A COMMENTARY ON THE SOVEREIGN WEALTH FUND ACT OF ZIMBABWE

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OXFAM Novib

Published by : Zimbabwe Environmental Law Association (ZELA)

Year of Publication: 2014

Available from : Zimbabwe Environmental Law Association (ZELA), No. 26B, Seke Road, Hatfield, Harare. Email: zela@mweb.co.zw, Website: www.zela.org

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This publication was made possible through the support of Oxfam Novib

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INTRODUCTION AND BACKGROUND

> *We are groaning under the weight of an intolerable debt burden. On the other hand, the balance sheets of these foreign entities that hoard our mineral rights are busy enticing banks, investors and fund managers from global capital market...*
>
> *This matter will be addressed in tandem with the creation of a Sovereign Wealth Fund... The setting of a Sovereign Wealth Fund will helpraise much needed capital for our infrastructure needs that has seen much neglected [and] making Zimbabwe a foreign direct investment destination of choice.*[1]

This paper seeks to analyze the provisions of the Sovereign Wealth Fund (SWF) Act of Zimbabwe. The above quoted assertions marked the recent impetus of efforts to establish legislation governing the Sovereign Wealth Fund (SWF) in Zimbabwe. From the above assertions, the legislation would ensure that the SWF would act to stabilize the economy in the face of mineral price fluctuation; provide a savings and investment fund for the benefit of future generations and provide for infrastructural development. Zimbabwe's economic blueprint, the Zimbabwe Agenda for Sustainable Economic Transformation (ZIMASSET), also identifies the need to establish a Sovereign Wealth Fund to anchor economic growth. This is identified as a key success factor for the economic blueprint.[2] In January 2014, the Zimbabwe government officially tabled its Sovereign Wealth Fund (SWF) Bill,that establishes the SWF through the use of proceeds from royalties of gold, platinum, nickel and diamonds and invest them in gold bullion, stockpiles of precious stones as well as other foreign assets.[3] The SWF of Zimbabwe Act was subsequently enacted into law in November 2014.

SWF are fundsoften derived from a country's natural assets and or surpluses. These funds are set aside for investment purposes that will benefit the country's economy and citizens.[4] A SWF is a form of a national savings account with a specific purpose, but mainly set up for the benefit of current and future citizens. Generally, the SWF belongs to the public and derives from the extraction of non-renewable public resources and should, therefore, serve the public interest. Governments can use these funds to cover budget deficits when resource revenues decline; to save for future generations; to earmark for national development projects; or to help mitigate Dutch disease by investing abroad.[5] They can also be used to reduce spending volatility, in turn improving the quality of public spending, promoting growth and reducing poverty and protect oil, gas and mineral revenues from corruption.[6] Globally the size and number of SWFs has increased dramatically since the 1950s. SWFs started in the 1950s when the Kuwait Investment Authority fund was established to invest excess oil income.

1. Senate Hansard 24 September 2013, The rationale for the Bill was outlined by the President in his opening address to the Eighth Parliament. Commenting on this, Senator Mutsvangwa opined
2. Article 3.4.1 ZIMASSET document, 2013
3. Section 17 of SWF Bill
4. Investopedia, *Definition of a Sovereign Wealth Fund* accessed 3 November 2014, Available at http://www.investopedia.com/terms/s/sovereign_wealth_fund.asp
5.
6. International Monetary Fund (IMF), 2008, *Sovereign Wealth Funds; Their Role and Significance,* accessed 3 November 2014, available at https://www.imf.org/external/np/speeches/2008/090308.htm

In addition to other smaller funds, major funds — Abu Dhabi's Investment Authority, Singapore's Government Investment Corporation and Norway's Government Pension Fund — were established in 1976, 1981 and 1990 respectively.[8] Currently, there are over 50 SWFs and the Sovereign Wealth Fund Institute puts their value at US$6 831 trillion at the end of September 2014.[9] Angola (Fundo Soberano de Angola), Nigeria (Nigeria Sovereign Investment Authority), and Ghana (Petroleum Fund) set up their own sovereign wealth funds over the past three years, managing US$5 billion, US$1,4 billion, and US$75 million worth of assets respectively.[10]

The setting up of SWF, while noble, does not necessarily result in the fund meeting the set objectives. There is general agreement that good governance is essential for SWF to accomplish their purpose. Legislation is one key aspect of governance of SWF to ensure efficient operation and enhanced financial performance. To achieve good governance in SWF, the Revenue Watch Institute now-Natural Resource Charter[11] recommends that SWF policy and legislation adhere to the following principles;

1. Set clear fund objective(s) (e.g., saving for future generations; stabilizing the budget; earmarking natural resource revenue for development priorities).
2. Establish fiscal rules—for deposit and withdrawal—that align with the objective(s).
3. Establish investment rules (e.g., a maximum of 20 percent can be invested in equities) that align with the objective(s).
4. Clarify a division of responsibilities between the ultimate authority over the fund, the fund manager, the day-to-day operational manager, and the different offices within the operational manager, and set and enforce ethical and conflict of interest standards.
5. Require regular and extensive disclosures of key information (e.g., a list of specific investments; names of fund managers) and audits.
6. Establish strong independent oversight bodies to monitor fund behavior and enforce the rules.

There are several key elements of good fund governance that have to be reflected in the SWF Act such as; setting a single or multiple fund objectives, establishing appropriate fiscal rules, setting clear investment constraints, creating an effective institutional governance structure, making extensive information on fund operations public and establishing strong independent oversight over these operations.

These aforementioned principles will be used to analyze the SWF Act based on international standards and best practice. Apart from the above, the Santiago principles, a set of voluntary good governance guidelines for sovereign wealth funds, will be used to assess the provisions of the Act.

7. IMF Working Paper WP/13/231,2013, Sovereign Wealth Funds Aspects of Governance Structures and Investment Management, accessed 3 November 2014 Available at http://www.imf.org/external/pubs/ft/wp/2013/wp13231.pdf
8. Ibid
9. Ibid
10.Ibid
11.Revenue Watch Institute Natural Resources Charter accesses 4 November 2014 Available at http://www.resourcegovernance.org/sites/default/files/NRCJ1193_natural_resource_charter_19.6.14.pdf

The Santiago Principles came into existence in response to fears that sovereign wealth fund investments could be politically motivated. In 2007 the G7 called on the International Monetary Fund (IMF) to develop international standards for fund governance and transparency which became known as the Santiago Principles.[12] An International Working Group of Sovereign Wealth Funds (IWG) consisting of fund officials was established in 2009 to encourage compliance with these principles. Implementation to date has been slow but the non-compliance should not be seen as evidence of weakness of the initiative but rather confirmation of the rationale behind their existence. If applied effectively the Santiago Principles are therefore, a tool to counter potential revenue mismanagement. In order to put the Act in context, the Constitutional provisions with a bearing on the Act will be discussed as well.

As aforementioned, theSantiago Principles are a set of International Working Group of Sovereign Wealth Funds' generally accepted guidelines that govern governance, accountability arrangements and conduct of investment practices by SWFs. The Santiago Principles have guidelines for legislating SWF. The global rationale for legislating SWF arises out of a legitimate concern that SWF have the potential to distort the global market and impede market forces and competition. Legislation based on the Santiago Principles will address concerns that SWFs would move the global economy away from liberalism through impeding market forces and competition. The local rationale for legislating SWFs is the need to allay fears that the Fund can be used as a rent seeking conveyor belt for the benefit of a select few at the expense of the public whose interest the Fund must serve. Commendably, Part IV of the SWF Act incorporates the international "Santiago Principles" for the operation of sovereign wealth funds outlining these in the Third Schedule.[13] The Santiago Principles will be continually referred to in this article based on their importance as a best practice benchmark. The Fund must endeavor to follow the Generally Accepted Principles and Practices (GAPP) as stated in the Santiago Principles in all undertakings.

12.Michele Barbieri,The International Regulation of Sovereign Wealth FundsAccessed at vi.unctad.orgon 19 December 2014

13.In economics the Dutch disease is the apparent relationship between the increase in the economic development of natural resources and a decline in the manufacturing sector or agriculture. The mechanism is that an increase in revenues from natural resources will make a given nation's currency stronger compared to that of other nations resulting in the nation's other exports becoming more expensive for other countries to buy, and imports becoming cheaper, making the manufacturing sector less competitive

ANALYSIS OF THE ACT

Objects of the Fund

Undoubtedly, transparency and accountability must be the bedrock of a SWF for success to be achieved. The sovereign wealth fund, although not part of the State fiscus, is part of public finances whose management principles are outlined in Section 298 of the Constitution of Zimbabwe as follows

> (1)the following principles must guide all aspects of public finance in Zimbabwe
>
> (a) there must be transparency and accountability in financial matters
>
> (b) the public finance system must be directed towards national development and in particular
>
> (i)…
>
> (ii)…
>
> (iii) expenditure must be directed towards the development of Zimbabwe and special provisions must be made for marginalised groups and areas
>
> (c) the burdens and benefits of the use of resources must be shared equitably between the present and future generations

Studies have revealed that there is opacity surrounding the existing SWF in Africa.[14] This opacity surrounds institutional arrangements of SWF which are designed in such a manner that the objectives for setting up the fund are unclear while there is very limited public participation, if any. Without sufficient safeguards in terms of transparency and accountability it is unlikely that SWF would benefit the people.

The other key consideration is that ithas been argued that it may not be prudent tocreate a fund if there are other critical and pressing demands that will require huge capital injections — these include investments in social and economic infrastructure.[15] It is international best practice that SWFs be created where there is budget surplus unlike the Zimbabwean context where there are already deficits and a pressing need to upgrade social service delivery.[16] The creation of the SWF under such a scenario may result in the failure of the fund to meet its objectives and diversion of the fund resources for speculative and political reasons. It is, therefore, imperative to discuss whether the objectives of the fund as laid out in the act are clearly for economic purposes. The IMF and Santiago Principles classify five types of SWFs which are; stabilisation funds, pension reserve funds, savings funds, development funds and reserve investment corporations.[17] Stabilisation funds exist to insulate the budget and the economy from volatility and external shock that may arise from commodity price boom and bust cycles.

14. Asafah, S, 2007, National Revenue Funds; Their Efficacy for Fiscal Stability and Intergenerational Equity, International Institute for Sustainable Development
15. Ibid
16. Article Zimbabwe rushes to create Sovereign Wealth Fund, The Standard Newspaper accessed 3 November 2014, Available at http://www.thestandard.co.zw/2014/10/12/zim-rushes-create-sovereign-fund/
17. African Development Bank Group Working Paper WP 142/2011 ,2011, *Africa's Quest for Development: Can Sovereign Wealth Funds help?*

SWF serve multiple purposes. This is the case in Zimbabwe, where, in terms of the above classification, the SWF has a multi-function fund.The SWF Act states the objects of the fund as being;to make secure investments for the benefits and enjoyment of future generations (general investment fund); to support development objectives of the Government, including long term economic and social development (development fund); to support fiscal or macro-economic stabilisation against fluctuating of commodity prices (stabilisation funds) and to contribute to the revenues of Zimbabwe from net returns on investment (reserve investment).[18] It can be concluded that the SWF Act clearly states the objects of the fund and the objectives can be classified and recognised internationally as per IMF and Santiago principles.

The Fund could have been much stronger if it sought to provide for social security and social care to those in need of it like the elderly and physically challenged and to further enhance inter-generational equity. The establishment of sovereign wealth funds ultimately serves a social function. This function is to distribute the gains of the country's mineral exploitation to the poor and this function is grounded in considerations of equity. Section 30 of the Constitution explains this as it provides that

> *The state must take all practical measures, within the limits of the resources available to it, to provide social security and social care to all those who are in need.*

By not including pension reserve funds as part of the functions of the SWF, arguably the SWF Act fails to cater for provision of social security to the aging population which has very limited access to social security and social care. There should therefore be legislative scope for improving the current deficiency in the Act as it relates to provision of pension support. The concept of equitable distribution of the gains of natural resources provided for in Section 298 (1) (c) of the Constitution recognizes the importance of managing natural resources in a manner which promotes intergenerational equity and one way which the fund can do this is to buttress the importance of a savings fund to benefit future generations.

Lack of clarity about the expected outcome from establishment of SWF can lead to their future failure as investment strategies could become inconsistent with achieving the original mandate and vision of SWF establishment.[19] Taking a leaf from good practices recommended by the Revenue Watch Institute-Natural Resource Charter, which has been adopted by over 50 countries including Ghana, Russia, Chile among others,[20] these objectives are best assisted by strong statements of the intention of the Legislature which may be handy in supplementing legislative deficiencies in the application of the Act that may not be foreseeable at the time of drafting or analysis.

18. Section 4 of SWF Bill
19. African Development Bank WP 142/2011 supra
20. Recent Articles: Revenue Watch Institute Accessed at http://www.resourcegovernance.org/related_articles_ci/46654?page=7 on 19 December 2014

Another inherent shortcoming of the objects is that they do not make provision for the protection of the natural resources from unjustifiable and uncontrollable exploitation and depletion. This defeats a fundamental understanding to the establishment of SWF for the sustainable enjoyment of the gains of a finite resource. The funds generated for the SWF derive from wasting assets there should be recognition of this in the Act notwithstanding the existence of environmental legislation. The State is mandated in terms of section 13 (4) of the Constitution to ensure that local communities benefit from the use of resources in their locality which point has not been captured in the objectives of the Act. This understanding defeats the concept of equity the Act seeks to promote. Black's Law Dictionary defines equity to include fairness, impartiality and even-handed dealings. There should, therefore, be some preference to communities that house the resources that are extracted as long as the preference given is justifiable and reasonable not arbitrary. Revenue sharing arrangements with the sub-national levels particularly the affected local communities is an area which is not clearly clarified.

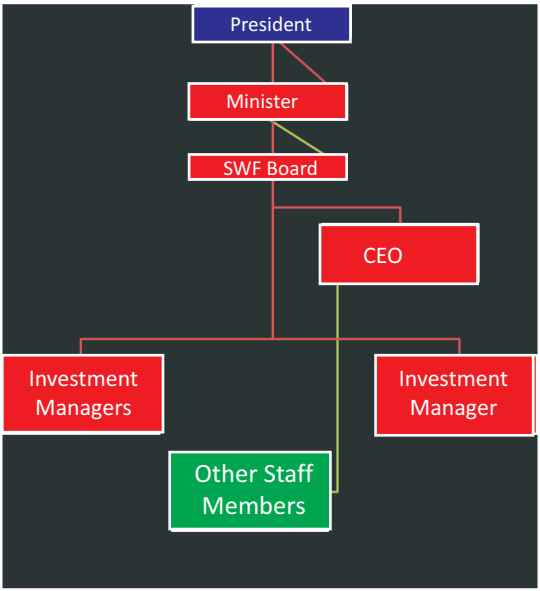
Institutional Arrangements of the Fund

Whilst the objects are stated, for good governance of the SWF to be achieved, the organisational structure of SWF needs to have clear separation of authority and responsibilities. In line with this, the Act has to be appreciated in light of the national objectives outlined in Chapter Two of the Constitution particularly the principle of good governance outlined in section 9 as follows

> (1) The state must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of the government at every level and in every public institution and in particular
>
> (a) appointment to public offices must be made primarily on the basis of merit
>
> (b) measures must be taken to expose, combat and eradicate all forms of corruption by those holding political and public offices.

SWF Board Members

Part III of the SWF Bill provides forthe establishment of the Sovereign Wealth Fund of Zimbabwe Board and related matters. The SWF ownership is vested in the Republic of Zimbabwe with the President as trustee and patron. The Board composition consists of the Chief Executive Officer and nine other members who must be people of 'recognised integrity', have proven competencies in finance, investment, economics, business and law among other eligibility criteria. However, there is no clarity on the meaning of 'recognised integrity'. It is unclear who recognises the integrity of selected individuals and on what basis. Such a requirement would only be sensible if there was a body which would assess and individual's conduct against set standards of ethics. Such a body could be in the form of a Board of Ethics which would set standards of ethics against which conductof prospective Board Members of the SWF could be tested.



The most interesting commendable distinguishing feature of the criteria is that all members of the civil service and government are not eligible to sit on the SWF Board. This is a measure taken to address potential conflict of interest. The downside of provisions on Board structure is that thenine members are appointed by the Minister with the approval of the President. Whilst the Act recognises the need to appoint to the Board members who represent the diversity of the peoples and communities of Zimbabwe including women, there still exists too much executive discretionary power over the Board appointments. The gender equality ethos called for by section 17 of the Constitution are adhered to in the Act as the Minister is obligated to ensure half of the Board members are women and the Vice Chairperson is supposed to be of the opposite sex from the Chairperson.

The Chairman of the Board is appointed by the President who may, in making this decision, consult the Minister.[21] The wording of the provision suggests no recourse should the Minister not be consulted in making this decision. Having the Parliament of other independent body make the board appointments or have oversight over the appointment of the Board members would have further strengthened the provisions of the Act by limiting use of executive ministerial discretion. The composition of the Board should have explicitly included a cross-sectoral representation ensuring that the board will at all times have civil society and academia representatives to buttress prudent management of sovereign resources in Ghana.

A close analysis of the Act reveals inherent inconsistencies and many vague or ambiguous terms which could have a negative bearing on the institutional arrangements of the fund. Good governance demands that the mandate of the Minister, Board and CEO be clear to ensure there is clear role clarity and division of responsibilities and mandates. GAPP Principle 6 dictates that the governance framework for the SWF should be sound and establish clear and effective division of roles and responsibilities in order to facilitate accountability and operational independence in the management of SWF to pursue its objectives. The SWF Board is responsible for the administration of the Fund, that is, overseeing the investment and management of the fund, determining investment guidelines, including policy and direction of the Board; appointing the Chief Executive Officer (CEO) and Investment Managers; and to invest, reinvest profits and attract co-investment.[22] The Chief Executive Officer is to be responsible for carrying out the policy decisions of the Board and the day-to-day administration and management of the affairs of the Board among other responsibilities.[23] Whilst there is clear division of roles and duties between the SWF Board and the CEO, the Minister can at any time give directions to the Board in the "national interest'' relating to any of the Board's functions.[24] "National interest" remains undefined and this, therefore, means the Minister has room to interfere in the work of the Board and the Board cannot rebut or refuse to action the directive of the Minister. This seriously compromises the independence of the Board since extensive executive discretionary powers can overbear on the functions of the Board. This provision could have been made stronger if "national interest" had been defined with clarity and if procedures where laid out on how the Board can rebut or refuse unreasonable use of this provision by the Minister.

21. Section 6 (4) of the SWF Bill
22. Section 7 of the SWF Bill
23. Section 8 of the SWF Bill
24. Section 11 of SWF Bill

Investment Managers must be 'fit and proper persons' with requisite qualifications for managing the relevant investment portfolio.[25] The role and appointment of unlimited number of investment managers is governed by s9 of the Act that provides that the Board look at the merit and experience of the person. These must be appointed through a "competitive and transparent process"[26] either as employees of the Board or as independent contractors. The Board can appoint investment managers in two capacities, that is; either as employees of the Board or as independent contractors. The Act does not define to what extent internal or external investment managers are used, the range of their activities and authority and the process by which they are selected and their performance monitored as is required by the Santiago Principles.[27] Moreover, whilst there are detailed eligibility criteria for Board members and Investment Managers, the Act does not list any detailed eligibility criteria for the CEO. The failure to set any eligibility criteria for the CEO is glaringly conspicuous and could hinder prudent use of sovereign funds. This is worsened by the failure of legislation to clarify the definition of a 'fit and proper person' to be appointed as Investment Manager. Therefore the Act leaves critical aspects on institutional arrangements subject to executive discretions and interpretations.

It is one of the requirements of good governance of SWF that there be penalties for misconduct by Investment Managers and staff. For this to be achieved there must be clear ethical and conflict of interest standards for the Board, CEO and Investment Managers and other staff members. The Act does not state uniform standard of ethics for all players in the institutional arrangement. The SWF Act emphasises conflict of interest and requires that members of the Board disclose all conflict of interests and lays down penalties for breach of conflict of interest yet the same is not required of the CEO and other staff members. The Act criminalises conflict of interest by Board members and makes it an offence with a penalty of possible imprisonment. Another ethical standard set for the Board is that it is specified to be a financial institution for the purposes of the Money Laundering and Proceeds of Crime Act [Chapter 9:24] (No. 4 of 2013) this means therefore that the Board has a responsibility to abide by anti money laundering regulations. The preservation of secrecy by Board members and employees and the offence attached to the use of confidential information for personal gain is a standard not required of the CEO. Therefore, there is no uniform standard of ethics for all players involved in the SWF. Furthermore,the provisions could be strengthened by calling for recovery of gains or assets derived from non-disclosure of conflict of interest. It must also be a regulations function to set up uniform standards of ethics for all of the players in the institutional arrangement since they are not civil servants who fall under the Public Service Code of Conduct. Asset disclosure provisions for the Board, CEO and Staff of the fund could also have hugely strengthened the corporate governance structure of the fund.

25. Section 9 of SWF Bill
26. Section 9 (1) of the SWF Bill
27. GAPP 18.2

Fund Operations

The international yardstick against which the Act and activities of the Board can be assessed, that is the Santiago Principles indicate that there should be clear arrangements, procedures and rules governing funding, withdrawal and spending operations of SWF.[28] Ancillary to these functions, the functions of the Reserve Bank of Zimbabwe as custodian of the Sovereign Wealth Fund are outlined in section 308(2)

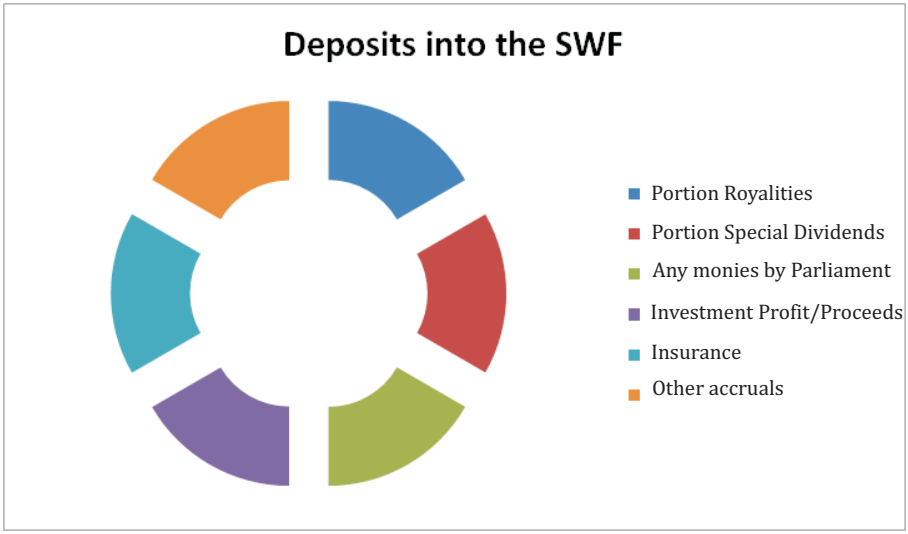
> *(2) It is the duty of every person who is responsible for the expenditure of public funds[29] to safeguard and ensure that they are spent on legally authorised purposes and in legally authorised amounts.*
>
> *(3)…*
>
> *(4) An act of Parliament must provide from the speedy detections of breaches of subsection (2) and (3) and the disciplining and punishment of persons responsible from any such breaches and, where appropriate, the recovery of misappropriated funds or property.*

Deposits into and accruals to the Fund shall form the Fund consisting of a portion of royalties that is not to be more than a quarter of the royalties, from minerals, a portion of special dividends from some minerals, any monies appropriated into the Fund by Parliament, profits and proceeds from investments, moneys received under contract of insurance and any other accruals.

The Board is allowed to open one or more bank accounts with the RBZ into which monies received by the Fund may be deposited and there are also provisions for the establishment and operation of a general reserve of the fund.[30] The Board may segregate a portion of the money of the Fund into sub-funds to advance objects of the fund as per section 4 above into stabilisation, infrastructure development, general investment and other appropriate sub-funds.

Whilst the Act clearly outlines the sources of funds for the SWF, there are no rules for when the deposits into the fund must be made. The Bill states the Financial year of the fund to be twelve months ending the 31st of December every year. It is unclear whether the deposits must be made at the beginning of every financial year of the Fund to allow it to carry out its mandate or whether deposits are made at any point during the course of the year. Apart from this it is unclear whether the deposits into the fund can be exempted and when such exceptions can be made. Furthermore, it is unclear what proportion of the fund is designated for each objective and what operational rules, if any, help the fund achieve them. Multiple objectives in and of themselves are not necessarily problematic, but the lack of operational rules to help funds meet those objectives and lack of clarity around objectives are.

28. GAPP 4 there should be clear and publicly disclosed policies, rules, procedures or arrangements in relation to the SWF's general approach to funding, withdrawal and spending operations
29. Defined in s3018(1) to include any money or held by the State or any institution or agency of agency, including provincial and local tiers of government, statutory bodies and government controlled entities
30. Section 20 of the SWF Bill



Proper regulation of SWF and best practice dictate accuracy about how much will be withdrawn from the fund and for what purposes. First, rules act as a commitment mechanism, binding successive governments to a long-term vision of public finances. This is particularly important in the case of mineral resources as they are finite and dependent on international commodity prices. . Second, they can facilitate the implementation of budgetary goals and hence improve the efficiency of the public financial management system. Third, they define the conditions under which deposits and withdrawals are made, which can stabilize government spending or generate savings. Fiscal rules are operationalized through deposit and withdrawal rules are clearly defined and the exceptions thereto, notably s23, are well defined and predetermined to act as a guard against indiscriminate withdrawal and improve transparency. The Act does this by ensuring that Parliament passes a supplementary budget. Zimbabwe faces the fundamental and critical question of how to balance use of SWF for public infrastructure, saving funds and/or using them for economic stabilisation. Section 23 of the SWF Act seeks to avert the risk of emptying the SWF from public expenditure by limiting withdrawals from the SWF for the state benefit. The section curbs discretionary spending of SWF by making sure that Parliament expropriates any withdrawals through an Appropriation Bill for the purposes of infrastructure development or withdrawals for the purposes of the national budget or setting aside of contingency. This is commendable as discretionary withdrawals pose a danger to prudent use of SWF revenue.

African Development Bank Group Working Paper WP 142/2011 ,2011, *Africa's Quest for Development: Can Sovereign Wealth Funds help?*
Section 4 of SWF Bill
African Development Bank WP 142/2011 *supra*
Recent Articles: Revenue Watch Institute Accessed at http://www.resourcegovernance.org/related_articles_ci/46654?page=7 on 19 December 2014

The Fund is charged for operational costs, that is, Board allowances, salaries, administration costs, audit costs and taxes the total of which must not exceed two point five percent (2.5%) of the total projected deposits into the fund for that financial year. This rule limiting how much can be charged for these running costs is commendable as it promotes prudent use of the Fund.

Investment Rules

Research has shown that the legal framework for SWF must balance between making rules on institutional arrangements on the one hand and making rules on investment risk limitations on the other hand. There is need for explicit rules that limit risk by distributing the investment portfolios amongst cash, fixed income investments, equities and alternative assets. There must prohibition of certain high risk financial instruments or volatile currencies. The Santiago Principles, GAPP 18 state that;

> *The SWF's investment policy should be clear and consistent with its defined objectives, risk tolerance, and investment strategy, as set by the owner or the governing body(ies), and be based on sound portfolio management principles. (Emphasis added)*

A look at the underlined sections manifests a frustration of the above principles in that there is no defined risk tolerance and there are undefined management principles in the l Actor the Schedules thereto the net effect of which is to present an opaque investment policy. It is apt to further to look at the expansion of the above principle in the sub-principles to GAPP 18

(a) GAPP 18.1

The investment policy should guide the SWF's financial risk exposures and the possible use of leverage.

(b) GAPP 18.2

The investment policy should address the extent to which internal and/or external investment managers are used, the range of their activities and authority, and the process by which they are selected and their performance monitored.

(c) GAPP 18.3

A description of the investment policy of the SWF should be publicly disclosed

The investment rules in the Act are a privilege of the Board and not for public scrutiny in terms of s7 (b) further violating GAPP 18.3. Section 16(3) of the Act stipulates the principles which apply to the investments. The investments must be in 'gold bullion, stockpiles of precious stones and other precious metals and foreign assets'[31] or in whatever way not inconsistent with the fund's objectives. This is a very problematic provision in that it does not attempt to clearly make rules of investment and those that limit investment risks.

31. Section16 (3) the SWF Bill

An example of a clear investment rule provision would read as follows a maximum of 20 percent can be invested in equities. The provisions once again allow for discretionary determination of investments by the Board which can disadvantage prudent use of the Fund if the Board adopts a minimalist interpretation of the investment options available or if it's too liberal in interpretation to such an extent as to jeopardize the fund by engaging in risky investments. Reports have shown how Kuwait lost $5 billion in speculative investments in the 1990s caused by undefined investment rules.[32] Zimbabwe can avoid such tragic losses through establishing investment rules hopefully through a comprehensive policy. An example of a risk management strategy is establishment of The Council of Ethics in Norway which seeks to prohibit some investments of the sovereign wealth fund into questionable investments like arms deals and cigarettes trade.[33]

There should be sufficient clarity in the definition of investment rules that are a function of and derived from the policy objectives. This helps prevent mismanagement and promotes purposive and controlled investment that looks at the assets of the Board. The Act has a dual economic and development purpose and there should be guidelines in the investment policy as to what aspect should be dedicated what resources. From the functions of the Board in s7, duties of investment managers in s9 and general guidelines to the Board in the First Schedule, there appear no clear, objective investment guidelines and policies. Arguably this could be the function of the Board but considering the huge amount of ministerial power over the Board outlined above, it is recommended for this to be a function of policy linked to the above, the Board, essentially, determines its own mandateas long as it prepares an investment mandate and budget and presents these to the Minister for approval. It is trite to note that there is no procedure defined in s18 should the Minister reject the mandate and budget presented to him.

According to the IMF good governance standards for SWFs, there must be explicit prohibition on domestic investments and limitations on the use of resource revenue as collateral. As it stands investments can be made in either foreign or domestic assets. Where domestic investments are permitted, recommended practice is to make these investments from the budget itself, presented to the Minister for approval, for at least two reasons. First, domestic spending through the fund can undermine rules designed for fiscal sterilization meant to protect the SWF from other public funds. More importantly, such spending might undermine transparency and accountability systems. Bypassing the normal budget process could circumvent controls and safeguards such as project appraisal, public tendering and project monitoring, and enable patronage or financing for projects that support the political goals of government officials or fund managers. To avoid these outcomes, it is prudent to prohibit direct domestic investments.

32. Revenue Watch Institute Natural Resource Funds: Managing the public trust: How to make natural resource funds work for citizensAccessed at http://www.resourcegovernance.org/sites/default/files/NRF_RWI_Complete_Report_EN.pdfon 19 December 2014
33. Council on Ethics in Norway established to offer Ethical Guidelines

Commendable to note that the assets of the Fund have been withdrawn as collateral in terms of section 22 and any contract that seeks to encumber these is null and void.The assets of the Fund shall not be used—

(a) to provide credit to the Government, public enterprises, private sector entities or any other persons or entities; or

(b) as collateral for debts, guarantees, commitments or other liabilities of any other person or entity, whether public or private

Using SWF resources as collateral puts natural resource revenues at risk especially if the government has a tendency to default and encourages over-borrowing which defeats the national objective that natural resources must be equitably managed for the benefit of future generations.

Transparency and Oversight

Transparency and accountability with respect to the management of SWF is of great importance. First, transparency can encourage compliance with fiscal rules and investment rules by aligning public expectations with government objectives. Second, transparency can improve government efficiency, since ministries, parliaments and regulatory agencies benefit from improvements in data quality. Third, transparency is a prerequisite for accountability and compliance with governance rules, because oversight bodies cannot monitor fund operations and scrutinize fund performance without adequate information. Transparency means not only publishing regular, accurate and data-disaggregated reports on fund activities in a format that is fully accessible to lay readers but also making the rules governing the fund clear and public. One way of institutionalizing transparency is by requiring the public release of all regulations, policy documents, quarterly financial statements and annual internal and independent external audits, and requiring that these meet international standards. Reports should not only be backward-looking; they should also clarify what will be achieved in the future to set benchmarks for performance and set public expectations.

Disclosure of information to the public is one fundamental aspect of transparency since the public itself have vested interests in SWF and can play an independent oversight role. Section 16 of the SWF Act purports to afford the public access to information mandating the Board to maintain an up to date website showing particulars of the Fund's current investments in sufficient detail to enable members of the public to assess the Fund's financial soundness, and the Board shall ensure that the schedule of the Fund's current investments is available for inspection at all reasonable times by the public.

While the idea of a website which promotes open access to information is commendable, the website access is limited to members of the public who have access to internet. Moreover, the section results in a give and take situation since the Board still controls what information to release and when. It is also worrisome that the provision leaves the assessment of financial soundness to the members of the public who often lack the requisite skills to make such complex analyses of financial figures. The provision of open access information on the website could thus have been strengthened by making it mandatory for regular and periodic assessments reports to also be made public apart from the list of investments made. This would ensure that the public participates meaningfully in the work of the SWF Board and has a clear nuanced understanding of returns on investments and health of the fund. Civil society also has a role to play to ensure that information is made accessible to the public in a format which is easy to understand. Civil society can proactively carry out assessments of the SWF and publish them in a simplified format for public consumption.

There is opacity in the legislation relating to oversight and checks to the activities of the Board and the Minister. Good practice dictates that the SWF Board be politically accountable to the legislature; operationally accountable to the comptroller, auditor-general or other independent formal supervisory body; legally accountable to the judiciary; and scrutinized by civil society, the press and even international bodies like the IMF or policy institutes. In terms of the Act, the Board is required to submit annual and quarterly reports to the Minister detailing expenses and income during the relevant period and any other report that may be deemed necessary to ensure transparency and accountability. The Minister should table these before Parliament within prescribed times. Given that the Minister appoints the Board in terms of s6 and has the sole power to dismiss and suspend such a member in terms of s4 as read with s3(2) of the First Schedule under some defined circumstances and also should there be "reasonable grounds for suspicion" the removal of such a member in terms of s3(2). Further, the likelihood of patronage and issues being swept under the carpet is perpetuated by the fact that Parliament has no say in the mandate and budget proposed by the Board and presented to the Minister in s 18 and yet are to make a determination on this when the Minister presents the annual report of the Board in terms of s12 (4). Withdrawals from the Fund made by the Board, except those for State benefit, only have to be in accordance with the said investment mandate and mandate thus are made under very minimal supervision without any other channel to provide oversight.

Effective internal control mechanisms, as those found in the Act, are often not enough to ensure compliance with governance rules or management of natural resource funds in the public interest. Independent oversight bodies should also funds in order to exert external pressure on policymakers and fund managers. A leaf can be plucked from Ghana. In Ghana, the Public Interest and Accountability Committee (PIAC), is a body charged with monitoring compliance with oil revenue management legislation and established and funded by the Government. Independent oversight bodies can encourage good financial management by praising compliance with the rules and good fund governance. In some cases, they can also discourage poor behavior by imposing punitive measures ranging from naming-and-shaming to fines, imprisonment or international sanctions.

The Act currently has no provisions for technical capacity building and continuous education for the institutions and persons involved in management and oversight of SWF. Independent oversight is most effective when the oversight body has expertise in the topic under investigation, possesses the power or capacity to investigate, has access to information, holds enforcement powers, and is integrated with the institutional environment. There are no provisions for the Parliament to engage in any technical skills enhancement to build their capacity to meaningfully engage with issues which may arise from the Minister's report. There are also no provisions which relate to continuing learning of the SWF Board, CEO and staff to move in tandem with global developments in SWF managements and investment. These gaps result in a weakening governance structure of the SWF which can potentially result in diminishing returns to the citizens who rely on the institutions to ensure the best possible deal on investments and use of SWF revenues.

The Board will serve administrative functions in the execution of its mandate and the principles of natural justice, provided in natural law and the Constitution has to be respected. Section 68 details the right to administrative justice as

> *(1)every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantially and procedurally fair.*
>
> *(2) any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly, and in writing, the reasons for the conduct.*

The importance of the above right is amplified by a reading of First Schedule to the SWF Bill Part Two thereof which gives the fullest effect to the rights and freedoms guaranteed by the bill of rights; the above right included. In order to ensure prompt action, the Board sits once every three months, the quorum is set at five members and procedures for meetings are outlined to ensure procedural fairness.

The requirement for internal and external auditors upholds the good governance principles advocated for in the Constitution.[34] The accounts of the SWF Board shall be audited by the Auditor-General and any person who misrepresents information to the Auditor-General shall be guilty of a criminal offence. The only weakness of this provision is that the audit reports are not as of mandate made public. The consequences of mismanagement of funds or misuse of funds emanating from the audit are not known.

34. Section 9 of the Constitution

CONCLUSIONS

The SWF Act which ushers the SWF into existence strives to capture international standards and recommended best practice in establishment, management and oversight of the SWF. The Act adopts the Santiago Principles which provide guidelines on transparency and accountability in the SWF affairs. The Bill captures the gender equality and good governance ethos of the Constitution by ensuring equal representation of both sexes in the Board and promoting use of open access data to information. Whilst these provisions are commendable, they are inadequate to guarantee that the SWF meets its objects as they have inadequacies in fundamental governance aspects. Too much ministerial discretion in SWF Board appointments is likely to create patronage especially since the Minister can issue directives to the Board as and when it is in the "national interest" according to him/her.

African Development Bank Group Working Paper WP 142/2011 ,2011, *Africa's Quest for Development: Can Sovereign Wealth Funds help?*
Section 4 of SWF Bill
African Development Bank WP 142/2011 *supra*
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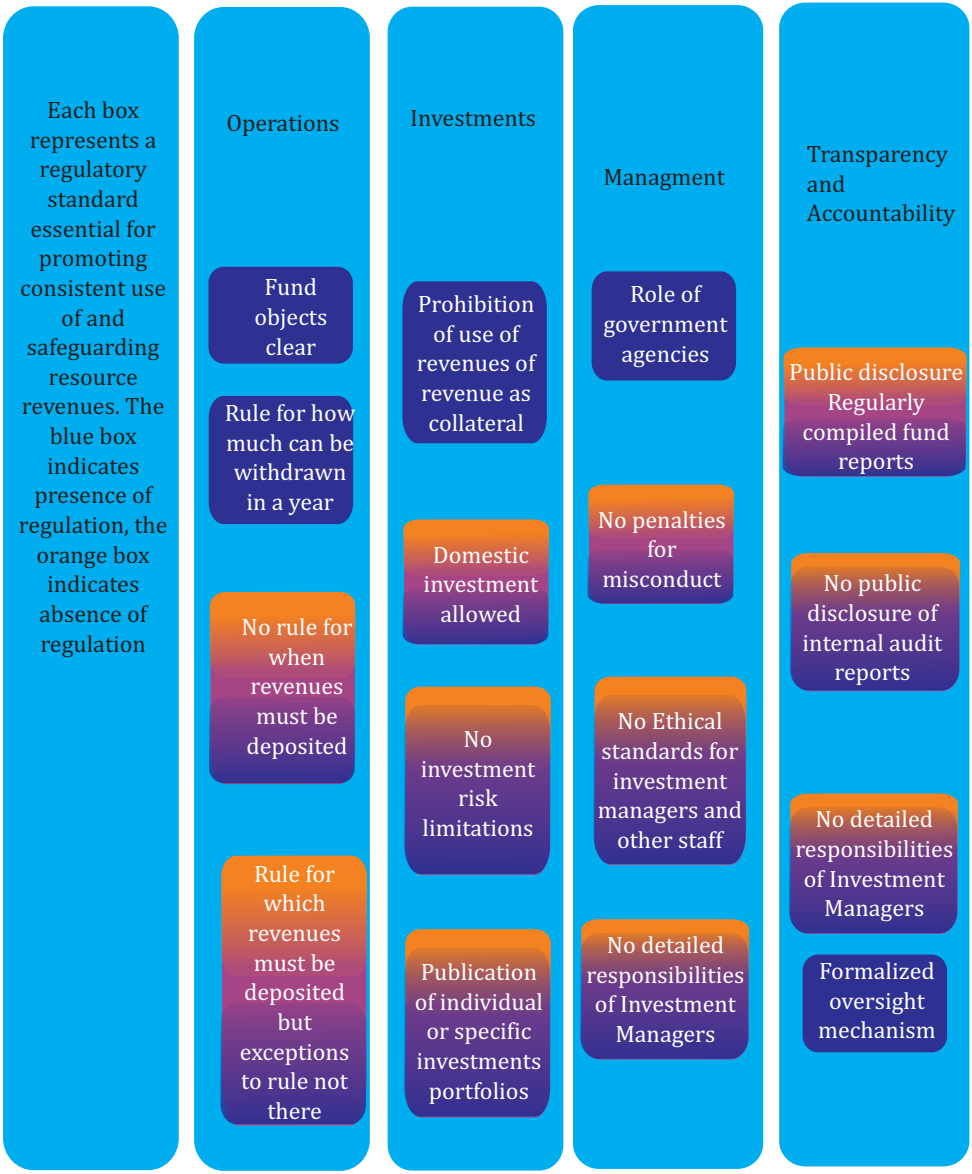
The vague criterion for the appointment of Investment Managers in the Act raises perceptions of abuse of unlimited Board discretion in making appointments. In summation, the table below depicts our findings.



There are weak oversight provisions in the Act. Public disclosure of information through an up-to-date website is undermined by the fact that it is up to the Board to decide when such information can be availed and what information can be availed. Both internal and external audits are not subject to mandatory public disclosure. Whilst there may be public disclosure of investment portfolios, it remains a challenge for the general public to make an effective assessment of the health of the SWF. In the same vein, the Act has no provisions for continuous learning for both staff and oversight bodies of the SWF. There are no investment rules and while there are limitations on withdrawals for administration costs, there is no limitation on funds to be withdrawn annually from the SWF and funds that can be withdrawn for state benefit i.e. budget and infrastructure. This raises concerns about intergenerational equity and long term-fiscal and macro-economic stability.. There is need for stronger policy direction on management of the SWF if it should accomplish its objects.

As it stands the IMF has advised Zimbabwe to delay establishment of the SWF.[35] The Government paid a deaf ear to this advice and proceeded to allocate 50000USD to the SWF in the budget. It is unlikely that government will put more money into the fund given the challenges in terms of fiscal space. The civil service wage bill consumes almost 80% of the total budget. Generally, the mining sector has been shrouded by a lack of transparency and accountability, especially in the diamond sector. Hence it is very difficult for the government to forecast the revenue that will accrue to the fiscus. It is highly likely therefore that whatever is deposited into the SWF is not the full value from the country's mineral assets. Zimbabwe is overburdened by the ballooning debt levels currently standing at 10billion.[36] The high debt levels and limited fiscal state make it less feasible to fully operationalize the fund.

35. IMF, Boom, Bust, or Prosperity? Managing Sub-Saharan Africa's Natural Resource Wealth Accessed at http://www.imf.org/external/pubs/ft/dp/2013/dp1302.pdf on 19 December 2014 (2013)
36. The Herald, Debt Overhang Deters Funding as Government Plots Strategies to Attract Investors, April 2014 Accessed at http://www.herald.co.zw/debt-overhang-deters-funding-as-govt-plots-strategies-to-attract-investors/on 19 December 2014

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