

Environmental, social, and governance issues have crept into the mainstream of corporate law through two main legal initiatives, namely the legal construct initiative and the legal compliance initiative. The legal construct initiative involved the alteration of the duty of the directors to act in the best interests of the company or another legal construct of the company to accommodate ESG issues. One of the leading cases to this effect, is the case of ***BCE Inc v 1976 Debentureholders [2008]***[150]. In this case, the Supreme Court of Canada held that although the duty of loyalty is owed to the company when considering the "best interests" of the company, the board is duty bound to consider the interests of other stakeholders to achieve business success. The Supreme Court of Canada also reached the same position in ***Peoples Department Stores Inc. (Trustee of) v Wise***.[151] Pursuant to these cases, the Canadian Business Corporations Act was amended in 2019 to include a non-limitative and comprehensive list of factors that may be considered by the board when considering the best interests of the company. These include shareholders, employees, retirees, pensioners, creditors, consumers, governments, the environment, and the long-term interests of the corporation.[152] This approach is in tandem with the approach advocated for in King IV and Zimbabwe's Corporate Governance Code where the codes advance the view that a company is represented by various interests. For instance, King IV emphasizes that a company is represented by the interests of various stakeholders like shareholders, employees, consumers, the community, and the environment. It thus asserts that requiring directors to act in good faith in the interests of the "company" cannot in modern times mean anything other than a blend of all these interests.[153] Similarly, the Corporate Governance Code of Zimbabwe stipulates that a company is a multi-interest enterprise with stakeholders who can be affected by its activities.[154] The stakeholders listed are "shareholders, institutional investors, creditors, lenders, suppliers, customers, regulators, employees, trade unions, the media, analysts, consumers, society in general, communities, auditors, and potential investors."[155] The second leg of the legal construct initiative

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[150] 3 S.C.R 550.

[151] 2004 SCC 68.

[152] C, Borduas *et al*, ESG: What boards of directors should do. Accessed on 11 July 2022, https://www.nortonrosefulbright.com/en/knowledge/publications/bed17bb0/esg-what-boards-of-directors-should-do-now

[153] Esser & Delport (n 1 above) 106

[154] s393 of the Corporate Governance Code, Zimbabwe

[155] S394 of the Corporate Governance Code, Zimbabwe

involved the promulgation of binding legislation, regulations, or codes prescribing recognition of ESG concerns by corporates. Various jurisdictions now require compliance with ESG considerations through legislation and regulations. Various legislative interventions in the European Union, United Kingdom, France, and the United States shall be discussed briefly below whilst Zimbabwe's legislative interventions shall be discussed in detail in Chapter 4.

3.3 ESG frameworks in various jurisdictions

3.3.1 The European Union

One of the most important ESG laws in the European Union on ESG issues is the Non-Financial and Diversity Disclosure Directive 2014/95/EU (NFRD). The NFRD require large companies to publish regular reports on the ESG impacts of their activities. The NFRD applies to large public-interest companies with more than 500 employees.[156] This covers around 11700 large companies and groups across the EU. Under the directive, these large companies are obliged to publish information on "environmental matters, social matters, and treatment of employees, respect for human rights, anti-corruption and bribery and diversity on company boards."[157] In 2017 the European Commission published accompanying guidelines to assist companies to report on environmental and social information. These guidelines are however not mandatory. In 2019, the European Commission also published non-binding guidelines on reporting climate-related information.

The EU has been increasingly aggressive on ESG regulation.[158] In 2020, it approved the Taxonomy Regulation, which came into force in July 2020. The EU taxonomy is a classification system for environmentally friendly economic activities.[159] The Taxonomy Regulation lists six environmental objectives namely, climate change mitigation, adaptation to climate change, sustainable use and protection of water and marine resources, transition to a circular economy, prevention and control of pollution, and protection and restoration of biodiversity and ecosystems.[160] In 2019, the EU adopted the Sustainable Finance Disclosure Regulation (SFDR). The SFDR came into force in March 2021.

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[156] D. Esty &T. Cort, 'Toward Enhanced Corporate Sustainability Disclosure: Making ESG Reporting Serve Investor Needs' *Virginia Law and Business Review* (2022) Vol. 16 , 438

[157] Ibid

[158] Ibid @440

[159] E. Webster, Information Disclosure and the Transition to a Low-Carbon Economy: Climate-Related Risk in the UK and France, Transnational Law Institute, Think! Paper, 19

[160] Esty & Cort (n 156 above), 440

Under the SFDR, ESG requirements were largely standardized and given additional force. The SFDR was designed to eliminate roadblocks that prevent investors from accessing sustainability information. The SFDR has three main objectives, namely to improve access to sustainability information, to enhance a level playing field within the EU so that firms are not exposed to unfair competition from firms outside the EU, and to counter greenwashing.[161]

3.3.2 The United Kingdom

In the UK, ESG issues have managed to enter the mainstream of the corporate field through the use of hard and soft laws. The most essential provision on ESG issues for companies is section 172 (1) of the Companies Act, 2006 provides as follows:

> **172 Duty to promote the success of the company**
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the environment,
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
> (f) the need to act fairly as between members of the company.
>
> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.[162]

In terms of this section, directors are obliged to pay due regard to material ESG issues as they promote the success of the company. Of special interest, is the need for directors to pay due regard to the long-term consequences of their decisions. In other words, directors are duty bound to pay due regard to the sustainability of their decisions. Further, directors are bound to put into consideration the interests of

[161] Esty & Cort (n 156 above) 440
[162] s172 of the UK Companies Act, 2006

other stakeholders like employees, suppliers, customers, the community, and the environment. E. Webster asserts that to fulfill this statutory requirement, *"the question is whether the director honestly believed that his act or omission was in the best interests of the company."*[163] Debevoise & Plimpton assert that the most fundamental duty in the UK for a director is to act with good faith in a manner he considers will promote the success of the company for the benefit of shareholders.[164] The term "success of the company" is nebulous and can be viewed under the prism of ESG to mean sustainable long-term success as opposed to short-term profit maximization. Debevoise & Plimpton further assert that in the absence of any indication in the constitution of the company on what success means, the board is at liberty to define "success" and it may take the view that the company becoming a "responsible citizen" and taking into account the various interest of stakeholders should be an integral part of the meaning of success.[165] They further opine that generally, directors should pay due regard to any relevant ESG factors as they seek to promote the success of the company. Directors can be found in breach of their fiduciary obligations if they fail to comprehensively and systematically consider material ESG issues under s172. Shareholders can bring a derivative action against directors who fail to comply with the provisions of s172 of the directors' duty to consider the interests of the other stakeholders.[166] However, s172 of the UK Companies Act, 2006 has been criticized for making the interests of other stakeholders subservient to those of shareholders. For instance in ***Regentcrest plc v Cohen***[167] the court held that the requirement to promote the success of the company and to consider the interests of other stakeholders should be interpreted in the interests of promoting the interests of shareholders. It would thus imply that the ESG issues will be taken into consideration in so far as they are necessary to promote the interests of shareholders.

In a more aggressive move towards greater recognition of ESG issues in the UK, the Companies (Miscellaneous Reporting) Regulations, 2018 were promulgated in 2018. These regulations require all large companies to include a section 172(1) statement as part of their strategic report. The statement must detail how directors have performed concerning matters set out in s172(1) to (f) of the

[163] Webster (n 159 above),23
[164] Debevoise & Plimpton, Accessed on 11 July2022, https://www.unpri.org/download? ac=9525, 4
[165] Ibid
[166] Webster (n 159 above)24
[167] [2001] BCC 494 [120],

Companies Act, 2006. These large companies are required to publish the statement on the company's website and the strategic report. The Financial Reporting Council (FRC) has developed guidelines to supplement these regulations. The FRC guidelines state, *inter alia,* that the s172(1) statement "should explain how the board has had regard to the broader matters in their actions, behaviours, and decisions."[168] The guidelines further highlight some of the information that must be included in the s172(1) statement. This includes how directors have engaged with stakeholders and the consequential effect on the company's decisions and strategy. In terms of s463 of the Companies Act, a director can be held personally liable to compensate the company if he "knowingly or recklessly provides misleading or untrue statements, or conceals facts by omission that leads to the company suffering any loss".[169] However, this does not extend to the loss suffered by shareholders.[170] In terms of s414A(1), directors are collectively responsible for the production of the strategic report and thus if directors fail to produce such a report will commit an offence that attracts a fine on conviction. In terms of s414C(7)(b), strategic reports for quoted companies, which require extensive disclosure, require a "comply or explain" approach, in which the report should disclose which s172 information is absent in the report and an explanation thereof.

Under soft law, the updated UK Corporate Governance Code 2018 mandates a company's directors to disclose and explain the key risks faced by the business and how such risks are mitigated or managed.[171] The key objective of the Code is to facilitate effective board practice and sound corporate governance. All companies that have a premium listing of equity shares are obligated under the Listing Rules to provide a report on how they have complied with the Code on a "comply or explain" basis.[172] The UK Stewardship Code complements the UK Corporate Governance Code.[173] The Code sets out "the principles of effective stewardship by investors."[174] The Stewardship Code is primarily directed to institutional investors with holdings in listed companies who are obliged not merely to vote but to hold directors of investee companies to account for their obligations. Under the

[168] Webster (n 159 above), 29
[169] s463 of the UK Companies Act, 2006
[170] Webster (n 159 above), 30
[171] Ibid @31
[172] Ibid
[173] Ibid@32
[174] Ibid

Financial Conduct Authority's (FCA) Conduct of Business Rules, all UK-authorised Asset Managers are required to commit to comply with the Stewardship Code or explain why it is not appropriate to their model of business. The signatories of the Code are required to produce a statement on their website detailing the extent of their compliance with the Code. The Code is aimed at promoting behavioral changes through investor engagement and corporate accountability.

3.3.3 France

France is credited for having one of the world's most comprehensive and stringent ESG frameworks.[175] Under the French Code Civil [C.CIV] [Civil Code) art 1833 (Fr) each French company must be managed "in furtherance of its corporate interest" whilst due regard is paid to the social and environmental issues of its activities.[176] Since 2012, companies with over 500 employees and with a turnover of 100 million euros must report on 42 ESG metrics.[177] The French framework adopts a "comply or explain" approach, which allows companies to disclose the essential ESG information or explain why they have failed to do so.[178] The ESG report must be verified by a third party. In 2015, France promulgated the Energy Transition Law, which has the prime objective of diversifying France's energy mix in the context of climate change.[179] This Law became France's flagship of its commitment to the fight against climate change and the commitment to reduce greenhouse gas emissions.[180] Article 173-IV of the Energy Transition Law mandates companies to systematically report their scope of emissions. In particular, companies are required to report on the climate change financial risks, the steps taken to mitigate the risks, and the impacts that climate change may pose on the company's activities and the goods and services they produce. In 2017, the French Parliament passed the Law on the Duty of Vigilance for Parent and Subcontracting Companies. This law obligated companies with over 5000 employees in France or 10 000 employees worldwide to establish a system to implement and verify human rights, environmental, and health and safety issues in their supply chains.[181] Each reporting company must come up with a "vigilance plan" with five elements namely, risk mapping; assessment of subsidiaries, subcontractors, and suppliers;

[175] Esty & Cort (n 156 above), 441
[176] Turner (n 17 above), 8
[177] Esty & Cort (n 156 above), 441
[178] Ibid
[179] Webster (n 159 above), 40
[180] Ibid
[181] Esty & Cort (n 156 above), 441

actions taken to reduce risks; whistleblower procedures; and a monitoring mechanism.[182] Any concerned stakeholders like employees, customers, shareholders, or members of the public are at liberty to file a complaint for failure to create or disclose this plan. In a unique move, Article 2 of the law makes companies to which the law applies liable for environmental or social harm that may result in their activities in the supply chain. D. Esty & D.Cort asserted that this "provision represents one of the most ambitious requirements in the world in terms of integrating ESG considerations into corporate governance."[183]

3.3.4 The United States of America

Much of the developments toward more socially responsible corporations in the USA arose from changes in business norms and practices rather than changes in legislation.[184] Investors are increasingly not concerned with profitability alone, but also sustainability. Sustainable investments under management grew from US$ 8.7 trillion to US$12 trillion between 2016 and 2018 in the USA.[185] In the investment community, sustainability has been viewed under the prism of ESG. ESG issues have been seriously pushed through shareholder advocacy where resolutions are filed with investee companies demanding greater recognition of material ESG issues. These resolutions would cover a range of ESG issues like climate change, human rights at the workplace, and diversity. Shareholder resolutions on ESG issues have been on the increase since the late 2000s.[186] For instance, in 2007, only 43 climate change resolutions were filed with US companies. The number increased in 2009, where 68 shareholder resolutions on climate change were filed.[187] In 2015, a record 433 ESG resolutions were filed during the proxy season with climate change being the leading driver of the upward increase.[188] Recently a climate justice resolution was filed with ExxonMobil for the company to acknowledge the "Moral Imperative to Limit Global Warming to 2° Celsius".[189] The company challenged the resolution as vague. However, US Securities and Exchange Commission (SEC) intervened and rejected Exxon's challenge. The ESG considerations

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[182] Ibid
[183] Ibid @442
[184] Afsharipour, (n53 above) 469
[185] F. Lopez-De-Silanes (n 21 above), 217
[186] Balzac (n 143 above) 10160
[187] Ibid
[188] Ibid
[189] Ibid

continue to play the centre stage in the investment decisions of several institutions that seek greater respect for ESG issues by companies.

Generally, the US has a non-mandatory disclosure regime that covers ESG issues very narrowly. The disclosure regime under the Securities Act of 1933 is generally meant to protect investors.[190] It was based on Justice Brandeis' theory that *"publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best disinfectant, electric light the most efficient policeman"*.[191] Thus, in the past, the US Securities and Exchange Commission (SEC) has been largely silent on ESG issues leaving companies to determine which ESG issues to consider or disclose.[192] However, with the inception of the Biden Administration, there has been increased policy commitment to broad-based action on climate change and other sustainability issues like diversity in the workplace, pay equity, and racial justice.[193] Thus investors are increasingly demanding that companies observe material ESG issues and require them to report on ESG activities. In 2021, the SEC created a Climate & ESG Task Force.[194] The Task Force is mandated to develop initiatives to proactively identify ESG-related misconduct. In the same year, the SEC also released regulations on the disclosure of climate-related risks and greenhouse gas emissions.[195]

The promulgation of benefit corporation law in various states in the US also ushered ESG-oriented entities. As indicated in the previous Chapter a benefit corporation is a legally *"for-profit socially obligated, corporate form of business"* with all the traditional characteristics of a corporation coupled with the objective to pursue public benefit.[196] The benefit corporation has two prime objectives, namely, generating a profit and fostering positive social or environmental impact. Directors of these corporations have a fiduciary obligation to advance these two objectives. Benefit corporations statutes have been adopted in over 30 states in the United States and legislation is still being debated in several other states.[197] Under the ESG legal framework in the US, the Dodd-Frank Act[198] is also worth mentioning. This Act

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[190] Hasz (n 119 above), 139
[191] Ibid
[192] Esty & Cort (n 156 above) 426
[193] Ibid
[194] Ibid
[195] Ibid
[196] J.S. Hiller, The Benefit Corporation and Corporate Social Responsibility, Journal of Business Ethics , December 2013, Vol. 118, No. 2, 287
[197] Afsharipour (n 53 above) 474
[198] Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010

requires companies purchasing certain minerals to carry out due diligence investigations relating to the source of minerals to ensure that they do not purchase conflict minerals. This is an essential ESG legislative prescription is it is meant to ensure that companies do not prop entities that breach social and environmental justice by purchasing their tainted products.

3.4 The interplay between ESG and the duties of directors

As pressure increases from lawmakers, regulators, investors, and the general public for greater recognition of material ESG issues, directors must be mindful that their duties are evolving and their activities may be scrutinized under the unfamiliar lens of ESG.[199] Directors need to know that ESG is much more than value-oriented investors chasing feel-good stories of sustainability, diversity, and ethics.[200] Far from window dressing, there are real risks at play when it comes to the issue of ESG issues, and also opportunities to seize.[201] Progressive companies now view ESG as a business imperative: they seize opportunities and manage risks whilst laggards ignore the topic and view ESG as a check-the-box exercise grounded in philanthropy.[202] As they discharge their duties, directors are generally expected to pay due regard to material ESG issues. The board occupies a vantage point of being the leader of the company. It is also trite that the board of directors or a director duly authorized is an agent of the company. Thus, the activities of directors play a crucial role in the company's responsibilities toward material ESG issues.

The board of directors occupies a special position in a company. In terms of s218 (1) of the COBE Act, the board of directors is responsible for company decisions on all matters except those reserved to the shareholders by the Act or by the company's constitutive documents. In terms of s218 (2) of the Act, the board's responsibilities include, determining and directing overall business performance and strategic plans for the company; ensuring that the financial records, financial statements, and external audits are kept maintained and performed; the appointment, removal, compensation, and performance of officers and oversight of the management of the company; and deciding any other matters referred to the exclusive competence of the board of directors in the company's constitutive documents.[203] Thus, the board of directors plays

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[199] Mayer Brown, Directors' Duties and ESG – decision-making in the Future Accessed on 11 July 2022, https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/09/directors-duties-and-esg.pdf
[200]PWC, ESG and the Role of the Board. Accessed on 11 July 2022. https://www.pwc.com/mt/en/publications/sustainability/esg-and-the-role-of-the-board.html
[201] Ibid
[202] Ibid
[203] s218 (2) of the COBE Act

a crucial role in steering companies to address material ESG issues. As the board initiates company strategy and establishes company goals roles, objectives, and major policies of the company, it is now increasingly required to pay due regard to material ESG issues. Similarly, the board should also pay due regard to material ESG issues as it exercises its approval power and appoints executive management. Further, as the board evaluates the overall performance of the company, it should not ignore material ESG issues. PWC asserts that the board can fulfill ESG oversight in four tasks.[204] Firstly, the board should consider ESG issues as it links purpose and strategy. From the board's vantage point, it is its role to properly articulate the purpose of the company and ensure that the purpose is linked to strategy. Secondly, the board oversees how the ESG strategy of the company aligns with the company's business strategy. Thirdly, the board is obligated to establish a reliable ESG disclosure regime. Directors can choose from a plethora of ESG disclosure regimes and should choose a regime with the right metrics suitable for their business. Fourthly, directors should establish checks and balances to ensure that the right information is disclosed by the company.[205]

The directors generally owe various fiduciary obligations to the company. These obligations include the duty to act in the best interests of the company, the duty of loyalty, and the duty of care. However, these traditional fiduciary obligations are not static.[206] With increased pressure from legislators, regulations, investors, and the general public, directors are now expected to be mindful of the interplay between their fiduciary obligations and ESG issues.[207] The traditional fiduciary obligations are continuously evolving. For instance, the duty to act in the best interest of the company is no longer viewed in the short-term perspective of profit maximization but in the long term.[208] This corresponds with the global push for sustainability. Companies are increasingly required to take into consideration ESG issues to achieve sustainable commercial activities. Thus, if directors fail to comprehensively and systematically account for material ESG issues, they may be found in breach of their fiduciary obligations. For instance in the UK, if directors ignore the interests of any of the stakeholders listed in s172 of the Companies Act, 2006, and such actions prove to be disastrous, they could be found in breach of their duty of reasonable care, skill, and diligence.

[204] PWC (n 200 above)
[205] Ibid
[206] Eng & Yin (n14 above)
[207] Ibid
[208] Ibid

Directors bear the primary responsibility to ensure that their companies comply with any laws, codes, or regulations on ESG issues. For instance, in the UK, directors as leaders of the company bear the primary responsibility to ensure that their companies comply with s172 of the Companies Act, 2006. As they carry out their duties and seek to promote the success of the company, directors are bound to pay due regard to the interests of various stakeholders including suppliers, customers, the community, and the environment. It is the first time in corporate law history that directors have a statutory obligation to pay due regard to the impact of their decisions on both the community and the environment.[209] Directors can be held to account if they fail to systematically and comprehensively consider the interests of any of the stakeholders in s172. The shareholders can institute derivative actions to ensure that the directors comply with s172. One of the cases that provide valuable guidance on the meaning of s172 is the case of ***Simpson v Southern Landlord Association***.[210]The court held that the directors can act in any way they consider to be in good faith for the promotion of the success of the company but where the company has mixed objectives, the interest of the members must prevail. In case of conflicting the success of the company and benefiting the members, a balancing exercise should be carried out. Thus, the board has to balance the divergent interests of the stakeholders. This approach was also supported by Justice Popplewell in ***Madoff Securities International LTD (in liquidation) v Stephen Raven & Others***.[211] The language of s172 seems to suggest that directors should consider the interests of stakeholders like the environment and rights of communities where such interests are consistent with the long-term profitability of the company and interests of shareholders. This has been the criticism of the UK's approach of enlightened shareholder value. However, it must be noted that in some jurisdictions like India, the interests of all stakeholders including those of shareholders are on paper at par. Thus, directors are bound to balance the divergent interests, respecting ESG issues without any preference toward shareholders' interests. However, with increased regulation, ESG has been taken to greater heights, even in the UK. Directors bear the primary responsibility to prepare the strategic reports and include the s172 statement as required by the Companies (Miscellaneous Reporting) Regulations 2018. The statement must include a report on how the company has taken into account the interests of s172 stakeholders. Directors are also collectively responsible for the production of the s172 statement and if they provide misleading, false, or conceal certain facts which result in the company bearing any losses, the directors can be held personally responsible to compensate the company. It is worthy to emphasize that the duties of directors are owed separately by each director and each director has his

[209] Ibid

[210] [2010] BLC 387.

[211] [2013] EWHG 3147.

separate obligation to exercise independent judgment. Thus, each director can be pursued for breach of fiduciary obligations even when taking part in a collective process of decision-making.

The WBCSD opines that it is now essential for directors to be cognizant of ESG and in particular sustainability issues for five main reasons.[212] Firstly, there is increased regulation that requires corporates and boards to take ESG and sustainability issues into account in their business activities, decision-making, and reporting. Secondly, there is a risk of litigation should directors fall short in the duties they owe the company by failing to account for material ESG issues or should the company breach any ESG-related regulation. Thirdly, there is the risk of damage to reputation if a company fails to meet public expectations. Fourthly, it is now the trend that important stakeholders, such as shareholders, the communities, customers, and employees, are increasingly focused on ESG issues. For instance, the shareholder activism on ESG issues in the US puts directors on their toes on material ESG issues. Fifthly, increasingly companies are publicly committing to ESG and in particular sustainability issues through best practice statements. In this regard, directors have no option but need to be cognizant of material ESG issues affecting their business operations. ESG issues can no longer be swept under the carpet or through window dressing. It is now a real risk that should be comprehensively and systematically addressed by directors, and indeed, there are opportunities to seize from pursuing material ESG issues.

3.5 Conclusion

ESG has managed to take root in the field of corporate law through both legal and none legal means. International organizations like United Nations and OECD played a crucial role to push for greater recognition of ESG and in particular sustainability issues in the field of corporate law. The efforts of these international organizations and also non-governmental organizations in pushing for greater recognition of material ESG issues by corporates can never be overemphasized. ESG entered into the mainstream of corporate law through two main legal initiatives, namely legal construct initiative and legislation, codes, or regulation. Some of the pacesetters on ESG issues include the European Union, the UK, France, and the United States. In the ESG movement, directors occupy a very crucial role as they are the leaders of companies. Directors have a positive obligation to consider material ESG issues as they lead their companies. The WBCSD opines that good corporate governance is all about understanding roles, responsibilities, and accountability across the company.[213] It further entails good and balanced decision-making by the board.

[212] WBCSD, (n44 above)
[213] Ibid

As propounded by Lord Cadbury in his report of 1992, "Governance is the system of rules, procedures, and processes by which a company is directed and controlled. Specifically, it is a framework by which various stakeholder interests are balanced and efficiently and professionally managed".[214] Thus, directors have the task to ensure that divergent interests of stakeholders and sustainability issues are properly managed and integrated into the companies' activities. As fiduciaries of the companies, directors are bound to act in good faith and in the best interests of the company, and in a manner that promotes the success of the company. Success and the best interests of the company are increasingly no longer viewed in the traditional sense of profit maximization, but rather in the long term. As leaders of business, directors are bound to ensure that their companies comply with legislative and regulatory requirements on ESG. As indicated above, financiers have not been left out in the ESG drive. As evidenced by Equator Principles, some of the world's biggest financiers now demand that companies comply with material ESG issues before they finance certain projects. Thus, directors have also opportunities to seize by taking seriously ESG issues.

[214] Ibid

CHAPTER 4: LEGAL FRAMEWORK ON ESG ISSUES IN ZIMBABWE

4.1 Introduction

Zimbabwe has not been left out of the ESG global movement. The COBE Act, which was promulgated in 2019 ushered in a new era in Zimbabwe as far as ESG issues are concerned. The Act has a bevy of provisions that changed the corporate landscape on ESG and sustainability issues. Directors in Zimbabwe need to be aware of the interplay between their fiduciary obligations and material ESG issues in the Act. Failure to properly handle ESG issues may pose serious risks to directors or their companies. Public companies are obliged to establish and adopt corporate governance guidelines which must be consistent with the provisions of the National Code on Corporate Governance (the Code).[215] At the annual general meeting, the company's board of directors is obliged to report on the company's compliance with its guidelines and their conformity to the principles outlined in Code, and explain the extent, if any to which it has varied them or believes that any noncompliance therewith is justified.[216] The general approach that was taken by the Act for public companies towards compliance with the company's guidelines and effectively the Code is a "comply or explain" approach. This is at variance with the provisions of the Code itself that adopts an "apply or explain" approach. Like in many counties, although directors are obligated to pay due regard to the interests of various stakeholders and other material ESG issues, the remedies in the Act are mainly available to shareholders. Other stakeholders may struggle to enforce their rights using mechanisms in the Act. The Public Entities Corporate Governance Act[217] stands out as one of the most ambitious legal instruments on corporate governance for state entities in Zimbabwe. The Act requires boards of state-owned commercial entities to conduct business and affairs of the entity in line with the provisions of the National Code on Corporate Governance. Thus, public entities or state-owned companies are obliged to adopt the "apply or explain" approach prescribed by the Code. It follows that directors of state-owned companies are obliged to comply with all ESG provisions in the Code including sustainability reporting standards provided for in the Code or explain if they fail to do so. The Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019[218] also require listed companies to comply with material ESG issues. The Rules require listed companies, to *inter alia*, disclose the relevance of sustainability to the company and the company's strategy on sustainability issues.[219] Listed companies are obliged to report on how their operations positively and

[215] s220(1) of the COBE Act
[216] s220(2) of the COBE Act
[217] Chapter [10:31]
[218] SI 134 of 2019
[219] s399 of Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019

negatively impact on environment and society, how they relate to their stakeholders, and how they are contributing to sustainable development.[220] Companies are encouraged to adopt internationally accepted reporting frameworks such as the Global Reporting Initiative (GRI) Sustainability Reporting Guidelines or other standards in disclosing the company's performance.[221] Under soft law, as already highlighted above, the National Code of Corporate Governance has extensive provisions on ESG issues. Companies are required to adopt an "apply or explain" when dealing with the Code. Considering that corporate governance is in itself a broad subject with its codes and regulations, this Chapter shall place more emphasis on the environmental and social dimensions of ESG.

4.2 The Companies and Other Business Entities Act

4.2.1 Key Provisions on ESG Issues in the COBE Act

The most essential provision on ESG issues in Zimbabwe as far as directors are concerned is found in s195 of the COBE Act. Sections 195(4) and (5) provide as follows:

(4) Each or every director (as the case may be) shall exercise independent judgment and shall act within the powers of the company in a way that he or she considers, in good faith, to promote the success of the company for the benefit of its shareholders as a whole.

(5) For the purpose of subsection (4), every director shall have regard to, among other things—

(a) the long-term consequences of any decision;
(b) the interests of the company's employees;
(c) the need to foster the company's relationships with suppliers, customers, and others;
(d) the impact of the company's operations on the community and the environment;
(e) the desirability of the company maintaining a reputation for high standards of business conduct;
(f) the need to act fairly as between shareholders of the company.[222]

This provision is almost a replica of section 172(1) of the UK's Companies Act, 2006. Thus, the section adopted the enlightened shareholder value (ESV) model. In terms of s195(4), directors are obliged to exercise their powers in good faith to promote the success of the company for the benefit of its shareholders as a

[220] s400(2) of Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019
[221] s401(1) of Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019
[222] ss195(4) & (5) of the COBE Act

whole. As exposed in the previous chapter, the term "success of the company for the benefit of shareholders" has various dimensions. It may mean short-term profit maximization for the benefit of shareholders. It can also be viewed under the prism of ESG to mean sustainable long-term success as opposed to short-term profit maximization. As asserted by Debevoise & Plimpton, in the absence of any indication in the constitutional documents of the company on what success means, the board is at liberty to define "success" and it may take the view that the company becoming a "responsible citizen" and taking into account the various interest of stakeholders should be an integral part of the meaning of success.[223] In modern days, investors are no longer only concerned with short-term profit maximization, but also with the sustainability of the activities of the company. The shareholder activism on ESG and sustainability issues in the US indicated in the previous Chapter is enough proof that the traditional profit maximization approach has lost grip, even from a shareholder perspective. Thus, it can be argued that benefit to shareholders no longer means profit maximization from the traditional profit-maximization approach. Rather, shareholders have immense benefits that they can derive from directors paying due regard to the interests of other stakeholders. However, it is evident from this section that the primary obligation of directors is to exercise their powers in good faith for the benefit of shareholders as a whole. Accordingly, the wording of the section can give room to a shareholder-centric short-term profit maximization interpretation.

In terms of s195 (5), as directors act in the promotion of the success of the company for the benefit of shareholders as a whole, they must pay due regard to several factors and interests of various stakeholders. The list of factors and stakeholders that directors should pay due regard to is non-exhaustive as the phrase "among other things" is used in the wording of the section. This opens room for other issues that directors should pay due regard to. The issues listed that directors must pay due regard to include, the long-term consequences of any decision; the interests of the company's employees; the need to foster the company's relationships with suppliers, customers, and others; the impact on the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly as between

[223] Debevoise & Plimpton, (n 164 above) 4

shareholders of the company.[224] It follows that directors can no longer act in a parochial shareholder-centric approach. They are now obligated to pay due regard to several issues, including ESG issues like long-term consequences of decisions and the interests of various stakeholders like employees, suppliers, customers, employees, the community, and the environment. Paying due regard to the long-term consequences of decisions goes hand in glove with sustainability. As highlighted previously, although sustainability is often used in connection with environmental issues it also refers to what it takes for a business to achieve long-term existence, profitability, and growth. The term “sustainability” is not synonymous with ESG but “sustainability” encompasses ESG since all three elements of ESG contribute to the sustainability of a business.[225] The requirement for directors to pay due regard to the interests of various stakeholders like employees, suppliers, customers, the community and the environment is an essential element of ESG as ESG embraces stakeholder governance. Just like in the UK, s195(5) of the COBE Act introduced a new paradigm concerning the interests of the community and the environment. It is the first time in the corporate law history of Zimbabwe that directors have a statutory obligation to pay due regard to the impact of their decisions on both the community and the environment. The Act recognizes that companies do not operate in a vacuum. Rather, their activities may impact the environment and the communities they operate. By embracing stakeholder governance, the Act embraces the approach in the National Code on Corporate Governance that a company is a multi-interest enterprise whose activities have positive or negative impacts, on various stakeholders. Hence, the company should pay due regard to the interests of these various stakeholders as it carries out its activities. Requiring directors to pay due regard to the environment as they make decisions is a topical issue due to the climate change risk that is trending the world over. C.A. Williams *et al* assert that climate change poses physical, economic transition, and economic risks to companies and their business models.[226] An increasing number of countries have set out policies to reach net-zero greenhouse gas emissions by 2050, and an increasing number of financiers and investors now require their investee companies to

[224] s195(5) of the COBE Act

[225] Deloitte, (n 98 above)

[226] C.A Williams *et al*, Directors’ Fiduciary Duties and Climate Change: Emerging Risks, Accessed on 23 July 2022, https://corpgov.law.harvard.edu/2021/12/08/directors-fiduciary-duties-and-climate-change-emerging-risks/

demonstrate the compatibility of their business models with the transition to a low-carbon economy.[227]

However, the usual criticism which befalls s195(5) is the weakness of the ESV model. ESV is criticized for placing priority on the interests of shareholders at the expense of the interests of the non-shareholding stakeholders. It is asserted that in terms of the ESV approach, directors are only obliged to pay due regard to the interests of non-shareholding stakeholders in so far as such interests are paramount in advancing the interests of shareholders.[228] However, other scholars argue that the ESV framework goes beyond just paying lip service to the interests of other stakeholders. Directors are obliged to take into consideration the interests of non-shareholding stakeholders in good faith. According to this perspective, if the board of directors makes decisions that opportunistically benefit shareholders at the expense of other stakeholders, they may be found in breach of their fiduciary duties towards the company as such decisions do not promote the success of the company for the benefit of stakeholders as a whole.[229] Be that as it may, in the event of the interests of other stakeholders conflicting with those of the shareholders, the interests of the members will prevail under the ESV model. This was highlighted in ***Simpson v Southern Landlord Association***[230] when interpreting the meaning of s171 (1) of the UK Companies Act, 2006. It follows that the interests of shareholders are superior under s195(5).

Another essential ESG provision, which is intertwined with the duty to promote the success of the company, is s54. In terms of s54 directors have the duty to act "*in good faith, in the best interests of the registered business entity and with the care, skill, and attention that a diligent business person would exercise in the same circumstances."*[231] It can be argued that the term "best interest of the registered business entity" is so broad to the extent that it incorporates the interests of other stakeholders. As advanced by the Corporate Governance Code of Zimbabwe and King IV of South Africa, a company is a multi-interest enterprise represented by several interests of stakeholders like shareholders,

[227] Ibid
[228] Afsharipour, (n 53 above) 473
[229] Ibid
[230] [2010] BLC 387.
[231] s54 of the COBE Act.

employees, consumers, the community, and the environment. As opined by King IV, requiring directors to act in good faith in the interests of the "company" cannot nowadays mean anything other than a blend of all these interests, but first and foremost they must act in the best interests of the company as a separate legal entity.[232] It is axiomatic that a company cannot survive and prosper without the input of the other stakeholders. Hence, the "best interests of the company" should in modern times be interpreted to include stakeholder governance. It can also be argued that if directors recklessly ignore material ESG issues, they can be found in breach of the duty to act with care and skill towards the company. With the emergence of issues like ESG issues, disruptive technologies, cybersecurity threats, and climate change risk, the duty of care and to act with skill is particularly of great importance to directors in modern days. Directors should at all times take measures to be fully informed of these new issues before they act, lest they can be found in breach of the duty to act with care and skill. Companies should have policies for board development that ensures that directors are abreast with new issues affecting the corporate landscape.

Another notable ESG provision in the COBE Act is s220. In terms of s220(1), a board of every public company is required to establish or adopt written corporate governance guidelines covering matters such as standards for qualification and independence of directors, directors' responsibilities, director compensation policy, succession planning for both directors and officers, and other corporate governance matters.[233] The guidelines are required to be consistent with the then-current National Code on Corporate Governance. In terms of s220 (2), directors of a public company are required to report at every annual general meeting on the "company's compliance with its guidelines and their conformity to the principles set forth" in the said Code, and "explain the extent if any to which it has varied them or believes that any non-compliance therewith is justified."[234] In this regard, s220(2) adopts a relatively loose approach towards compliance with corporate governance best practices in the Code where apart from the "comply or explain" approach, it gives room to the companies to come up with guidelines that should, *prima facie*, be consistent with the Code, but the companies can still vary them and provide

[232] I Esser & P. Delport (note 1 above) 106
[233] s220(1) of the COBE Act
[234] s220(2) of the COBE Act

an explanation for that variation. Thus the approach can best be described as a "comply, vary or explain". The risk of the approach adopted in the Code is two-pronged. Firstly, directors can take a lackadaisical approach toward compliance with the guidelines and then explain at the meeting for failure to comply with the guidelines. Secondly, the option to vary the guidelines and provide a justification for noncompliance creates room for the directors to come up with standards that may be way below acceptable standards of good corporate governance. In terms of s167(5)(e), the "comply or explain" report of directors is one of the agenda items that should be discussed at the annual general meeting. The "comply or explain" approach prescribed by the Act is now outdated and no longer a best practice in corporate governance. The Code itself adopted the "apply or explain" approach instead of "comply or explain". As explained in the Code, the "apply or explain" approach is a clear message to companies to apply the provisions of the Code and, where they fail to do so, explain or give reasons for the failure to do so.[235] The Code further clarifies that "comply or explain" is different from "apply or explain". It explicates that the "comply or explain" approach "denotes a mindless application of a code" whilst the "apply or explain" principle reflects an appreciation of the fact that it is not merely a case of complying or not, but rather a case of taking due consideration of how the principles of a code and its recommendations contained should be applied in given circumstances of a company.[236] Thus, the compliance-based approach, like "comply or explain" is criticized for failing to create an environment for companies to engage with the spirit of the Code. It must be emphasized that South Africa, has moved a notch higher from "apply or explain" to "apply *and* explain". King IV adopts the "apply *and* explain" approach. By this approach, the *King* assumes that companies are already applying or in compliance with the principles and must provide an explanation on how they achieve their targets. Thus King IV is outcomes-oriented. This approach ensures that companies move away from the "tick box" approach on compliance with corporate governance practices by tasking the companies to show how they are practically achieving compliance with the principles.[237] To make this realistic King IV provides a framework of a limited number of principles. There are

[235] Preface of National Corporate Governance Code , Zimbabwe, 2014, 9

[236] s371 of the National Corporate Governance Code , Zimbabwe, 2014

[237] KPMG, King IV Summary Guide, Accessed on 22 July 2022, https://assets.kpmg/content/dam/kpmg/za/pdf/2016/11/King-IV-Summary-Guide.pdf

only 17 principles, one of which only applies to institutional investors. It is argued that the approach taken by King IV encourages companies to be proactive and by so doing they reap the benefits. Be that as it may, the COBE Act requires public companies to come up with guidelines that are in tandem with the provisions of the Code. The Code covers both environmental, societal, and governance dimensions of ESG. A discussion on key ESG provisions in the Code shall be done below.

The obligation for directors to submit the s220 report at the annual general meeting also appears in s183 (3) of the Act which deals with financial statements. The s220 report on corporate governance is described as a report of the audit committee which must be submitted by the board at the annual general meeting of shareholders. The section stipulates additional information that should be included in the report which includes, a descriptive review of the nature of the business of the company and any subsidiaries and any changes therein, and the total amount of remuneration paid to directors and any benefits received by each director or former director during the previous financial year.

Another remarkable ESG provision on s220 of the COBE Act is its subsection (4), which provides that every *"public company shall formulate and implement a policy to promote diversity and gender balance in their governance structures and employment policies from the board downwards."*[238] The wording of the section is not optional, but mandatory. Thus, directors of public companies must take diversity and gender balance seriously. Diversity and gender balance are important societal concerns under the ESG framework. Diversity means the range of human differences. It includes race, sex, gender, age, social class, ethnicity, political beliefs, religious beliefs, national origin, and physical ability and differences.[239] Directors as the leaders of the company should ensure that diversity is properly handled by their company. Diversity can touch several areas in a company like board composition, recruitment, investment policy, and retrenchment policy. Gender balance refers to the "equal participation of women and men in all areas of work, projects or programmes."[240] The obligation of public companies to

[238] s220(3) of the COBE Act
[239] Ferris State University, Diversity and Inclusion Definitions, Accessed on 21 July 2022, https://www.ferris.edu/administration/president/DiversityOffice/Definitions.htm
[240] UN ESCWA, Gender Balance, Accessed on 21 July 2022, https://archive.unescwa.org/gender-balance

promote gender balance augments the obligation placed upon the State to promote gender balance by the Constitution of Zimbabwe.[241]

Another area that could be interpreted as incorporating ESG considerations is the disclosure regime appearing in the COBE Act. Disclosure is a new buzzword in the Act. Apart from the ordinary disclosure of conflict of interest by directors at meetings and when handling affairs of the company, which is in itself a good corporate governance practice, companies are now required to disclose certain information regarding ownership of the company. For instance, in terms of s72, every company is obliged to maintain an accurate and up-to-date register of the beneficial owners of the company. Companies are obliged to file in the prescribed form beneficial ownership information with the Registrar. Beneficial information at the company or kept by the Registrar shall be made available for inspection by the Financial Intelligence Unit or by any law enforcement agent as stated in s2 of the Money Laundering and Proceeds of Crime Act [Chapter 9:24]. In terms of s73(13) every company should nominate a director or officer who should be responsible for keeping the register of beneficial owners. Sections 235 and 236 deal with disclosure of control acquisition and controlling block of shares in a public company. From an ESG perspective, these kinds of disclosures address several societal concerns like fostering transparency, curbing money laundering, and combatting corruption. Thus, the provisions benefit the general public. It is trite that the general public is an important stakeholder under the stakeholder governance framework.

The Act has several provisions that encompass the “G” element of ESG. This includes various provisions in the Act meant to foster sound financial management appearing from sections 182 through 193. Another material governance provision is s195 (1) which deals with board composition. It provides that a private company that has more than one and fewer than ten shareholders must have two or more directors, whilst a private company with ten or more shareholders must not have fewer than three directors. A public company is required by the section to have at least seven, but not more than fifteen directors. Section 195(2) requires that at least one director of any company must be ordinarily resident in Zimbabwe. Section 195(2) prohibits a director who occupies the

[241] s17 of the Constitution of Zimbabwe, 2013

position of the chief executive officer from also being the chairman of the board. Section 214 deals with the allotment of shares to directors. It prohibits directors from issuing, allotting, or reserving any shares to any director without the approval of the company in a general meeting. Section 215 deals with particulars that should be contained in accounts laid before a general meeting concerning the director's salaries. Section 218 is also of particular importance from a governance perspective. The section stipulates the board's role and responsibilities. In terms of s218 (2) of the Act, the board's responsibilities include, determining and directing overall business performance and strategic plans for the company; ensuring that the financial records, financial statements, and external audits are kept maintained and performed; the appointment, removal, compensation, and performance of officers and oversight of the management of the company; and deciding any other matters referred to the exclusive competence of the board of directors in the company's constitutive documents.[242] Section 219 prescribes that every public company must have an audit committee and it further outlines the functions of the audit committee.

Another important ESG provision from a governance perspective is 195 (9) of the Act which prohibits a director of a public company from serving on more than six boards of unassociated public companies, and his or her service to other boards shall be disclosed at every general meeting. However, the use of the word "unassociated" public companies in s195(9) is somewhat retrogressive. It means that a director can serve on more than six boards of associated public companies. This runs roughshod against the mischief meant to be combated by limiting the number of boards that a director can serve. The idea that directors should not "overboard" has been a key consideration for investors.[243] The main concern of investors is the ability of the director who "overboards" to fulfill his duties and responsibilities given the significant time commitment associated with each directorship.[244] A wide range of issues is expanding the directors' mandate which means that more time and commitment is now required from directors when handling a company's affairs. New issues in the

[242] s218 (2) of the COBE Act
[243] K. Papadopoulos, Director Overboarding: Global Trends, Definitions, and Impact, Havard Law School Forum on Corporate Governance, Accessed on 21 July 2022, https://corpgov.law.harvard.edu/2019/08/05/director-overboarding-global-trends-definitions-and-impact/
[244] Ibid

corporate landscape have arisen including increased regulatory requirements, cybersecurity threats, stakeholder governance, disruptive technologies, and climate change risk.[245]

4.2.2 Enforcement of ESG issues under the COBE Act

There are various mechanisms for enforcing compliance with material ESG issues in the Act. Failure to pay due regard to material ESG issues in certain circumstances may amount to a breach of duty of care and loyalty enshrined in s54 and 55 of the Act respectively. It is worth noting that in terms of s55(3)(h) of the Act, knowingly causing harm to the entity amounts to a breach of the duty of loyalty. If a director fails to pay due regard to material ESG issues in a manner that amounts to a breach of duty of care or loyalty or any duty placed on the director in terms of the Act, any shareholder can approach the courts in terms s60 for recourse, to enforce, or recover damages caused to him by violation of a duty incumbent upon any such director. It follows that shareholders who suffer loss as a result of the director's failure to pay due regard to any material ESG issue prescribed by the Act can approach the court in terms of s60 of the Act. Thus, shareholders can utilize s60 to enforce violations against s195 (4), s195 (5), s195 (9), s220, or any other ESG essential provision. Shareholders can also institute derivative actions in terms of s61 to enforce compliance, or recover any damages suffered by the company as a result of a breach of duties in s54, s55, or any duty placed by the director in terms of the Act. If directors fail to fairly balance the interest of shareholders as is required in terms of s195(5)(f) in a manner that is oppressive or unfairly prejudicial to the interests of any shareholder, the aggrieved shareholder can approach the court for recourse in terms of s222 to s225. Dissenting shareholders have also recourse in terms of s233. If the breach of material ESG issue amounts to a fraudulent, reckless, or grossly negligent conduct of business, recourse can also be found in terms of s62 of the Act. This section gives room for a creditor, member, judicial manager, or liquidator to approach the court for recourse.

Another essential mechanism for enforcement of ESG issues in the Act is Part II of the Act which deals with inspections and investigations by the registrar. Section 38(1) states that the purpose of investigations and inspections by the Registrar of registered business entities is to *"promote good corporate governance"* and to *"inspire confidence in investors in such*

[245] Ibid

entities that their investments are safe and are being dealt with transparently."[246] ESG is an element of good corporate governance. Further, enhancing the interests of "investors" also fits well into stakeholder governance which is an essential component of ESG. The use of the word "investors" does not only mean shareholders but other non-shareholding investors like financiers, lenders, and debenture holders.

Like in many jurisdictions the avenues for enforcement of ESG concerns are mainly available to shareholders and not to the other stakeholders. The million dollar question would be, is there a mechanism in the Act for stakeholders like employees, customers, the community, and environmentalists to enforce their rights breached by directors or companies? Section 65 (2) is an interesting provision. It reads, *"Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."* However, it seems s65(2) was misplaced as the heading reads *"Allegations of voidness, impropriety, etc. by registered business entities"*. It seems the heading does not speak to s65 (2). Section 65(2) is almost identical to the South African s218(2) Companies Act, 2008. I. Esser and P. Delport opine that s218(2) could have the effect that liability for breach of duties like the duty of care and skill, can be extended to third parties, such as outside stakeholders.[247] They argue that although no direct rights are given to stakeholders, they can still get some recourse under the provision.[248] They however asserted that s218(2) is drafted in very wide terms and this type of provision may discourage experienced people from serving as directors as the risk of litigation is increased by the section.[249] They however warned that it may be difficult for third parties to succeed with a claim based on s218(2).[250] It follows that although on paper s65(2) of the COBE Act may seem to be an available remedy for stakeholders to enforce their rights, it may be difficult to utilize. The utilization of the provision is yet to be tested through case law.

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[246] s38(1) of the COBE Act
[247] I. Esser & P. Delport (n 1 above) 106
[248] Ibid
[249] Ibid @ 107
[250] Ibid @106-107

4.2.3 Legal Consequences of Ignoring ESG Issues Under the COBE Act

Ignoring material ESG issues by directors has serious repercussions against directors and their companies. Failure to pay due regard to certain ESG issues may amount to a breach of fiduciary obligations of directors and other duties imposed by the Act. Ignoring ESG issues in a manner that amounts to a breach of duties in s54, s55, and s195 of the Act attracts civil liability against the directors in terms of s197 of the Act. In terms of s197 (2) a director of a company may be held liable under the principles of the common law relating to breach of a fiduciary duty, for any loss, damages, or costs sustained by the company as a consequence of any breach by the director of the duties in s54, s55 and s195. However, directors can be exonerated from liability in terms of s197(9) where in proceedings against the director, apart from proceedings involving breach of trust or willful misconduct, the court may relieve the director from liability if it can be proved that when he breached the duty, he had acted honestly and reasonably and having regard to the circumstances of the case, it is fair to excuse the director. Directors can also be exonerated from liability for negligence, breach of duty, or breach of trust in terms of 59 (1) of the COBE Act. A director can be exonerated from liability if he can prove that:

> he "acted honestly and reasonably and that, having regard to all the circumstances of the case, including those connected with his or her appointment, he or she ought fairly to be excused for the negligence, default, breach of duty…"[251]

For failure to pay due regard to ESG issues in a manner that amounts to a breach of duty of care, directors may be exonerated from liability based on the business judgement rule. The business judgement rule is enshrined in s54(4) of the Act. As a standard of review, the breach of duty of care must be gross for a director to be held liable.[252] To enjoy the protection of this rule, a director should prove in terms of the COBE Act that: (1) he does not have a personal interest in the matter[253], (2) he was fully informed on the subject to the extent appropriate under the circumstances[254] and (3) that he honestly believed when the judgment was made was in the best interests of the company or corporation.[255] The

[251] s59(1) of COBE Act

[252] This accords with international best practice as interpreted by the US and Australian Courts cited in text.

[253] s54(4)(a) of COBE Act

[254] s54(4)(b) of COBE Act

[255] Section 54(4)(c)

requirement that the director must not have a personal interest in the matter is fairly straightforward. However on the requirement that the director must prove that he was fully informed of the matter, it was held in ***Australian Securities and Investments Commission v Rich***[256] that the level of information required for decision-making is more subjective than it is objective. In ***Brehm v Eisener***[257] the court held that gross negligence is the standard that should be used in assessing whether a director is properly informed for the purposes of decision-making. The third requirement entails that the director must prove that he rationally believed that the decision made promoted the interests of the company.[258] In ***Visser Sitrus v Goede Hoop Sitrus (Pty) Ltd & Ors***[259], it was held that the test to be used is subjective. A director is required to prove that he subjectively believed that the decision made was in the best interest of the company.

For failure to pay due regard to a material ESG issue in a manner that amounts to the fraudulent, reckless, or grossly negligent conduct of business, directors who were knowingly a party to carrying on of business in such manner can be held personally responsible in terms of s68 (3)(e) of Act. The responsibility extends to liabilities of the company.

Another legal consequence that companies or directors may face for failing to pay due regard to material ESG issues is civil penalties. In terms of 294, the Registrar has extensive powers to issue civil penalty orders for failure to comply with certain provisions in the Act. For instance, failure to hold an annual general meeting, which among other things, discusses the company's "comply or explain" report on the company's corporate governance guidelines and the current National Code on Corporate Governance attracts category 4 civil penalty. Failure to keep a register of beneficial ownership information and also failure to nominate a director or officer that should be responsible for maintaining a register for beneficial owners attracts category 4 civil penalty. If a director contravenes the maximum "boarding" requirement of s195 (9), he or she risks a category 2 civil penalty.

[256] NSWSC 1229
[257] 746 A.2d 244 (Del 2000)
[258] B.M. Mupangavanhu, Standard of Conduct or Standard of Review? Examination of an African Business Judgement Rule under South Africa's Companies Act 71 of 2008, *Journal of African Journal Law*, 63, 1(2019), 132, DOI: 10.1017/S00218553180027X
[259] 2014(5) SA 179 (WCC)

Failure to pay due regard to material ESG issues poses also the risk of litigation from affected stakeholders who can utilize s65(2). As highlighted above, the section allows any person who has suffered loss or damage as a result of a contravention of the Act to sue the errant "person". The word person is wide enough to include the company, its directors, shareholders, or any officer of the company.

Apart from these legal consequences, it is essential to state that failure to pay due regard to material ESG issues leads to companies missing out on opportunities. Paying due regard to material ESG issues ensures that risks are tracked, opportunities are maximized and the creation of value is optimized. For instance, as exposed in the previous Chapter, the largest financiers for projects in emerging markets are signatories of the Equator Principles. These principles guide financiers to ensure that "projects they finance and advise on are developed in a manner that is socially responsible" and that reflects "sound environmental management practices."[260] For financial institutions that have adopted the EPs, financing of projects is conditional on compliance with the EPs. If a company fails to comply with the principles, no project finance or loans will be availed.

4.3 Key ESG considerations in Other Legislation

4.3.1 The Public Entities Corporate Governance Act

This Act was promulgated in 2018. Its main objective is to foster good corporate governance in public entities. This includes state-owned companies and corporations. It follows that directors of state-owned companies and corporations must be aware of ESG obligations contained in the Act. A unique stance taken by the Act is that it incorporated the whole National Corporate Governance Code as part of the Act. The Code constitutes the first schedule of the Act. In terms of s26(1) of the Act, all boards of commercial state entities must conduct business and affairs of the entity in accordance with the Code. It follows that directors of state-owned companies must be cognizant of the provisions of the Code and material ESG provisions in the Code. The Code has extensive provisions on ESG, covering all three dimensions of ESG. A discussion of some of the notable ESG provisions in the Code, especially the environmental and social dimensions shall be discussed below. It is

[260] Equator Principles, Accessed on 11 July 2022.https://equator-principles.com/

however necessary to note that the Code adopts the "apply or explain" approach. It follows that boards of state-owned companies are obliged to apply the provisions of the Code and if they fail to do so, they should provide an explanation for their failure to do so.

4.3.2 The ZSE Listing Requirements

The Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019 also contains notable ESG provisions for public companies listed on the Zimbabwe Stock Exchange. Part XXI deals with sustainability and disclosure. Section 399 provides as follows:

> The issuer shall be required to disclose in the chairman's statement the relevance of sustainability to the organisation and the organisation's strategy for addressing sustainability issues.[261]

As indicated previously, sustainability refers to what it takes for a business to achieve long-term existence, profitability, and growth. Sustainability encompasses ESG since all three elements of ESG contribute to the sustainability of a business.[262] Section 400 of the Rules deals with sustainability reporting. In terms of s400 (1), the issuer is obliged to disclose its sustainability policy, including risk mitigation measures, data on sustainability performance, and other relevant information which assist stakeholders to understand the performance of the company. In terms of s400(2), the issuer should provide an objective and balanced view of its "performance by including both positive and negative impacts on environment and society" and how it relates to its stakeholders and contributes to sustainable development. In terms of s401(1), the ZSE encourages public companies to adopt internationally accepted reporting frameworks in disclosing the company's sustainability, such as the Global Reporting Initiatives (GRI) Sustainability Reporting Guidelines or Standards, in disclosing the company's sustainability performance. The GRI Sustainability Reporting Guidelines or Standards are generally universally applicable and outline general principles, indicators, and metrics that listed companies can utilize to measure and report the company's economic, environmental, and social performance.[263] However, merely encouraging companies to adopt internationally accepted sustainability reporting frameworks is a weak approach to sustainability issues. With the global movement on ESG and sustainability issues, it is not sufficient to merely encourage public

[261] s399 of Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019
[262] Deloitte (n 98 above)
[263] s401(1) of Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019

companies. It should be a requirement. Section 402 deals with the adoption of special reporting frameworks for certain sectors. Companies operating in sectors that are extremely sensitive to environmental and social issues such as oil and gas, mining and metals which have high environmental and social exposure are required to adopt an industry-specific reporting framework; the GRI Sector Supplements for selected industries; or any other internationally recognized reporting framework.

4.4 ESG Considerations under Soft Law

The most important soft-law corporate governance instrument in Zimbabwe is National Code on Corporate Governance, 2014. This is the first national corporate governance code in Zimbabwe. It applies to every business entity in Zimbabwe. The Code encompasses all three dimensions of ESG, that is environmental, social and, governance concerns. As indicated above, this study will place more emphasis on environmental and social concerns since the governance dimension is a broad subject. In any event, the whole Code is all about good corporate governance. A notable approach from an ESG perspective is the stakeholder approach adopted in the Code. Directors are required to pay due regard to several stakeholders as they carry out their duties. In s393, the Code recognizes that a company is a multi-interest enterprise whose operations may affect various stakeholders. It emphasizes that in the governance of a company, a balance should be maintained between the maximization of shareholder value and the interests of other stakeholders.[264] Stakeholders listed in the code include shareholders, institutional investors, creditors, lenders, suppliers, customers, regulators, employees, trade unions, the media, analysts, consumers, society in general, communities, auditors, and potential investors.[265] The Code further states that stakeholders are the *raison d'etre* for corporate governance and the prime constituency of the company.[266] In carrying out their duties and responsibilities, directors are required to pay due regard to the interest of several stakeholders. Paying due regard to the interests of stakeholders is a running theme throughout the code. For instance s17 of the Code requires, *inter alia,* that the board protects and promote the interests of the company and its stakeholders. Section 23 requires companies to conduct business in a manner that benefits all stakeholders. Sections 54 (e), 57, 58, 99, 100, 109,120(r), 121(b), and 121(j) require boards and/or the chairman of the board to *inter alia* promote the interests of all stakeholders, while s55(f) requires that the boards be accountable to all stakeholders. Section 60 requires boards to put in place systems, procedures, and policies to resolve conflicts of interest among and between directors, management,

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[264] s393 of the Corporate Governance Code, Zimbabwe
[265] s394 of the Corporate Governance Code, Zimbabwe
[266] s395 of the Corporate Governance Code, Zimbabwe

shareholders, the company, and other stakeholders. Section 60 (i) requires boards to ensure that the company's major stakeholders are identified and a clear policy on communicating with and relating to them is formulated. Sections 262, 265, 266, 276, 277, and 292 emphasize the need for disclosure for the benefit of all stakeholders.

Apart from the need to protect the community interests as a relevant stakeholder, the Code also provides for essential societal concerns like diversity and gender balance. For instance, in terms of s95, every board should consider whether its diversity and demographics make it effective. In terms of s127, the board should consider, among other things, gender equality when appointing the chief executive officer of the company. In terms of s228, the board assesses whether or not there is a need for an internal audit unit in a company. Once the unit is in place, one of its obligations is to assess the risk of corruption. Corruption is a notable societal concern.

Another notable provision from an ESG perspective in the Code is integrated and sustainability reporting requirements stipulated in the Code. In terms of sections 317 and 318, the Board should ensure that information that must be disclosed in terms of the Code or any law is disclosed using a sustainable and integrated reporting framework. The integrated report should be guided by the requirements of the Global Reporting Initiative's International Integrated Reporting Council (IIRC) as amended from time to time, and any other reputable international reporting framework.[267] Information that should be included in the report includes financial, environmental, social, and governance issues which impact the company's operations and responses by the company.[268]

However, it is worth noting that the Code adopts an "apply or explain" approach to disclosure. As indicated above, South Africa has abandoned this approach in favour of the "apply *and* explain" approach in King IV. King IV also reduced the number of principles to only 17. One out of the 17 principles is only applicable to institutional investors. The reduction of the principles was meant to ensure the practicability of the new "apply *and* explain" approach. As indicated above, the approach assumes that companies are already in compliance and applying the principles, and should only explain how they are achieving them. Since 2014, the Zimbabwean Code has never been amended or reviewed. With global developments in the corporate landscape, it is high time that the Code should be reviewed. Globally, directors are battling pressing issues like rising governance and accountability bar, cybersecurity, climate change risk, trade turmoil, disruptive technologies, and sustainability. It is high

[267] s317 of the Corporate Governance Code, Zimbabwe

[268] Ibid

time that the Code should be reviewed and streamlined with global developments. It is also essential to review the Code in line with Zimbabwe's environment instead of adopting codes from other jurisdictions hook-sinker-and-line.

4.5 Conclusion

As seen in this Chapter, ESG entered the field of corporate law in Zimbabwe through both legislation and soft law. Notable pieces of legislation embracing ESG include the COBE Act, Public Entities Corporate Governance Act, and the ZSE Listing Rules. Under soft law, the National Code on Corporate Governance stands out as the most important instrument embracing ESG issues in Zimbabwe. The COBE Act is the most important piece of legislation in the Zimbabwean corporate law landscape. The Act ushered in a new era for Zimbabwe as far as ESG is concerned. Notable provisions that incorporate material ESG issues from an environmental and societal perspective include s195(4), s195(5), s220, s72, and s73. Several other provisions in the Act encompass the "G" element of ESG. Directors must pay due regard to a host of environmental, social, and governance concerns as they carry out their duties and responsibilities. Failure to pay due regard to material ESG issues may amount to a breach of fiduciary obligations of directors and/or other duties placed upon them by the Act. Directors risk personal liability and also expose their companies to liability. By, failing to pay due regard to material ESG issues, companies and directors also expose themselves to civil penalties. However, as seen above the enforcement mechanisms in the Act on material ESG issues are largely available to the shareholders. Other stakeholders may struggle to find a solid pad to pursue their interests in terms of the Act. However, they may resort to other legislation or areas of law. For instance, employees can utilize the Labour Act[269] and consumers can utilize the Consumer Protection Act.[270] Apart from the COBE Act, the Public Entities Corporate Governance Act has also material ESG issues to which directors of state-owned companies and corporations must pay due regard. The Act places an obligation for directors of commercial state-owned entities to carry out their obligations in line with the National Code of Corporate Governance. Since the Code adopts an "apply or explain" approach it follows that the directors are obliged to adopt this approach as they conduct the affairs of the company. Directors of companies listed at ZSE should also be cognizant of material ESG issues in the ZSE Listing Rules. The ZSE encourages companies to use an internationally recognized sustainability reporting framework that encompasses environmental, social, and governance concerns. Under soft law, the National Code on Corporate Governance is the most important code on corporate governance issues in Zimbabwe. The Code has provisions that cover all three elements of ESG.

[269] Chapter 28:01

[270] Chapter 14:14

However, the Code adopts the "apply or explain" principle. As indicated above, one of the progressive countries on corporate governance, South Africa has already abandoned the approach. King IV adopted the "apply *and* explain" approach. This approach fosters an environment that allows companies to be proactive on corporate governance issues.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This study looked at how ESG grew to become a global phenomenon. The concept of ESG entered into the corporate law landscape through various non-legal and legal initiatives. Jurisdictions that have been at the forefront of ESG issues include the European Union, the United Kingdom, France, and the United States of America. Zimbabwe has not been left out of the ESG movement. The COBE Act, the Public Entities Corporate Governance Act, and ZSE Listing Rules ushered in a new era in Zimbabwe as far as ESG is concerned. However, the most important piece of legislation on corporate law in Zimbabwe is the COBE Act. The key ESG provision in the COBE Act is s195 (5) as read with s195(4). These sections are almost a replica of s171(2) of the UK's Companies Act, 2006. In terms of s195(4) and s195(5) directors should exercise their powers in good faith in a manner that promotes the success of the company for the benefit of shareholders as a whole and in so doing pay due regard to several factors and the interests of various stakeholders. This includes long-term consequences of their decisions, acting fairly between shareholders and interests of various stakeholders like employees, customers, suppliers, the community, and the environment. It follows that directors are required to pay due regard to the sustainability of their decisions and stakeholder governance. Directors of public companies must pay due regard to other material ESG issues like gender balance and diversity. The Act has a plethora of provisions meant to foster good governance. For state-owned commercial entities, directors need to be cognizant of the ESG provisions embraced in the Public Entities Corporate Governance Act whilst listed companies need to be also aware of ESG issues contained in the ZSE Listing Rules. Directors need to be aware of the interplay between ESG issues and their obligations.

Ignoring material ESG issues in the COBE Act has detrimental consequences for directors and their companies. As indicated in the study, ignoring ESG issues in certain circumstances may constitute a breach of fiduciary obligations by directors and/or other duties imposed by the Act. Some of the consequences that may visit the directors and/or their companies include civil penalties, lawsuits against the companies, and personal liability.

However, directors should not consider ESG issues as a mere responsibility or for fear of adverse legal consequences. Embracing ESG has huge benefits for the company. It is an "opportunity to build a more sustainable business and a key differentiator to enhance relevancy and trust with organization

stakeholders."[271] Considering material ESG issues can create a valuable impact on the organization, the community, and the planet for years to come.[272] There is almost a universal convergence on the idea that ESG issues like stakeholder governance are essential for business success and longevity.[273] Paying due regard to material ESG issues goes a long way in ensuring that risks are tracked, opportunities are maximized and the creation of value is optimized. Setting environmental goals helps in mitigating the impacts of climate change and ensuring sustainable use of natural resources.[274] From a social impact lens, ESG helps companies to build meaningful diversity programs, fosters gender equality, enables companies to plough back into the community through various programmes, and promotes the respect of human rights by companies. From a governance perspective ESG enhances sound business ethics, creates strong board structures, fosters sound financial management and enhance transparency. The biggest financiers for emerging markets now require ESG compliance before injecting capital into projects. This is a low-hanging fruit that directors can get by taking ESG issues seriously.

5.2 Recommendations

Considering that ESG has become such an important aspect in the field of corporate law, directors must be aware of the interplay between their duties and material ESG issues. As seen above, some of the provisions embracing ESG issues in Zimbabwean legislation have their weaknesses. In this regard, the following recommendations and/or suggestions are made:

- **Companies should put in place policies for board development so that their directors are frequently educated on the interplay between their duties and material ESG issues. This includes furnishing board members with best practice codes and other material on ESG issues, training on ESG issues, regular evaluation to assess progress, providing access to relevant ESG-related information and reports, and refresher training constantly.**

- **Boards should come up with mechanisms on how they can provide oversight on material ESG issues. Boards can consider an allocation of ESG oversight. For instance ESG oversight can be done by the whole board, an existing board committee, or a newly formed, dedicated ESG Committee.**

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[271] Bakertilly, Lets build a sustainable future now, for tomorrow, Accesed on 23 July 2022, https://www.bakertilly.com/services/environmental-social-governance.

[272] Ibid

[273] WBCSD,(n 44 above)

[274] Bakertilly, (n 271 above)

- The ESV model enshrined in s195(4) and s195(5) of the COBE Act (the Act) should be discarded. Directors should be required to exercise their powers in good faith for the benefit of all stakeholders. This ensures that directors pay due regard to the interests of all stakeholders without prioritizing shareholders at the expense of the interests of the non-shareholding stakeholders. It will create a conducive milieu for corporate citizenship.

- There should be a clear mechanism in the COBE Act for enforcing the rights and interests of non-shareholding stakeholders.

- Section 65(2) of the Act which is misplaced and hidden under the heading *"Allegations of voidness, impropriety, etc. by registered business entities"* should be removed from the section and stand independently. The section needs to be rephrased so that it is not too wide, and should provide a clear avenue for the protection of the rights and interests of non-shareholding stakeholders.

- Section 220(2) of the Act should be amended to ensure that the board of directors for public companies craft its guidelines on an "apply or explain" approach when it comes to the guidelines' conformity with the National Code of Corporate Governance. However, once the guidelines have been crafted, the board should be required to take an "apply *and* explain" approach when it comes to compliance with its guidelines.

- Section 195(9) of the Act should be amended by deleting the word "unassociated" so that the maximum number of directorships that a person can hold for public companies is eight, regardless of whether or not the companies are associated. Giving room for a person to exceed this number runs against the mischief of limiting the number of boards to eight.

- Section 401(1) of Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules, 2019 should be amended so that the ZSE does not merely *encourage* public companies to adopt internationally accepted reporting frameworks in disclosing the company's sustainability performance, but should be required to do so.

- It is high time that the National Code on Corporate Governance is reviewed and revamped to adapt to global and national developments. It should provide for burning ESG issues like climate change risk and how directors should mitigate against the risk.

- **In reviewing the Code, some lessons can be drawn from King IV that reduced the number of principles to only 17. The Code should also abandon the "apply or explain" approach and move to the "apply *and* explain" approach to disclosure.**

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