



UNIVERSITY *of the*
WESTERN CAPE

CORPORATE GOVERNANCE IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY



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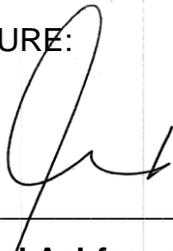
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DECLARATION

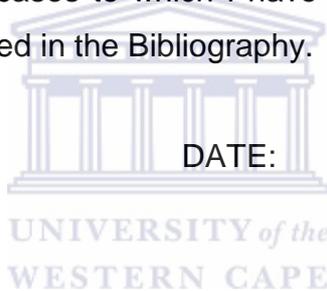
I, **Mohamed Ashfaque Ahmed**, hereby declare:

1. That the Research Paper titled '**Corporate Governance in the South African Development Community**' is my own work and that it has not been submitted before any degree or examination in any other university.
2. Every significant contribution to, and quotation in, this Research Paper from the work or works of other people is acknowledged by means of citation and/or references contained in footnotes.
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TABLE OF CONTENTS

Title:	Page No:
DECLARATION	2
KEY WORDS	3
ACKNOWLEDGEMENTS	4
CHAPTER 1: THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY AND ITS PURSUIT OF ECONOMIC INTEGRATION THROUGH CORPORATE GOVERNANCE	8
1.1 Background	8
1.2 Purpose and Methodology	9
1.3 What is Economic Integration	10
1.4 The Background to SADC and the Pursuit of Economic Integration in the Region	11
1.5 Foreign Direct Investment in Southern Africa	12
1.6 The Link between Corporate Governance and Integration	14
1.7 The Dual Economy	15
1.8 The Regional Indicative Strategic Development Plan	16
1.9 Conclusion	18
CHAPTER 2: THE FUNDAMENTALS OF CORPORATE GOVERNANCE	19
2.1 Defining Corporate Governance	19
2.2 The need for Corporate Governance	21
2.3 The Role-players in Corporate Governance	21

2.4 Comparative Overview of Corporate Governance Frameworks	23
2.4.1 USA	23
2.4.2 ICGN Global Governance Principles	27
2.4.3 The King Report on Corporate Governance	27
2.4.4 OECD Principles of Corporate Governance	30
2.5 Sustainability	32
2.6 Transparency and Accountability	33
2.7 The State of the Corporate Governance Landscape in the Region	34
2.8 Conclusion	37
CHAPTER 3: THE SADC AND THE CHALLENGES IT CURRENTLY FACES	38
3.1 Introduction	38
3.2 Structure and Functioning of SADC	39
i. The Summit	40
ii. The Troika	41
iii. The Council of Ministers	41
iv. The Integrated Committee of Ministers	42
v. The Standing Committee of Officials	42
vi. The SADC Tribunal	42
vii. The Secretariat	43
3.3 Problems Facing SADC	44
3.4 SADC Regulatory Framework	44
i. The SADC Protocol	44
ii. The SADC Model Law	45
3.5 Conclusion	45

CHAPTER 4: THE IMPLEMENTATION OF A UNIFORM	47
CORPORATE GOVERNANCE REGIME FOR SADC	
4.1 Introduction	47
4.2 The Company Board	47
4.3 State Owned Enterprises	49
4.4 The Comparative Study	50
4.4.1 The King Code on Corporate Governance	50
4.4.2 The OECD Principles of Corporate Governance	54
4.5 Proposed Solution	56
4.6 Possible Challenges to the Proposed Solution	59
4.7 Conclusion	59
 CHAPTER 5: CONCLUSION AND RECOMMENDATIONS	 61
5.1 Introduction	61
5.2 Corporate Governance as a Relevant Solution	61
5.3 Corporate Governance and Integration	62
5.4 SADC Model Law on Corporate Governance	63



CHAPTER 1:
**THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) AND ITS
PURSUIT OF ECONOMIC INTEGRATION THROUGH CORPORATE
GOVERNANCE**

1.1 Background

It has been submitted that an increasingly integrated and globalised economy demands appropriate and effective governance policies with a view to sustainability and well-governed wealth creation.¹ There is a growing consensus that good corporate governance policies improve the sustainability of companies by, among other things, increasing access to capital via investment.² The Organisation for Economic Co-operation and Development (OECD) promotes a similar argument by asserting that good corporate governance policies enhance, *inter alia*, investor confidence.³

On a separate (and seemingly unrelated) note, it has further been submitted that, in conjunction with facilitating economic growth and integration in the region, attracting investment has been placed at the core of the development agenda for the Southern African Development Community (SADC).⁴ However, it has been argued that SADC has failed in respect of this stated aim, in that it has not made the desired progress in its above-mentioned objectives, particularly facilitating economic growth and integration in the region.⁵

In light of the above, it is submitted that SADC is in need of some form of assistance in the pursuit of its goals, and the establishment of a uniform corporate governance regime is potentially a catalyst for the achievement thereof. Briefly put, if SADC governments want to successfully attract private partners, they need to win the trust and confidence of investors.⁶ It has been found that the vast majority of international

¹Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 31.

²Wiese T 'Corporate Governance in South Africa: With International Comparisons' (2014) 5.

³Wiese T 'Corporate Governance in South Africa: With International Comparisons' (2014) 6.

⁴OECD-SADC Policy Brief June 2015 available at <http://www.oecd.org/dat/inv> (accessed 25th September 2016).

⁵Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 475.

⁶OECD-SADC Policy Brief June 2015 available at <http://www.oecd.org/dat/inv> (accessed 25th September 2016).

investors are prepared to pay a premium for shares in well-governed companies and that the board practices of potential investor recipient companies are considered as important as financial performance.⁷

This paper will delve into what constitutes corporate governance in greater detail in the ensuing chapters, though it is useful to illustrate it here briefly, for the purposes of an introduction. Broadly speaking, corporate governance is described as the system of regulating and overseeing corporate conduct and of balancing the interests of all internal stakeholders and other parties who can be affected by the corporation's conduct, in order to ensure responsible behaviour by corporations and to achieve the maximum level of efficiency and profitability for a corporation.⁸

1.2 Purpose and Methodology

This paper will interrogate the idea of devising and implementing a uniform corporate governance system amongst SADC member states, in order to attract investment and, as a desirable side-effect, to assist in the economic integration of the region.

In particular, this paper will be guided by questions surrounding specific aspects of this topic, including what the current corporate governance landscape in the SADC region is, and whether there has been any overtures made in the pursuit of a uniform corporate governance regime in the region. Furthermore, this paper will examine what obstacles exist to establishing a uniform corporate governance regime in the region, as well as the features of a good corporate governance regime that will be of most benefit in the pursuit of economic integration. Lastly, it is submitted that it is necessary to explore existing corporate governance regimes (local and/or international) for guidance.

It is submitted that the most apt approach would be to conduct desktop research in a legal comparative manner, using the applicable available sources, which include

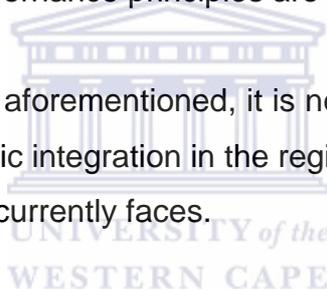
⁷ According to the McKinsey and Company Investor Opinion Survey of 2000.

⁸Wiese T 'Corporate Governance in South Africa: With International Comparisons' (2014) 2.

journal articles, textbooks, reports and internet sources. The use of a comparative study will examine the King Report on Corporate Governance for South Africa (specifically King III and King IV) primarily due to its internationally recognised status as a leading corporate governance code, as well as the OECD Principles on Corporate Governance due to their cross-border application within its member countries.

Furthermore, the corporate governance legal systems of the United States (including the Sarbanes-Oxley Act of 2002 and the Securities and Exchange Act of 1934, as well as the Principles of Corporate Governance of the New York Stock Exchange); the United Kingdom; China as well as the International Corporate Governance Network Global Governance Principles will be examined, primarily due to these countries' and organisations' positions as economic world-leaders. It is submitted that the presentation of this information will be of benefit in gaining a practical illustration of the manner in which corporate governance principles are manifested.

However, before exploring the aforementioned, it is necessary to briefly touch on the concept and history of economic integration in the region so as to better understand it and the challenges the region currently faces.



1.3 What is economic integration?

Economic integration is defined as an agreement among countries in a geographic region to reduce and ultimately remove, tariff and non-tariff barriers to the free flow of goods or services and factors of production among each other's' regions.⁹

Furthermore, it includes any type of arrangement in which countries agree to coordinate their trade, fiscal, and/or monetary policies are referred to as economic integration.¹⁰ The aim of economic integration is to reduce costs for both consumers

⁹Definition of economic integration available at <http://www.calculemus.org/pub-libr/eu-integr/1-2econ-integr.pdf> (accessed 25th September 2016).

¹⁰ Definition of economic integration available at <http://www.calculemus.org/pub-libr/eu-integr/1-2econ-integr.pdf> (accessed 25th September 2016).

and producers, and to increase trade between the countries taking part in the agreement.¹¹

Economic integration between sovereign states has been regarded as one of the leading pursuits of international economic policy in the twentieth century, to the extent that this era has been dubbed 'the age of integration'.¹² With particular regard to the subject matter of this paper, economic integration has long been recognised as an important vehicle for Africa's development,¹³ whilst the pursuit of integration rests significantly on the quality of technical and governance skills available to participating states.¹⁴ As such, integration remains one of contemporary Africa's leading unresolved governance questions.¹⁵

1.4 The background to SADC and the pursuit of economic integration in the region

As is typically the case in significant watershed developments in the region during the more recent past, regional integration in Southern Africa stemmed from the involvement of African states, particularly those located in Southern Africa (the so-called Frontline States),¹⁶ in the fight against apartheid in South Africa.¹⁷ As ever, the demise of white minority rule in the region proved to be the catalyst for the development of regional integration in the area.

As the number of states attaining majority rule and freedom from colonial rule in the region increased, the motivations for their liberation struggle became redundant. In April 1980, nine Southern African states founded the Southern African Development Coordination Conference ('SADCC') in Lusaka, Zambia, when they signed a statement

¹¹Definition of economic integration available at <http://www.investopedia.com/terms/e/economic-integration> (accessed 25th September 2016).

¹²Robson P 'Economic Integration in Africa' (2011) 11.

¹³ Corrigan T *Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism* (2015) 6.

¹⁴Schmitter PC 'Three neo functional hypotheses about international integration', *International Organisation*, 23 1(1969) 161–166.

¹⁵ Corrigan T *Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism* (2015) 10.

¹⁶Clough M & Ravenhill J "Regionalism in Southern Africa: the SADCC" in Clough M (ed) *Political Change in Southern Africa* (University of California Berkeley) 1982.

¹⁷Saurombe A 'The role of South Africa in SADC Regional Integration: the making or breaking of the organisation' (2010) 5 3 *Journal of International Commercial Law and Technology* 124 125.

of strategy, *Southern Africa: Towards Economic Liberation* (the Lusaka Declaration).¹⁸ SADCC was a loose and non-binding structure,¹⁹ but had more ambitious goals than the Frontline States, and was in particular aimed at reducing economic dependence on the then apartheid South Africa.²⁰

SADCC made significant inroads in securing external aid, but did not succeed in eroding the economic dependence of many of its members on South Africa. According to the late President of Botswana, Sir Seretse Khama, "economic dependence had in many ways made political independence somewhat meaningless".²¹

Upon the demise of apartheid in South Africa in the early 1990s, the Heads of States of SADCC on 17 August 1992 turned SADCC (and its loose structure) into the Southern African Development Community (SADC), which will be examined in detail in Chapter 3 hereof.

1.5 Foreign Direct Investment in Southern Africa

It has already been submitted that attracting investment has been placed at the core of the development agenda for SADC. It is furthermore submitted that the lack of a developed business community and inadequate domestic savings makes attracting foreign investment critical for Africa, and in particular the Southern African region's prospects.²² Accordingly, in light of the above it has been submitted that foreign direct investment has been a major catalyst of Africa's economic growth over recent years.²³

It has been posited that if SADC governments want to successfully attract investors, they need to win the trust and confidence of same, to demonstrate that private

¹⁸Saurombe A 'The role of South Africa in SADC Regional Integration: the making or breaking of the organisation' (2010) 5 3 *Journal of International Commercial Law and Technology* 124 125.

¹⁹Oosthuizen GH *The Southern African Development Community: The Organisation, Its Policies and Prospects* (Institute for Global Dialogue Midrand 2006)

²⁰Saurombe A 'The role of South Africa in SADC Regional Integration: the making or breaking of the organisation' (2010) 5 3 *Journal of International Commercial Law and Technology* 124 125.

²¹Khama S *African Research Bulletin* 1979 51 – 55.

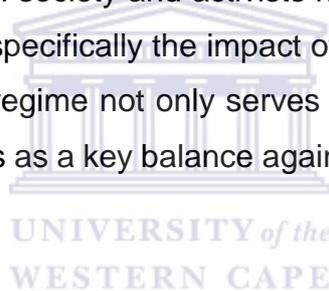
²² ²² Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 61.

²³Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 61.

participation in infrastructure investment will ultimately be profitable, and to engage in more systematic regulatory and governance reforms.²⁴

A report by the Capital Markets Consultative Group has found that in Sub-Saharan Africa, particularly Southern Africa, most foreign direct investment is aimed at the extraction of the abundant natural resources in the region.²⁵ As it has been found that most Southern African countries have business sectors consisting of mostly resource-based activities,²⁶ the concomitant importance of foreign direct investment (and as a result hereof, a favourable investor climate) becomes clear. It is for this reason that a healthy corporate governance regime can be deemed to be desirable in the region.

However, this reliance on resource-based activities brings with it added responsibilities in respect of sustainability. Indeed, foreign direct investment has regularly courted controversy in this regard. Civil society and activists have voiced concerns about the impact of foreign investment, specifically the impact of mining.²⁷ It is submitted that a sound corporate governance regime not only serves to create a favourable investor climate, but furthermore serves as a key balance against the excessive exploitation of resources.



Furthermore, good corporate governance may give multinational firms engaging in foreign direct investment some form of reassurance against appropriation or unlawful losses from their investment.²⁸ Good corporate governance at a macro-level may also have implications for whether firms can realise the benefits from their investments. For example, bad governance practices such as high levels of corruption or overly intrusive regulation can impede business activity in the recipient country.²⁹ The apparent lack of such policies certainly does nothing to increase the appetite of

²⁴OECD-SADC Policy Brief June 2015 available at <http://www.oecd.org/dat/inv/> (accessed 25th September 2016).

²⁵Adeoye A *Macroeconomic Level Corporate Governance and FDI in Emerging Markets: Is there a close relationship?* (Masters of Management Science thesis, King's College London, 2007) 13.

²⁶Sultan Balbuena, S. (2014), "State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges", *OECD Corporate Governance Working Papers* OECD Publishing 7.

²⁷Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 61.

²⁸Adeoye A *Macroeconomic Level Corporate Governance and FDI in Emerging Markets: Is there a close relationship?* (Masters of Management Science thesis, King's College London, 2007) 27.

²⁹Adeoye A *Macroeconomic Level Corporate Governance and FDI in Emerging Markets: Is there a close relationship?* (Masters of Management Science thesis, King's College London, 2007) 27.

investors. There is a consensus that good corporate governance improves the long-term sustainability of companies by reducing risk, increasing shareholder activism in the company and maintaining public accountability.³⁰

1.6 The link between corporate governance and integration

As submitted previously, among the fundamental goals of SADC is the economic growth and the complete integration of the member states. It has been submitted further that the member states' economic growth depend on the success of the businesses operating within them, and these in turn depend on proper systems of regulation and governance.³¹

Without a solid foundation of rules that are uniformly enforced, participants in the business sector have a harder time starting and growing the small and medium-size companies that are the instruments of growth and job creation for most economies around the world.³² Accordingly, there can be said to be an identifiable correlation between a proper system of corporate governance and economic growth and integration.

In amplification of this, the essential objectives of a good corporate governance regime amongst companies have been identified as:

- Leadership;
- Oversight of management;
- Ethical compliance with laws and regulations;
- Risk management;
- Achieving sustainability;
- Transparency and disclosure;
- Accountability and responsibility to stakeholders.³³

³⁰ Wiese T 'Corporate Governance in South Africa: With International Comparisons' (2014) 5.

³¹ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 7.

³² World Bank and IFC (International Finance Corporation), *Doing Business 2014: Understanding Regulations for Small and Medium-Size Enterprises*, 2013, p. v.

³³ Du Plessis, Hargovan & Bagaric *Principles of Contemporary Corporate Governance* 2 ed (2011) 11. This concept will be explored in further detail in Chapter Two.

A sound corporate governance regime has substantial implications for development in the region, in that it helps to provide a steady, predictable environment within which business decisions can be taken, and thereby contributes to wealth and employment creation.³⁴ Furthermore, by its very nature, it does this with a view on the longer term, with corporate governance as an essential component of an overall agenda of sustainability and it contributes to building a culture of ethics and accountability, which is vital for the resilience of strong democracies and for the cultivation of a strong economy.³⁵

It has furthermore been posited that the promotion of the region's development and regional integration can only be fostered in an environment that encourages good economic and corporate governance.³⁶ In light hereof, the connection between a sound corporate governance regime and economic integration is clearly tangible.

1.7 The 'dual economy'

There exists literature which suggests that SADC countries mostly have branched economies, which is comprised of a 'modern' formal sector which exists simultaneously with a low-value adding, frequently informal sector.³⁷ How this 'sub-economy' fits into the economy proper, and what the prospects are for the more sophisticated stakeholders in this sub-economy to make the evolution to the formal sector, are important concerns, and in SADC this is particularly important when considering the size and relative international competitiveness of its 'first economy'.

It has been argued that the fundamental challenge being faced is how to formulate a corporate governance regime that works for such a dual economy and, in the long run, will succeed in bridging the first and second economies and promote the interests of historically disadvantaged groups.³⁸

³⁴ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 9.

³⁵ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 9.

³⁶ 'Economic and Corporate Governance' available at

<http://nepadbusinessfoundation.org/index.php/thematic-areas/economic-and-corporate-governance> (accessed 10th October 2016).

³⁷ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 17.

³⁸ Panel of Eminent Persons, APRM, *Country Review Report (CRR) of the Republic of South Africa*, APRM Secretariat, May 2007, p. 159.

1.8 The Regional Indicative Strategic Development Plan ('RISDP')

In March 2001, SADC Heads of State and Government met at an Extra-ordinary Summit in Windhoek, Namibia and approved the restructuring of SADC institutions, which Extra-ordinary Summit also approved the preparation of the Regional Indicative Strategic Development Plan (RISDP) by the Secretariat to complement restructuring and to provide a clear direction for SADC policies and programmes over the long term.³⁹

From a broader regional perspective, the RISDP defines good corporate governance in terms of sound macro-economic management; transparent public financial management and accountability; effective banking supervision and financial regulation; as well as a robust corporate governance regime.⁴⁰ Accountability and transparency, coupled with enforcement of internationally accepted codes and standards are seen as the hallmark of good corporate governance.⁴¹

It has been established that SADC's quest for poverty eradication and deeper levels of integration will not be realised if these standards are not in place, and it is thus clear that the RISDP recognises the inherent connection between a sound corporate governance regime and deep economic integration.⁴² There is clear understanding that the unification of the Region's economies through the SADC Free Trade Area ('FTA') and the quest to achieve deeper levels of integration will not be realised in the absence of good economic and corporate governance.⁴³

The off-shoot of fulfilling these objectives, particularly the reduction of risk and the achievement of sustainability, is that a favourable investor climate is created amongst

³⁹The Regional Indicative Strategic Development Plan available at <http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/> (accessed 10th October 2016).

⁴⁰ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 17.

⁴¹SADC-UNECA Governance of Financial Institutions in Southern Africa: Issues for an Institutional Convergence Framework for Regional Financial Integration in SADC (2009) 43.

⁴²The Regional Indicative Strategic Development Plan available at <http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/> (accessed 10th October 2016).

⁴³The Regional Indicative Strategic Development Plan available at <http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/> (accessed 10th October 2016).

these compliant companies. Member states of SADC acknowledge that creating a favourable investment climate is central to diversifying their economies, creating new labour skills, developing infrastructure, and enhancing their participation in regional and global value chains.⁴⁴

Accordingly, it can be said that good corporate governance has a positive and significant impact on the flow of foreign direct investment to emerging markets, which would suggest that countries reliant on foreign direct investment (or at the very least, desirous of increasing same) should formulate and shape policies in this area to fully exploit their potential.⁴⁵ If foreign direct investment is beneficial to emerging markets countries then it is crucial that proper policies are in place in respect of corporate governance in order to attract it.⁴⁶

Good governance, including accountable and transparent public resource management, is fundamental in establishing credibility that will attract investment resource flows. The New Partnership for Africa's Development ('NEPAD') has identified and prioritised codes and standards for achieving good economic and corporate governance and in this context, it has been said that harmonisation of best practices in governance standards across the region for sound public financial management is an imperative.⁴⁷

Existing research makes it clear and convincing that the presence of weak institutions of economic and corporate governance acts as a constriction on sustainable development in Africa.⁴⁸ The logic behind such an assertion, it is submitted, lies in the fact that investment is key to stimulating economic growth and development, and thus

⁴⁴OECD-SADC Policy Brief June 2015 available at <http://www.oecd.org/dat/inv/> (accessed 25 September 2016).

⁴⁵Adeoye A *Macroeconomic Level Corporate Governance and FDI in Emerging Markets: Is there a close relationship?* (Masters of Management Science thesis, King's College London, 2007) 4.

⁴⁶Adeoye A *Macroeconomic Level Corporate Governance and FDI in Emerging Markets: Is there a close relationship?* (Masters of Management Science thesis, King's College London, 2007) 10.

⁴⁷The Regional Indicative Strategic Development Plan available at <http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/> (accessed 10th October 2016).

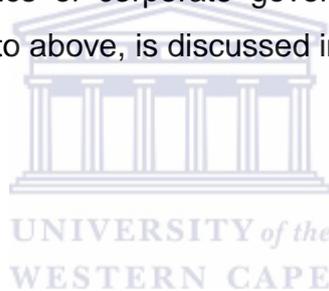
⁴⁸Hope, K. 2005. 'Towards Good Governance and Sustainable Development: The African Peer Review Mechanism', *Governance: an international journal of Policy, Administration and Institutions*, 18 (2) April 2005 286.

corporate governance is often defined as the ways in which suppliers of finance assure themselves that they will receive a fair return on their investments.⁴⁹

1.9 Conclusion

In summary, it is submitted that it has been established that the presence of a sound corporate governance regime can almost be described as a pre-requisite for the achievement of SADC's quest for poverty eradication, economic growth and (most importantly) economic integration, particularly in light of the region's reliance on foreign direct investment and the growing trend of trade globalisation. As such, the benefits of formulating and implementing such a regime cannot be ignored, and indeed deserves further scrutiny.

The fundamental characteristics of corporate governance, and its relation to the desired sustainability referred to above, is discussed in the following chapter.



⁴⁹Tsumba L L 'Corporate Governance Country Case Experience – Perspectives and Practices: Zimbabwe' *Reserve Bank of Zimbabwe* 4.

CHAPTER 2:

THE FUNDAMENTALS OF CORPORATE GOVERNANCE

As indicated in Chapter One, this paper will seek to elucidate the fundamental details of corporate governance, as it is submitted that it will be necessary to do so in order to effectively ventilate the topic at hand.

Accordingly, this chapter will delve into the details of corporate governance as a concept, including the definition; the need for corporate governance in general; the role-players; as well as the most prevalent theories. Furthermore, the notable legislative frameworks will be discussed and compared for the purposes of conducting a comparative study.

2.1 Defining corporate governance

To accurately define corporate governance would be akin to coming face to face with the mythical “Loch Ness Monster” – an absolute, definitive explanation of what corporate governance comprises does not exist, and any attempts to formulate one would be extremely difficult.

However, quite typically, corporate governance generally holds various meanings within various countries. Although corporate governance can trace its roots to the Joint-Stock Companies Act of 1844 in the United Kingdom (‘UK’),⁵⁰ it became a key issue of company law during the 1990’s, as a result of a large number of corporate problems and scandals of the late 1980’s.⁵¹

South Africa followed the example of the UK, when the UK brought about changes recommended by the Cadbury, Greenbury and Hampel committees in response to numerous corporate scandals and widespread mismanagement.⁵² South Africa’s

⁵⁰ Wiese T ‘*Corporate Governance in South Africa: With International Comparisons*’ (2014) 3.

⁵¹ Mongalo T ‘The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa’ (2003) 120 SALJ 174.

⁵² Mongalo T ‘The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa’ (2003) 120 SALJ 175.

efforts culminated in the formation of the King Committee, and its subsequent Code of Corporate Practices and Conduct.⁵³

As a result of the recommendations made by the King Committee, the interest in corporate governance in South Africa has dramatically increased.⁵⁴

However, for the purposes of the discussion at hand, an attempt will be made to identify the key characteristics of corporate governance. There exists a narrow definition of corporate governance, borne out of the origins of this particular branch of law and specifically out of the conflicts that arose as a result of the separation of “ownership”⁵⁵ and “control”⁵⁶ of companies.⁵⁷ The resultant need for supervision and control of the managers gives rise to this narrow definition: the practice by which companies are managed and controlled.⁵⁸

More recently, it became increasingly evident that this narrow interpretation can no longer adequately encompass how corporate governance has evolved and continues to evolve. Companies have a pronounced effect on the society and environment within which they operate, and indeed the size of companies are growing ever larger, close to the size of states and often bigger.⁵⁹

Thus the need for a more “universal” definition is required, which is touted as being:

“the system of regulating and overseeing corporate conduct and of balancing the interests of all internal stakeholders and other parties who can be affected by the corporation’s conduct, in order to ensure responsible behaviour by corporations and to achieve the maximum level of efficiency and profitability for a corporation.”⁶⁰

⁵³ Wiese T ‘*Corporate Governance in South Africa: With International Comparisons*’ (2014) 3.

⁵⁴ Mongalo T ‘The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa’ (2003) 120 SALJ 175.

⁵⁵ The shareholders.

⁵⁶ The directors.

⁵⁷ Wiese T ‘*Corporate Governance in South Africa: With International Comparisons*’ (2014) 2.

⁵⁸ Wiese T ‘*Corporate Governance in South Africa: With International Comparisons*’ (2014) 2.

⁵⁹ Mongalo T ‘The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa’ (2003) 120 SALJ 176.

⁶⁰ Wiese T ‘*Corporate Governance in South Africa: With International Comparisons*’ (2014) 2.

2.2 The need for corporate governance

Corporate governance, as described above, is seen as the answer to the corporate scandals that erupted in the latter part of the 20th century.⁶¹ It became apparent that the lack of proper protection against the abuse of power by directors of companies, and the lack of proper vigilance by non-executive directors was a critical matter that would be unsustainable in the long-term and thus required addressing.⁶²

Corporate governance is more than just the running of a company. Tricker states that, “If management is about running the business, then governance is about seeing that it is run properly. All companies therefore need governing as well as managing”.⁶³ Furthermore, it has been submitted that all stakeholders have vested interests in the sustainability of companies, and resultantly an environment of interdependence is created amongst companies and their stakeholders.⁶⁴

From this, it can be gleaned that corporate governance is, when stripped down to its bare basics, all about ensuring the sustainability of companies. It is submitted that the objectives identified in chapter 1, namely leadership; oversight of management; ethical conduct; transparency; and accountability are effectively tools for the achievement of sustainability of the company, for the benefit of the stakeholders.

2.3 The role-players in corporate governance

The identifying of the role-players in the sphere of corporate governance is an aspect that can potentially be difficult to pinpoint, particularly in light of the wider definition ascribed to corporate governance in recent times. The King Report on Corporate Governance for South Africa (King IV) differentiates between internal stakeholders and external stakeholders, which can be identified as follows:

1. Shareholders (internal);
2. Employees (internal);

⁶¹ Wiese T ‘*Corporate Governance in South Africa: With International Comparisons*’ (2014) 3.

⁶² Mongalo T ‘The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa’ (2003) 120 SALJ 187.

⁶³ Tricker R I (ed) *Corporate Governance* (2000).

⁶⁴ Wiese T ‘*Corporate Governance in South Africa: With International Comparisons*’ (2014) 13.

3. Creditors (external);
4. Customers (external);
5. The community (external);
6. The environment (external);
7. Government (external);
8. Trade Unions (external).⁶⁵

Corporate governance is said to be a strategic process, which is primarily the responsibility of the directors – it involves the delegation of power from the directors to the managers, and ensuring accountability to all stakeholders in the company.⁶⁶

There are two contrasting views on who the stakeholders are in the world of corporate governance. There is the “shareholder centric approach”, which stipulates that the directors of companies are to consider the interests of the shareholders first and foremost (as they are the source of the company’s capital).⁶⁷ Any other parties’ interests are only considered to the extent that it would be in the interest of the shareholders to do so.⁶⁸ This, it is clear, is a fairly narrow and ostensibly out-dated view.

In contrast, the “stakeholder approach” stipulates that directors are required to consider the interests of all stakeholders in the company (not just the shareholders), by striking a balance between social and economic goals and serving the best interests of the company itself.⁶⁹ The striking feature of this viewpoint is the fact that it encompasses both the formal and informal relationship between companies and their stakeholders, be it creditors, suppliers, customers, civil society *et al.*⁷⁰ The stakeholder approach has been seen to become a benchmark on corporate governance globally, and the OECD Principles on Corporate Governance embody same in their content.⁷¹

⁶⁵This list is not exhaustive.

⁶⁶ Wiese T ‘*Corporate Governance in South Africa: With International Comparisons*’ (2014) 3.

⁶⁷Mongalo T ‘The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa’ (2003) 120 SALJ 176.

⁶⁸ Wiese T ‘*Corporate Governance in South Africa: With International Comparisons*’ (2014) 8.

⁶⁹ Wiese T ‘*Corporate Governance in South Africa: With International Comparisons*’ (2014) 9.

⁷⁰Mongalo T ‘The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa’ (2003) 120 SALJ 173.

⁷¹Jesover F, Kirkpatrick G ‘The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries’ *Corporate Governance: an International Review* January 2005 4.

Indeed, the recently published King Report on Corporate Governance for South Africa (King IV) advocates that in the execution of its duties, the company should adopt a stakeholder-inclusive approach that balances the interests of stakeholders with the best interests of the company over time.⁷²

For the purposes of this study, and because it is submitted that the stakeholder approach best encapsulated the ethos of what corporate governance is in this current day and age, this paper will determine a corporate governance regime that falls to be categorised in this approach.

2.4 Comparative overview of Corporate Governance Frameworks

The problems facing SADC are naturally of an international dimension in that it has implications for all of its member states. Thus, as mentioned in chapter 1, a comparative study will be useful, which will examine the King Report on Corporate Governance for South Africa (King III and King IV) as well as the OECD Principles on Corporate Governance due to its cross-border application within its member countries and, *inter alia*, the corporate governance systems of the United States of America and the United Kingdom.

It is prudent to touch upon the basic aspects of these systems briefly, as a detailed discourse will result in something resembling a novella rather than a humble research paper.

2.4.1 United States of America

The United States of America is a federal republic made up of fifty states,⁷³ and is the largest economy in the world with a GDP of about \$16.8 trillion which

⁷² King IV principle 16.

⁷³ Brown L 'States Matter: America Is a Federal Republic' *New York Times* 8 August 2013 available at <http://www.nytimes.com/roomfordebate/2013/07/16/state-politics-vs-the-federal-government/states-matter-america-is-a-federal-republic> (accessed 25th September 2016).

constitutes 24% of the world's gross product.⁷⁴ It is a founder and still a member of the Organisation of Economic Co-operation and Development (OECD).⁷⁵

Delaware General Corporation Law (DGCL)

Corporations, in the United States, are incorporated directly under the regulation of each specific state's law.⁷⁶ However, most corporations are incorporated in the state of Delaware because of the corporate tax breaks offered by the state.⁷⁷ As a result of this courts in Delaware have developed case law establishing principles of corporate governance.⁷⁸ An example of one such principle is that managers hold fiduciary duties of care, candour and loyalty to the shareholders.⁷⁹

In addition to the Delaware General Corporation Law, the following laws regulate corporate governance in the United States:

a. ABA Model Business Corporation Law

This is a model law that is prepared by the American Bar Association and is applied in 24 states.⁸⁰ The Delaware Act and the Model Business Corporation Law ensure that corporations are under an obligation to abide by Title VII of the Civil Rights Act of 1964.⁸¹ This ensures that companies take into consideration interests of different stakeholders that are associated with it, including shareholders, creditors, communities and anyone who is deemed to have a vested interest in terms hereof.⁸²

⁷⁴IMF 'World Economic Outlook' available at

<http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx> (accessed 7 August 2015).

⁷⁵ OECD 'History' available at <http://www.oecd.org/about/history/> (accessed 25th September 2016).

⁷⁶ Armour J, Hansmann H, & Kraakman R 'The essential elements of corporate law: what is corporate law?' (2009) *Harvard John M. Olin Center For Law, Economics, And Business Discussion Paper No. 643 24*

⁷⁷ P Ryan 'Will there ever be a "Delaware of Europe?"' (Winter 2004/2005) 11 *Columbia Journal of European Law* 187.

⁷⁸ Emmerich AO, Savitt W, Niles SV & Ongun S 'United States' in Calkoen WJL (ed.) *The Corporate Governance Review* (2013) 401.

⁷⁹ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

⁸⁰ Bebchuk L 'The Case for Increasing Shareholder Power' (2004-5) 118 *Harvard Law Review* 844.

⁸¹ Bebchuk L 'The Case for Increasing Shareholder Power' (2004-5) 118 *Harvard Law Review* 844.

⁸² ABA Model Business Corporation Law Sec 8.11.

b. Securities and Exchange Act of 1934 (SEA)

Section 19(b) (1) of the SEA provides for corporate governance regulations, specifically self-regulated organisations. It authorises individual securities markets to determine the requirement that needs to be fulfilled by corporations before they can be listed or allowed to trade within these markets. Once the Securities Exchange Committee approves the rules set down by the securities markets, then the rules take effect.

c. Code of Financial Regulations

Title 17 of the Code of Financial Regulations on Commodity and Securities Exchanges provides for regulations on corporate governance. These regulations emphasise, amongst others, the independence of the board.⁸³

d. Sarbanes-Oxley Act

Signed into law on 30th July 2002, the Act was geared towards engendering transparency and accountability in the manner in which corporations are run. Section 301 of Sarbanes-Oxley obligates a listed company to have an audit committee which oversees an independent auditor. The members of the committee must be independent of the management.⁸⁴ This is set to ensure that the audits carried out are truthful.

e. Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Act was a response to the financial crisis of 2008-2009. It was intended to, *inter alia*; address the issue of executive pay and ensure that taxpayers are not called upon to bail out corporations even if their failure threatens the economy.⁸⁵

⁸³ Cornell University Legal Information Institute '17 CFR 229.407 - (Item 407) Corporate governance' available at <https://www.law.cornell.edu/cfr/text/17/229.407> (accessed 25th September 2016).

⁸⁴ Section 407.

⁸⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Preamble.

The Act obligates a corporation to inform investors why a person should serve as a chairman of the board of directors and the chief executive officer at the same time or why a person should not serve the two posts simultaneously.⁸⁶ This is to ensure engender balance of power in the corporation.⁸⁷

Furthermore, a number of non-legislative recommendations on corporate governance have been published in the USA. These include the American Law Institute's *Principles of Corporate Governance and Structure: Restatement and Recommendations*, the New York Stock Exchange's (NYSE) *Principles of Corporate Governance*,⁸⁸ the OECD *Principles of Corporate Governance (2004)*. For the purposes of this discussion, focus is placed on the *Principles of Corporate Governance* by the NYSE.

NYSE Principles of Corporate Governance

The NYSE compiled the comprehensive review of its own corporate governance structure in the wake of the 2008/2009 global financial crisis.⁸⁹ The corporate principles of the NYSE report require directors to be independent, to ensure successful governance.⁹⁰

The directors are required to put up appropriate risk management mechanisms;⁹¹ create long-term sustainability and growth;⁹² establish and maintain an ethical 'tone at the top';⁹³ have a duty to shareholders to act with care and loyalty, as well as with transparency.⁹⁴ These concepts are clearly aimed at promoting responsible conduct amongst companies, in the pursuit of sustainability and as a preventative measure against a recurrence of the aforementioned crises.

⁸⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act Sec 972.

⁸⁷ Sonnenfeld JA 'The Jamie Dimon Witch Hunt' *The New York Times* 8 May 2013 available at http://www.nytimes.com/2013/05/09/opinion/the-jamie-dimon-witch-hunt.html?_r=0 (accessed 25 September 2016).

⁸⁸ Wiese T *Corporate Governance in South Africa: With International Comparisons* (2014) 62.

⁸⁹ Report of the NYSE Commission (2010) 2.

⁹⁰ Report of the NYSE Commission (2010) 25.

⁹¹ Report of the NYSE Commission (2010) 26.

⁹² Report of the NYSE Commission (2010) 26.

⁹³ Report of the NYSE Commission (2010) 27.

⁹⁴ Report of the NYSE Commission (2010) 28.

2.4.2 International Corporate Governance Network Global Governance Principles

The International Corporate Governance Network (ICGN) was established in 1995, and developed the ICGN Global Governance Principles, which are largely slanted in favour of the shareholder.⁹⁵

The ICGN principles require the board of directors to act in the best interests of the company, and with good faith, care and diligence for the benefit of the shareholders.⁹⁶ It furthermore requires the board to be made up of a majority of independent directors, the appointment of whom must be transparent.⁹⁷

In addition, the board of directors must adopt and maintain high standards of business ethics and oversee a culture of integrity.⁹⁸

2.4.3 King Report on Corporate Governance for South Africa

As stated before, the King Report on Corporate Governance is internationally lauded for its efforts in fostering sound corporate governance practices amongst companies, and thus warrants examination in this paper. The King Committee has very recently released the King Report on Corporate Governance for South Africa 2016 ('King IV')⁹⁹, which will be explored, in conjunction with the current King Report on Corporate Governance for South Africa of 2009 ('King III').

The content of The King Report is seen as a recommendation and as a general point of departure compliance is thus voluntary, but it inspires listing regulations at the Johannesburg Securities Exchange and is accordingly compulsory for these companies.

The philosophy of King III revolves around effective leadership, sustainability and corporate citizenship.¹⁰⁰ Compliance with the recommendations of King III

⁹⁵ Wiese T *Corporate Governance in South Africa: With International Comparisons* (2014) 46.

⁹⁶ Principle 1.1 of the ICGN Principles.

⁹⁷ Principle 3 of the ICGN Principles.

⁹⁸ Principle 4.1 of the ICGN Principles.

⁹⁹ Due to take effect on 1 April 2017.

¹⁰⁰ Wiese T *Corporate Governance in South Africa: With International Comparisons* (2014) 20.

is voluntary, on the 'apply or explain' principle, which involves a consideration by the board of how the principles and recommendations can be applied.¹⁰¹

The principles of King III recommend that the board is responsible for effective corporate governance, and should be mindful of same when determining the company strategy.¹⁰² It also recommends a formal and transparent process for appointment of directors,¹⁰³ establishment of board committees, responsible Information Technology (IT) governance¹⁰⁴ and full and integrated reporting and disclosure. King III supplements the corporate governance regulations already in the Companies Act of South Africa.¹⁰⁵

The major differences in King IV can be elucidated as follows:

- i. King IV is streamlined to include 16 consolidated principles, as opposed to the 75 principles of King III;
- ii. King III required companies to apply or explain insofar as the principles were concerned, King IV assumes application of all principles, and requires entities to explain how the principles are applied. This is referred to as the 'apply and explain' philosophy;
- iii. King IV seeks to reconcile with the legislative minimum requirements placed on companies by advocating an approach whereby the principles are adapted to 'fit in' with sectoral contexts and legislative regimes.¹⁰⁶
- iv. Remuneration of directors has a more prominent role (although it merely requires a non-binding advisory vote of shareholders);
- v. King IV requires active stakeholders to hold the Board to account for their actions and disclosures. In particular, according to King IV principle 17, the governing body of an institutional investor should ensure that responsible investment practices are observed by the company to promote good governance and the creation of value by the companies in which it invests.¹⁰⁷

¹⁰¹ Wiese T *Corporate Governance in South Africa: With International Comparisons* (2014) 21.

¹⁰² King III principle 2.1 – 2.2.

¹⁰³ King III principle 2.18.

¹⁰⁴ King III principle 5.

¹⁰⁵ Act 71 of 2008.

¹⁰⁶ The King Report on Corporate Governance for South Africa 2016 ('King IV').

¹⁰⁷ This principle, predictably, is the only principle that is limited to institutional investors.

- vi. The governance framework of the company must be agreed upon and implemented by the company board, and not by any subsidiary boards (as was the case with King III).¹⁰⁸

2.4.4 OECD Principles of Corporate governance

The OECD principles provide for guidance for policymakers, regulators and market participants in improving the legal, institutional and regulatory framework that underpins corporate governance within its member countries and, as such, are non-binding.¹⁰⁹ These guidelines include recommendations for effective corporate governance through promotion of transparency, rule of law and clear differentiation of the powers and responsibilities of the various personnel.¹¹⁰

They also provide practical guidance and suggestions for stock exchanges, investors, corporations and other parties that have a role in the process of developing good corporate governance.

The essential facets of the OECD principles can be elucidated as follows:¹¹¹

I. Ensuring the basis for an effective corporate governance framework

The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and promote efficient allocation of resources.

II. The rights of shareholders and key ownership functions

The corporate governance framework should protect and facilitate the exercise of shareholders' rights, including minority and foreign shareholders.

¹⁰⁸ Deloitte Touche Tohmatsu Limited report on King IV (2016).

¹⁰⁹ Jesover F, Kirkpatrick G 'The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: an International Review* January 2005 2.

¹¹⁰ OECD Principles of Corporate Governance 17.

¹¹¹ OECD Principles of Corporate Governance (2015).

III. Institutional investors, stock markets, and other intermediaries

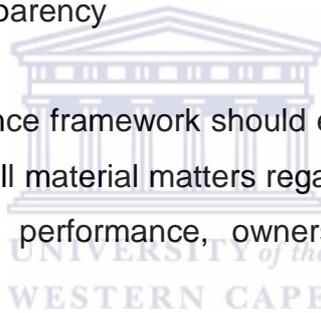
The corporate governance framework should provide sound incentives throughout the investment chain and provide for stock markets to function in a way that contributes to good corporate governance.

IV. The role of stakeholders in corporate governance

The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

V. Disclosure and transparency

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.



VI. The responsibilities of the board

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

It is submitted that the OECD can be used as an example of what can be achieved by a group of countries in the pursuit of economic integration with the use of sound corporate governance principles. The OECD is regarded as a unique forum where 34 member state economies work with each other, as well as with more than 70 non-member state economies to promote economic growth, prosperity, and sustainable development.¹¹²

¹¹²What is the OECD? available at <http://www.usoecd.usmission.com> (accessed 17 July 2016).

Furthermore, it is accepted that the OECD principles on corporate governance have significant impact and relevance to non-member countries.¹¹³ Indeed, the OECD already has in place the OECD Network on Corporate Governance of State-Owned Enterprises in Southern Africa, which includes the SADC member states (amongst others).¹¹⁴ This network was launched in 2007 to support efforts to improve the performance of state-owned enterprises by raising awareness of the benefits of governance and influencing policy-making based on experience and expert knowledge.¹¹⁵

It is evident from the above discussion that there exist a number of similarities amongst these various corporate governance regimes. Chief among these are the following:

- A fiduciary duty on directors to maintain ethical leadership;
- Independence of directors;
- The requirement of transparency and accountability;
- The requirement of acting in the best interests of the company and the stakeholders;
- Recognition of the rights and interests of stakeholders (and not only shareholders);
- A focus on long-term sustainability.¹¹⁶

These concepts tie in with the essential objectives of a good corporate governance regime which were identified in chapter 1 as being leadership; oversight of management; ethical conduct; risk management; sustainability; transparency and accountability.

¹¹³Jesover F, Kirkpatrick G 'The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: an International Review* January 2005 5.

¹¹⁴ Corporate Governance of State-Owned Enterprises in Southern Africa available at <http://www.oecd.org> (accessed 17 July 2016).

¹¹⁵ Corporate Governance of State-Owned Enterprises in Southern Africa available at <http://www.oecd.org> (accessed 17 July 2016).

¹¹⁶Wiese T *Corporate Governance in South Africa: With International Comparisons* (2014) 64.

It is submitted that these are critical in the composition of any corporate governance regime, and accordingly the most important of these (sustainability and transparency) are discussed in further detail here below.

2.5 Sustainability

In light of the aforesaid discussions, it is apparent that there is an inherent prominence placed on the concept of sustainability, seeing as it is referenced in the OECD principles on corporate governance, the King Report on Corporate Governance for South Africa, and the legislative frameworks of China, the U.K. and the United States. Accordingly, it is submitted that sustainability is one word that can be argued to encapsulate the very essence of corporate governance and is explored here in some detail insofar as it relates to SADC and its goals.

Generally speaking, in terms of good corporate governance policies, companies must strive to operate in a manner that is sustainable to the stakeholder, society and the environment.¹¹⁷ The relevance to the Southern African region however, is more specific. It has been said that Africa has been fortunate in recent years in being able to depend on revenues from its natural resources, but that this is not an indefinitely sustainable strategy.¹¹⁸ It requires a community of value-adding, innovative entrepreneurs to take it forward.

The long-term sustainability of companies in the region is dependent on a healthy environment and the availability of resources, and companies should thus take cognisance of the various factors that affect the environment in its operations.¹¹⁹ All stakeholders, including shareholders, have an interest in the long-term sustainability of the company.¹²⁰ As stated earlier in Chapter 1, the pursuit of foreign direct investment brings with it added pressure in respect of sustainability.

It is a well-known truism that sustainability reporting enables organisations of all types, including companies and public agencies, to measure, manage and publicly disclose

¹¹⁷ Mafatle T S *The Evolution of Corporate Social Responsibility* (LLM Thesis abstract, 2009) 4.

¹¹⁸ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 69.

¹¹⁹ Wiese T 'Corporate Governance in South Africa: With International Comparisons' (2014) 8.

¹²⁰ Wiese T 'Corporate Governance in South Africa: With International Comparisons' (2014) 13.

their economic, environmental and social performance,¹²¹ particularly the environmental impact of this performance.

It is submitted that, in policy terms, research indicates that three courses of action are clear.¹²² Firstly, better quality basics, such as better education, better infrastructure and increased management capacity in government are all critical for long-term sustainability. Secondly, a more amenable regulatory environment is necessary. Clear, understandable, implementable and impartially enforced regulations are essential to any country. These must be conceptualised with a view to both curbing undesirable behaviour and facilitating the day-to-day conduct of business. The goal should be better regulation rather than deregulation.¹²³

2.6 Transparency and accountability:

The concept of transparency is another that is inextricably linked to the premise of an effective corporate governance regime. There is an increasing demand for greater transparency in the corporate environment, and thereby greater accountability.¹²⁴

According to the London-based think tank SustainAbility, this decade was supposed to have been seen as the 'Transparency Decade'.¹²⁵ A series of major incidents forced early pioneers of transparency to lift the veil, so to speak, and issue economic social and environmental reports. It has since been suggested that the first decade of the 21st century might become the 'Trust Decade'. This decade was to be based on ever increasing transparency, accountability and integrated reporting.¹²⁶

However, the events of past few years have turned out to facilitate a culture of distrust. As a result of the global financial crisis and several corporate scandals, there is a general climate of distrust regarding companies' ability to self-regulate.¹²⁷

¹²¹ Carrots and Sticks – Promoting Transparency and Sustainability 6.

¹²² Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 69.

¹²³ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 69.

¹²⁴ Carrots and Sticks – Promoting Transparency and Sustainability 7.

¹²⁵ Carrots and Sticks – Promoting Transparency and Sustainability 7.

¹²⁶ Carrots and Sticks – Promoting Transparency and Sustainability 7.

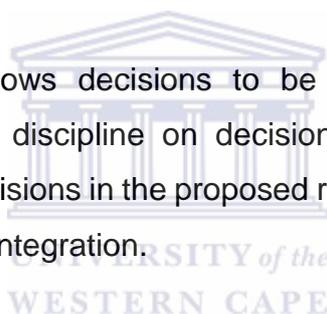
¹²⁷ This is according to the annual Edelman Trust Barometer published in 2009.

Consequently, the general public is demanding an increased role to be played by governments in the sustainability reporting sphere.¹²⁸

As mentioned in chapter 1, there is some understanding amongst researchers that the unification of the Southern African region's economies through the SADC free trade area¹²⁹ and the quest to achieve deeper levels of integration as desired in terms of the SADC treaty will not be realised in the absence of good economic and corporate governance.¹³⁰

Without doubt, there are benefits to be derived from the principles of transparency and accountability. An important benefit of transparency is that it earns the national and regional institutions the public trust that is necessary to forward the regional integration agenda.¹³¹ Accountability and transparency increase the public's confidence and the corporation's credibility, which coincidentally are two essential ingredients for the luring of investment.

Transparency furthermore allows decisions to be better informed, while better accountability imposes firmer discipline on decision-makers. Together, these will contribute to higher-quality decisions in the proposed regional institutions in the SADC region¹³² and in the pursuit of integration.



2.7 The state of the corporate governance landscape in the region

As alluded to at the introduction of this chapter, it is important to touch on the current corporate governance landscape of the region, which, it is submitted, is significantly lacking. One of the reasons why corporate governance is in an embryonic state in Africa, despite the obvious need for a robust framework regulating same (particularly in the Southern African region, as is to be discussed in this paper), is due to the fact that the state-owned sector is considerable in its size which is a result of the legacy of

¹²⁸ Carrots and Sticks – Promoting Transparency and Sustainability 7.

¹²⁹ The Member states of the SADC have formed a free trade area amongst themselves, wherein trade duties and other restrictive regulations (internally) are eliminated on substantially all trade between participant member states.

¹³⁰ SADC-UNECA Governance of Financial Institutions in Southern Africa: Issues for an Institutional Convergence Framework for Regional Financial Integration in SADC (2009).

¹³¹ The so-called 'licence to operate'.

¹³² SADC-UNECA Governance of Financial Institutions in Southern Africa: Issues for an Institutional Convergence Framework for Regional Financial Integration in SADC (2009).

past statist economic policies.¹³³ Indeed, state-owned companies are believed to make up the largest part of the economy in Southern Africa,¹³⁴ and accordingly this section will deal specifically with state-owned enterprises.

Accordingly, the lack of a coherent and effective corporate governance framework, together with deficient infrastructure, corruption, and inadequately trained workforce within state-owned entities are among the obstacles that are prevalent in the business environment within the SADC region.¹³⁵

By way of an example, it is accepted that proper board appointments are critical in terms of good corporate governance. However, government involvement in the board selection of state-owned enterprises is inevitable and necessary, although various checks and balances can be applied to mitigate the potential negative effect of this aspect and ensure appropriate candidates are appointed.¹³⁶

Another important issue is whether such board appointments are geared towards furthering a political agenda, and whether boards are able to operate without political interference once appointed.¹³⁷ As a point of reference, it is useful to note that the *OECD Guidelines on Corporate Governance of State Owned Enterprises* is clear that state-owned enterprises' boards should act in the best interests of the entities they control, exercise independent judgement and treat all stakeholders equitably.¹³⁸

One of the most urgent challenges in the region and which has a direct influence on the efficacy of any corporate governance regime is the need for clear ownership policies amongst state-owned enterprises.¹³⁹ An ownership policy, specifying the purpose of state ownership and the expectations of the state, is a prerequisite to providing individual state-owned enterprises with clear objectives and guidance in

¹³³ Corrigan T Policy Briefing 101 'Building an African Corporate Governance' August 2014.

¹³⁴ Sultan Balbuena, S. (2014), "State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges", *OECD Corporate Governance Working Papers* OECD Publishing 7.

¹³⁵ Corrigan T Policy Briefing 101 'Building an African Corporate Governance' August 2014.

¹³⁶ OECD, Working Party on State Ownership and Privatisation Practices, *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (2012) 16.

¹³⁷ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014)65.

¹³⁸ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014)65.

¹³⁹ Sultan Balbuena, S. (2014), "State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges", *OECD Corporate Governance Working Papers* OECD Publishing 10.

terms of corporate governance, and ensures that the government, acting as owner, is guided by a consistent and coherent approach.¹⁴⁰

For some countries, the establishing of legislation for state-owned enterprises may pose as a constriction, while for others the challenge is the lack of a clear categorisation of state-owned enterprise activities and subsequent separation between social/developmental and commercial activities.¹⁴¹ A number of countries are working towards establishing ownership policies and reinforcing their governance practices through the establishment of governance codes applicable to state-owned enterprises and other public commercial entities.¹⁴² Indeed, the King Report on Corporate Governance for South Africa (King IV) includes a supplement specifically and exclusively applicable to state-owned entities.¹⁴³

The *OECD Guidelines on the Corporate Governance of SOEs* recommends a central organisation – or at least a strong coordination – of the ownership function. However, this recommendation is made in a specific economic and administrative context that may or may not be applicable to the SADC region.¹⁴⁴

Centralised ownership may be either an advantage or a challenge, depending on the strength of existing governance frameworks; the size and volume of state-owned enterprises' portfolios; and the resources, capacities and integrity of the ownership function.¹⁴⁵ The question of whether to favour a centralised ownership function versus a decentralised or dual structure has not been sufficiently scrutinised in practice among Southern Africa economies, and it has been argued that merely changing the ownership regime of a region's state-owned enterprises' will not address all their problems, particularly when these relate to their operational effectiveness and ensuring integrity.¹⁴⁶

¹⁴⁰Corrigan T Policy Briefing 102 'Corporate Governance in Africa's State-Owned Enterprises: Perspectives on an Evolving System' September 2014.

¹⁴¹ Sultan Balbuena, S. (2014), "State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges", *OECD Corporate Governance Working Papers* OECD Publishing 10.

¹⁴²South African Institute of Directors (2009)

¹⁴³ The King Report on Corporate Governance for South Africa (2016) Part 6.6.

¹⁴⁴OECD Guidelines On Corporate Governance Of State-Owned Enterprises.

¹⁴⁵ Sultan Balbuena, S. (2014), "State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges", *OECD Corporate Governance Working Papers* OECD Publishing 14.

¹⁴⁶Corrigan T Policy Briefing 102 'Corporate Governance in Africa's State-Owned Enterprises: Perspectives on an Evolving System' September 2014.

It is submitted, in light of the above, that the corporate governance landscape in the region is beset with numerous challenges. It has been posited that strengthening the corporate governance policies via changing the ownership policy will be a step in the right direction.¹⁴⁷

2.8 Conclusion

It is clear from the foregoing that at the heart of a sound corporate governance regime lies concepts such as ethical leadership, sustainability, transparency, acting in the best interests of the stakeholders *et al*, and that furthermore these are not overwhelmingly prevalent in the region currently. Accordingly, any attempts at formulating a uniform corporate governance regime in the region must seek to amalgamate the characteristics of the above-mentioned frameworks.

This paper will now turn to the structure and functioning of SADC and the apparent obstacles to integration in the region.



¹⁴⁷ Corrigan T Policy Briefing 102 'Corporate Governance in Africa's State-Owned Enterprises: Perspectives on an Evolving System' September 2014.

CHAPTER 3:
**THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY AND THE
CHALLENGES IT CURRENTLY FACES**

3.1 Introduction

As alluded to in chapter one, it is necessary to examine the structure and functioning of SADC in order to gain a firm grasp of the challenges facing the region in its pursuit of economic integration. This chapter will serve to survey the institutional framework of SADC, and how same relates to the pursuit of integration.

SADC was formally established in 1992 in Windhoek, Namibia, with the ambitious goal of developing a regional economic community which would be fully integrated amongst its member states.¹⁴⁸ Article 5(1)(a) of the Southern African Development Community Treaty (the SADC Treaty) places economic growth and development at the top of the SADC objectives.¹⁴⁹ The focus was on deepening regional economic integration, SADC's aims are more ambitious than its predecessor's.¹⁵⁰

Subsequently, and commencing in the mid-1990s, SADC embarked on a comprehensive review and reorganisation process, particularly targeting SADC's decentralised co-operation model, its management framework, and the lack of clarity and specificity in its goals (the details of which will be discussed more fully in the ensuing chapters).¹⁵¹ The recommendations in the review report were incorporated into the Agreement Amending the Treaty of the SADC, which entered into force on 14 August 2001, upon its signature by the member states.¹⁵²

However, SADC has been hindered by a number of obstacles in its pursuit of the type of integration that will unlock its economic growth and development. The SADC

¹⁴⁸De Wet E 'The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa' (2013) 28 *ICSID Review* 45 45.

¹⁴⁹De Wet E 'The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa' (2013) 28 *ICSID Review* 45 46.

¹⁵⁰Saurombe A 'The role of South Africa in SADC Regional Integration: the making or breaking of the organisation' (2010) 5 3 *Journal of International Commercial Law and Technology* 124 125.

¹⁵¹Saurombe A 'The role of South Africa in SADC Regional Integration: the making or breaking of the organisation' (2010) 5 3 *Journal of International Commercial Law and Technology* 124 125.

¹⁵² About the SADC available at <http://www.sadc.int/about-sadc/> (accessed 20th November 2016).

member states are apparently not readily willing to subject themselves to supranational governance (as provided for by the SADC Treaty) and the resultant encroachment on their sovereignty.¹⁵³ Thus, as a result of their resistance to supranational institutions, SADC is arranged in a decentralised manner which serves as a hindrance to deeper integration.¹⁵⁴

3.2 Structure and Functioning of SADC

The SADC Treaty provides the legal framework of the organisation by setting out the status,¹⁵⁵ principles and objectives,¹⁵⁶ and obligations of Member States;¹⁵⁷ the membership,¹⁵⁸ the institutions,¹⁵⁹ procedural matters relating to areas of cooperation among Member States,¹⁶⁰ cooperation with other international organisations,¹⁶¹ financial issues,¹⁶² dispute settlement,¹⁶³ as well as sanctions, withdrawal and dissolution.¹⁶⁴ The SADC Treaty makes provision for the formulation of subsidiary legal instruments such as protocols giving specific mandates to various SADC institutions.

The arrangement of SADC was heavily influenced by previous failures of attempts at economic integration, which failures stemmed largely from indecision on how to equitably share costs and benefits of such integration.¹⁶⁵ As a result, SADC is structured in a decentralised manner, in order to avoid supranational institutions.¹⁶⁶

¹⁵³Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 454.

¹⁵⁴Mattli W *The Logic of Regional Integration: Europe and Beyond* (1999).

¹⁵⁵Article 14 of SADC Treaty (1992).

¹⁵⁶Chapter 3 Aa 4 and 5 of SADC Treaty (1992).

¹⁵⁷Article 6 of SADC Treaty (1992).

¹⁵⁸Chapter 4 Aa 37 and 8 of SADC Treaty (1992).

¹⁵⁹Chapter 5 Aa 9 and 16A of SADC Treaty (1992).

¹⁶⁰Article 21 of SADC Treaty (1992).

¹⁶¹Article 24 of SADC Treaty (1992).

¹⁶²Chapter 9 Aa 25-27 and Chapter 10 Aa 28-30 of SADC Treaty (1992).

¹⁶³Article 32 of SADC Treaty (1992).

¹⁶⁴Chapter 13 Aa 33-35 of SADC Treaty (1992).

¹⁶⁵Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 457.

¹⁶⁶Jakobeit C, Hartzenberg T and Charalambides N *Overlapping Membership in COMESA, EAC, SACU and SADC: Trade Policy Options for the Region and for EPA Negotiations - Summary of Findings* 2005 available at: www.acp-eustrade (accessed 4th October 2016) 12.

The principle organs of SADC will now be identified and their functions discussed in turn.

i. The Summit:¹⁶⁷

The Summit is made up of the Heads of State of all member countries of SADC, and is responsible for overall policy-making and control of functions of SADC.¹⁶⁸ As such, it has a critical role to play in economic integration within the region, and meets once a year.

The SADC Treaty¹⁶⁹ obligates its member states to adopt legal instruments for the implementation of the provisions of the Treaty. However, the Treaty is silent on whether the decisions of the Summit have a direct effect on member states.¹⁷⁰ The implementation of such decisions is, in fact, left to the discretion of the affected member state – a vague formulation that undermines the legal certainties that are necessary in the pursuit of economic integration.¹⁷¹

As a brief explanation, the direct effect principle is derived from European Union law, which simply means that European Union law confers rights and imposes obligations directly, not only on the European Union institutions and the Member States, but also on the European Union's individual citizens.¹⁷²

The direct effect principle therefore ensures the application and effectiveness of European Union law in the Member States.¹⁷³

Furthermore, the Summit is required to make all of its decisions on consensus only,¹⁷⁴ whilst there are no provisions made for the event that consensus is not reached. As a result, decisions are made by consensus that is 'manufactured'

¹⁶⁷Article 10 of SADC Treaty (1992).

¹⁶⁸Ng'ong'ola C 'Regional Integration and Trade Liberalisation in Africa: The Treaty for the Establishment of an African Economic Community Revisited in the Context of the WTO System' (1999) *Journal of World Trade* 485 506.

¹⁶⁹Article 22(1) of SADC Treaty (1992).

¹⁷⁰Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 461.

¹⁷¹Erasmus G 'What has Happened to the Protection of Rights in SADC?' (2012) 3.

¹⁷² Definition of Direct Effect available at <http://eur-lex.europa.eu/legal-content/> (accessed 4th October 2016).

¹⁷³Definition of Direct Effect available at <http://eur-lex.europa.eu/legal-content/> (accessed 4th October 2016).

¹⁷⁴Articles 10, 11 and 13 of SADC Treaty 1992.

through unclear structures and wide discretions that undermine the very nature of rules-based trade.¹⁷⁵

ii. The Troika

A system that allows for expeditious implementation of decisions and provide policy direction during periods between regular SADC meetings, the Troika consists of the current Chair of the SADC?, the incoming Chair and the outgoing Chair, and it is intended to foster continuity within SADC.¹⁷⁶

It is easier to convene and thus meets more often than the Summit, whilst it remains closely linked to the Summit.¹⁷⁷ However, the hindrances that affect the Summit (discussed above) extend to the Troika in that its decisions must be endorsed and can thus be nullified in the absence of consensus.

iii. The Council of Ministers¹⁷⁸

Generally speaking, the Council serves as the core driving force of SADC, developing and implementing the plans of SADC.¹⁷⁹

It consists of ministers of each member state,¹⁸⁰ and oversees the functioning and development of SADC.¹⁸¹ It also serves as an advisory body to the Summit, but is hamstrung by the need to report its actions to the Summit as well. This erodes its ability to make significant progress with SADC policies and agenda.¹⁸²

¹⁷⁵Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 462.

¹⁷⁶Erasmus G 'What has Happened to the Protection of Rights in SADC?' (2012) 3.

¹⁷⁷Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 463.

¹⁷⁸Article 11 of SADC Treaty (1992).

¹⁷⁹Afadameh-Adeyemi A and Kalula E 'SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community' (2010) *Monitoring Regional Integration in Southern Africa: Yearbook* 5.

¹⁸⁰Usually from the ministries of Foreign Affairs; Finance; Commerce.

¹⁸¹Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 464.

¹⁸²Afadameh-Adeyemi A and Kalula E 'SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community' (2010) *Monitoring Regional Integration in Southern Africa: Yearbook* 5.

iv. The Integrated Committee of Ministers

The integrated Committee is made up of at least two ministers from each member state, and functions as the 'initiator' of influencing policies on integration in the region in that the Committee first highlights the policies to be pursued which are then tabled for discussion among the higher institutions (the Council of Ministers; the Summit etc.)¹⁸³

v. The Standing Committee¹⁸⁴ of Officials

The Standing Committee serves as a technical advisory committee to the Council, whose representative in each of the member states serves as a contact point for SADC within that country. The main function of the Committee is to process documentation from the Integrated Committee and report to the Council.¹⁸⁵

vi. The SADC Tribunal¹⁸⁶

The Tribunal was constituted to ensure adherence to the proper interpretation of the provisions of the SADC Treaty and subsidiary instruments, and to adjudicate such disputes as may be referred to it.¹⁸⁷ Furthermore, if the interpretation of the SADC Treaty is in dispute, the Tribunal should be an independent forum with the duty to rule on the correct interpretation (and as a result, the application of whatever applicable legal instrument) thereof.¹⁸⁸

However, although the Tribunal has the authority to place sanctions on member states repeatedly defaulting on any obligation in terms of the SADC Treaty, such sanctions can only be imposed by the Summit¹⁸⁹ and the limitations of the consensus-based nature of the Summit has already been discussed.

¹⁸³Article 12 of SADC Treaty (1992).

¹⁸⁴Article 13 of SADC Treaty (1992).

¹⁸⁵Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 467.

¹⁸⁶Article 16 of SADC Treaty (1992).

¹⁸⁷Article 16(1) of SADC Treaty (1992).

¹⁸⁸Erasmus G 'What has Happened to the Protection of Rights in SADC?' (2012) 130.

¹⁸⁹Article 33.2 of SADC Treaty (1992).

The Tribunal is currently not operational due to a decision to suspend it by the 2010 Windhoek Forum. Subsequent to the ruling of the SADC Tribunal in the case of *Campbell and Others v Zimbabwe*,¹⁹⁰ (which was not to the liking of Zimbabwe) Zimbabwe commenced a lobbying campaign to convince Southern African leaders to disband the Tribunal.¹⁹¹

As a result, on the 17th August, 2010, SADC leadership capitulated ordering a review of the "role, function and terms of reference of the Tribunal."¹⁹² During the review process, the Tribunal was provisionally suspended, and in August 2012, it was stripped of its jurisdiction to hear individual human rights claims, relegating it to disputes between nation-states.¹⁹³

vii. The Secretariat¹⁹⁴

The Secretariat is the institution responsible for strategic planning, co-ordination and management of SADC programmes, headed by an Executive Secretary stationed in Gaborone, Botswana.¹⁹⁵

It is also tasked with implementing decisions of the Summit and the Council, as well as arranging and managing the SADC meetings.¹⁹⁶ Additionally, the Secretariat represents SADC at regional and multilateral levels in respect of trade negotiations.

The biggest challenge facing the Secretariat at this stage has been said to be the reluctance of member states to surrender national initiative and active representation to the principle of supra-nationalism.¹⁹⁷

¹⁹⁰ *Campbell and Others v Zimbabwe (Merits)*, Case No SADC (T) 2/2007.

¹⁹¹ Caesar Zvayi, *Zim Wants SADC Tribunal Rulings Nullified* (May 19, 2011) available at <http://www.herald.co.zw/zim-wants-sadc-tribunal-rulings-nullified/> (accessed 12th October 2016).

¹⁹² Cohen D 'A President, An International Tribunal And A Band Of Farmers Walk Into A Constitutional Court-The Last Laugh: Mike Campbell V. The Government Of The Republic Of Zimbabwe(2012) 39.

¹⁹³ Editorial, *Re-Empower SADC Tribunal*, MAIL & GUARDIAN, June 28, 2013, available at [http://mg.co.za/article/](http://mg.co.za/article/2013-06-28-editorial-re-empower-sadc-tribunal)

2013-06-28-editorial-re-empower-sadc-tribunal ("Justice can come wrapped in cruel irony.") (accessed 12th October 2016).

¹⁹⁴ Article 14 of SADC Treaty (1992).

¹⁹⁵ Article 2.2 of SADC Treaty (1992).

¹⁹⁶ Article 14.1.3 of SADC Treaty (1992).

¹⁹⁷ Evans D, Holmes P and Mandaza I 'SADC: *The Cost of Non-integration*' (1999).

3.3 Problems Facing SADC

There are a number of immediately apparent issues evident within the current structure and functioning of SADC. Chief among them is the resistance to supranational institutions¹⁹⁸ and the resultant encroachment on their sovereignty mentioned earlier, which has been argued to be a direct obstacle to deep integration in the region.¹⁹⁹

Furthermore, it has been submitted that economic integration requires, on a fundamental level, the delegation of power to a supranational body tasked with protecting the supranational institution as well as the individual member states.²⁰⁰

It is clear thus that SADC is a very ambitious model on paper, but there is a poor record with regards to implementation due to the legal uncertainties referred to above.²⁰¹

3.4 SADC Regulatory Framework

It is necessary, at this point, to delve into the manner in which SADC's regulatory framework currently operates, as the subject matter of this paper seeks to establish the viability of some form of uniform corporate governance framework within the region.

i. The SADC Protocol

A Protocol is a legally binding document committing the SADC states to the objectives and specific procedures stated within it.²⁰² It requires a two thirds of the member states to ratify or sign the agreement, thereby giving formal consent, to have it enter into force.²⁰³ A provision for any disputes arising from the application or interpretation of a Protocol is made by referring grievances to

¹⁹⁸Supranational Institutions are independent of member states and have decision-making powers that bind member states.

¹⁹⁹Mattli W 'The Logic of Regional Integration: Europe and Beyond' (1999) 3.

²⁰⁰Mutharika B 'Towards Multinational Economic Cooperation in Africa' (1972) 31.

²⁰¹Erasmus G 'Is the SADC Trade Regime a Rules-based System?' (2011) *SADC Law Journal* 130.

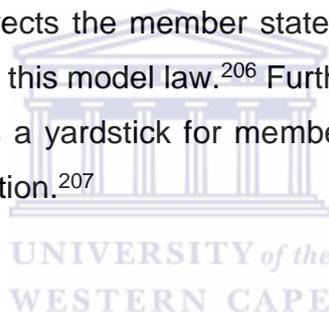
²⁰² SADC Protocols available at <http://www.sadc.int/about-sadc/overview/sa-protocols/> (accessed 11th October 2016).

²⁰³ Article 36 of SADC Treaty (1992).

the SADC Tribunal if they cannot be resolved amicably through regular diplomatic channels.²⁰⁴ However, the challenge this brings about is the non-functionality of the SADC Tribunal due to its suspension subsequent to the matter of *Campbell and Others v Zimbabwe*,²⁰⁵ as discussed herein above. Accordingly, there is in effect no enforcement mechanism currently in place to ensure adherence to the Protocol.

ii. The SADC Model Law

A model law is not binding on member states, but seeks to provide a hoped-for standard (a 'model') to be aspired to by member states' domestic legislation. By way of an illustration, the SADC Model Law on HIV and AIDS in Southern Africa contains significant direction in the fight against the HIV pandemic in Southern Africa and directs the member states to adopt domestic legislation that furthers the spirit of this model law.²⁰⁶ Furthermore, SADC Model laws are intended to be used as a yardstick for member states' review and reform of related domestic legislation.²⁰⁷



3.5 Conclusion

In summary, the aforementioned is argued to be part of the reason why SADC has not made the desired progress in its objective of facilitating economic growth and integration.²⁰⁸ A regional development community such as SADC cannot be expected to meet its objectives in achieving integration and stimulating economic growth and development if, for instance, its own adjudicatory body is defunct (as is the case with the Tribunal).

²⁰⁴ SADC Protocols available at <http://www.sadc.int/about-sadc/overview/sa-protocols/> (accessed 11th October 2016).

²⁰⁵ *Campbell and Others v Zimbabwe (Merits)*, Case No SADC (T) 2/2007.

²⁰⁶ Section 2 Model Law on HIV & AIDS in Southern Africa (2008).

²⁰⁷ Preamble Model Law on HIV & AIDS in Southern Africa (2008).

²⁰⁸ Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 475.

Furthermore, it has already been submitted that proper economic integration is not possible under a decentralised institution as is currently in effect.²⁰⁹ It has been argued that SADC, at this point in time, has failed to effectively fulfil its objectives and, as alluded to in chapter 1, is in need of some form of assistance to make its desired progress.

The following chapter will examine the proposed corporate governance regime in the pursuit of economic integration.



²⁰⁹Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 458.

CHAPTER FOUR

THE IMPLEMENTATION OF A UNIFORM CORPORATE GOVERNANCE REGIME FOR SADC

4.1 Introduction

This chapter will endeavour to explore the actual application of a uniform corporate governance regime and, together with the information presented in the foregoing chapters, conceptualise a form thereof for implementation within SADC.

It may be useful, at this stage, to recap the concept that is being discussed in this paper. Corporate governance, both as an academic discipline and as a business practice, is a tool to deal with the challenges and complexities of business behaviour.²¹⁰ In the words of one respected author, corporate governance is concerned with the 'exercise of power over corporate entities'.²¹¹



4.2 The Company Board

It will be prudent, at this juncture, to examine the practical workings of implementing and maintaining a corporate governance regime. Corporate governance, it has been submitted, is traditionally within the purview of the company board as it is this institution that is responsible for the leadership and accountability of companies which, as already stated, is among the fundamental aspects of corporate governance.²¹²

It has furthermore been argued that compliant company boards protect the interests of the owners, or shareholders, in overseeing the conduct of company executives, and the hope is that they will ensure good care of the company by these individuals running it on a day-to-day basis.²¹³

²¹⁰Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 7.

²¹¹Tricker B 'Corporate Governance: Principles, Policies and Practices' (2011) 29.

²¹² Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 39.

²¹³ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 39.

It is trite that, speaking from a SADC point of view, compliance with the concept of corporate governance rests heavily on self-regulation and as such company boards have a considerable obligation to not only ensure compliance with both the law and best practice, and protect the interests of their shareholders, but they also have to carry the burden of seeing to it that the corporate governance regime is acceptable to all of the various stakeholders.²¹⁴

The strategic importance of company boards was established in the corporate governance agenda by the seminal Cadbury Report,²¹⁵ whose Code of Best Practice deals principally with board structure and responsibilities.²¹⁶

The Cadbury Report has to a large degree been overtaken by the 'stakeholder-responsible' or 'stakeholder inclusive' approach engendered by the King Report on Corporate Governance for South Africa – particularly in South Africa and on the continent as a whole. The King Report on Corporate Governance for South Africa has also emphasised the importance of non-executive directors. It states that:

“The non-executive director plays an important role in providing objective judgement independent of management on issues facing the company. Not being involved in the management of the company defines the director as non-executive. Non-executive directors are independent of management on all issues including strategy, performance, sustainability, resources, transformation, diversity, employment equity, standards of conduct and evaluation of performance. The non-executive directors should meet from time to time without the executive directors to consider the performance and actions of executive management.²¹⁷”

In light of the recent emphasis on non-shareholder interests as espoused by the King Report on Corporate Governance for South Africa, company boards will be playing an increasingly vital role in ensuring that the interests of stakeholders other than

²¹⁴ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 39.

²¹⁵ *Report of the Committee on the Financial Aspects of Corporate Governance* (Sir Adrian Cadbury, Chair)(1992).

²¹⁶ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 39.

²¹⁷ *King Report on Corporate Governance for South Africa* (3rdreport), 2009, Annex 2.3.

shareholders are also adequately protected.²¹⁸ Indeed, stakeholder inclusivity forms part of the foundation of King IV, in terms of which the legitimate and reasonable needs, interests and expectations of all material stakeholders must be taken into account by the company.²¹⁹

4.3 State-Owned Enterprises ('SOEs')

It is a known fact that SOEs are an important part of many economies across the world and it has indeed been submitted in this paper that they are of particular importance to the economies within SADC, and from a corporate governance perspective, SOEs are first and foremost companies like any other. They are as susceptible to faults and non-compliance with legislation as their equivalents in the private sector.²²⁰ Their compliance with a form of corporate governance regime is therefore necessary. *The Principles for Corporate Governance in the Commonwealth* succinctly makes the following point:

“In emerging and transition economies, the main or substantive commercial activity usually rests with the state enterprises. These enterprises often constitute the primary (and sometimes only) customer or supplier on whom an emerging private sector activity may depend. With the emphasis on encouraging the development of small, micro and medium enterprises, this has significant economic consequences. The conduct and efficacy of state enterprises can, therefore, act as a ‘driver’ of good corporate governance practices in ensuring that this permeates through to an emergent private sector.²²¹”

Furthermore, the *OECD Guidelines on Corporate Governance of State Owned Enterprises* is clear that SOE boards should act in the best interests of the entities they control, exercise independent judgement and treat all stakeholders equitably.²²² In

²¹⁸ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 40.

²¹⁹ King Report on Corporate Governance for South Africa (4th report), 2016, 4.

²²⁰ For an illustration, see Vecchiato P, 'Eskom's bad record on environment "worrying"', *Business Day*, 23 November 2012, available at <http://www.bdlive.co.za/national/science/2012/11/23/eskoms-bad-record-on-environment-worrying>.

²²¹ Commonwealth Association for Corporate Governance, *Principles for Corporate Governance in the Commonwealth*, 1999.

²²² OECD, *Guidelines on Corporate Governance of State-Owned Enterprises*. Paris: OECD, 2005.

addition thereto and as mentioned in chapter 2, the King Report on Corporate Governance for South Africa IV ('King IV') includes a supplement relating specifically to state-owned enterprises, which requires that state-owned enterprises should establish and ethical culture and foster responsible corporate citizenship.²²³

4.4 The Comparative Study

The remainder of this chapter will, as indicated, attempt to interrogate the concept of employing a uniform corporate governance regime within SADC and, as referred to in chapter two, the use of a comparative study will look at the King Report on Corporate Governance for South Africa, as well as the OECD Principles on Corporate Governance due to, *inter alia*, its cross-border application within its member countries, as well as non-member countries. Much of what is discussed here has been touched on in chapter two but will be dealt with in greater detail at this stage.

4.4.1 The King Code of Governance Principles ('King III and King IV')

The King Committee was formed under the auspices of the Institute of Directors of Southern Africa in 1992.²²⁴ The purpose of the King Reports is, as mentioned in Chapter one, to promote the highest standards of corporate governance in South Africa.²²⁵ As such, the elements and principles as outlined in the King Report on Corporate Governance for South Africa are considered to be at the forefront of international trends and best practices. Indeed, the King Report on Corporate Governance for South Africa has placed South Africa at the forefront of governance worldwide, making it a global leader in the field of corporate governance and in effect becoming the benchmark.²²⁶

Due to the fact that King IV has very recently been published and is due to be implemented from 1 April 2017, there is predictably fairly few academic articles

²²³ The King Report on Corporate Governance for South Africa (4th report) 2016 Part 6.6.

²²⁴ Naidoo R *Corporate Governance* 2 ed (2009) 32.

²²⁵ Le Roux F *The Applicability of the Third King Report on Corporate Governance to Small and Medium Enterprises* (Masters of Business Administration Research Report, University of Stellenbosch (2010) 24.

²²⁶ Engelbrecht, L. 'King III code: comply vs. apply, what's the difference' (2009) *Occupational Risk Management* Volume 5, Issue 6.

published in respect thereof. Nonetheless, the principles of King III (as they are currently formulated and still in effect) remain relevant and worthy of scrutiny. However, the major differences between it and King IV will be discussed.

As mentioned previously in Chapter two, the King Report on Corporate Governance for South Africa revolves around ethical leadership, sustainability and corporate citizenship. Corporate citizenship and social responsibility, it has been argued, is about the integration of social and environmental considerations into the core focus of a company so that the existence of those companies will be sustainable in more than just financial terms.²²⁷ King III also states that the advent of integrated reports increases the trust and confidence of stakeholders in a company and the acceptability of its operations,²²⁸ thereby increasing business opportunities and improving the effectiveness of the company's risk management.²²⁹

The reality of corporate governance is that boards must take account of financial capital provided by shareholders, human capital from employees, natural capital provided by land, air and water and social capital provided by the community and society in which the company operates.²³⁰

One of the critical principles outlined in King III with reference to board and directors, is that the board and its directors should act in the best interest of the company.²³¹

In particular, King III places significant emphasis on the separation of the role of the CEO and the Chairperson. The application of this principle is considered international best practice²³² and helps to promote a balance of power within the leadership structure to avoid the situation where one single individual has unrestricted control of the company.²³³

²²⁷ Naidoo R *Corporate Governance* 2 ed (2009) 126.

²²⁸ King III 13.

²²⁹ Le Roux F *The Applicability of the Third King Report on Corporate Governance to Small and Medium Enterprises* (Masters of Business Administration Research Report, University of Stellenbosch 2010) 31.

²³⁰ King, M *Corporate governance: individuals emerge as chief providers of capital*. Business Report, 18 August 2009 14.

²³¹ Le Roux F *The Applicability of the Third King Report on Corporate Governance to Small and Medium Enterprises* (Masters of Business Administration Research Report, University of Stellenbosch 2010) 26.

²³² United Nations. 2006. *Guidance on good practices in corporate governance disclosure*. New York & Geneva: United Nations Publications 12.

²³³ Le Roux F *The Applicability of the Third King Report on Corporate Governance to Small and Medium Enterprises* (Masters of Business Administration Research Report, University of Stellenbosch 2010) 27.

It has been furthermore submitted that good governance will not result from mindless compliance with a governance code or rules, but rather from 'abstract' concepts such as fairness, accountability, responsibility and transparency on a foundation of intellectual honesty.²³⁴ King III is in essence about the building of an ethical culture within the corporate world and not just about the mechanical ticking off of duties and processes.²³⁵

King III is principles-based, not legislated and thus follows the 'apply and explain' principle.²³⁶ Although compliance with King III is voluntary, it is a requirement for listing on the Johannesburg Securities Exchange ('JSE'), which gives it a degree of weight, as it were.

There is, as can be expected, a substantial debate about the merits of this approach, or whether a legislated approach would be better.²³⁷ By comparison, as mentioned in Chapter two, the Sarbanes-Oxley Act of 2002, aimed at imposing legally enforceable corporate governance standards on the business sector, imposes significant compliance costs, and as compliance requirements tend to affect smaller businesses harder, they can have a particularly severe impact on ambitious entrepreneurs and on the sector of the economy most likely to create employment.²³⁸ It is submitted that a system that makes provision for this, and allows for the flexibility characteristic of a voluntary (as opposed to a legislated) approach, can address this problem.

The King III report makes the following prudent point:

"There is an important argument against the 'comply or else' regime: a 'one size fits all' approach cannot logically be suitable because the types of business carried out by companies vary to such a large degree. The cost of compliance is burdensome, measured both in terms of time and direct cost. Further, the danger is that the board and management may become focused on compliance

²³⁴ King M *The Corporate Citizen* (2006) 15.

²³⁵ Visser, C.B. 2009. *Corporate governance and the new King III report*. Southern Business School available at <http://www.sbsonline.info/essays-and-other-opinion-pieces> (accessed 13th October 2016).

²³⁶ Wiese T *Corporate Governance in South Africa: With International Comparisons* (2014) 21.

²³⁷ South Africa Country Review Report APRM Programme 2014 161.

²³⁸ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 34.

at the expense of enterprise. It is the duty of the board of a trading enterprise to undertake a measure of risk for reward and to try to improve the economic value of a company. If the board has a focus on compliance, the attention on its ultimate responsibility, namely performance, may be diluted.”²³⁹

The major differences to King IV can be explained as follows: ²⁴⁰

- i. King III required companies to apply or explain insofar as the principles were concerned, King IV assumes application of all principles, and requires entities to explain how the principles are applied. This is referred to as the ‘apply and explain’ philosophy;
- ii. King IV is streamlined to include 16 consolidated principles, as opposed to the 75 principles of King III;
- iii. King IV is principle and outcomes based, as opposed to rules based;
- iv. Remuneration of directors has a more prominent role (although it merely requires a non-binding advisory vote of shareholders);
- v. King IV recognises information in isolation of technology as a corporate asset that is part of the company’s stock of intellectual capital and confirms the need for governance structures to protect and enhance this asset;
- vi. King IV requires active stakeholders to hold the Board to account for their actions and disclosures;
- vii. The governance framework of the company must be agreed upon and implemented by the company board, and not by any subsidiary boards (as was the case with King III);
- vii. King IV contains a number of sector supplements, designed to assist in the interpretation and application of the principles across a number of contexts, situations and legislative regimes, which allows for a degree of

²³⁹Institute of Directors of Southern Africa and King Committee, *King Report on Governance for South Africa* (3rdreport), (2009) 4.

²⁴⁰ Deloitte Touche Tohmatsu Limited report on King IV (2016).

flexibility. This concept evokes the image of an accordion in that the principles can be 'stretched and squeezed' to adapt to particular challenges.

It has been posited that the advantage of principles over rules, is that principles are easy to understand but are not rigidly defined (as rules are) and that principles relate to individual behaviour in order to shape group behaviour, whereas rules are indistinguishable.²⁴¹ Furthermore, principles can achieve widespread acceptance, whereas rules are invariably specific to a given group at a certain point in time.

A model incorporating the flexibilities of the approach of the King Report on Corporate Governance for South Africa, it is submitted, is probably the most suitable approach for the region. Effective corporate governance is manifested by its principles, not on its rigid policing.²⁴² This approach provides a suitable foundation for proper, robust and meaningful corporate governance, which should pervade throughout companies' activities.²⁴³

4.4.2 The OECD principles on corporate governance

As stated previously, the OECD principles on corporate governance will be looked at as a benchmark, due to its international dimension, so to speak, and its impact on non-member countries as well. Furthermore, these principles are considered to be the international touchstone for corporate governance due to it having successfully initiated a number of changes, both by governments and the private sector.²⁴⁴ Accordingly, both the general principles and principles for state-owned enterprises will be examined.

A factor to be considered, and alluded to in chapter three, is the applicability of these principles on non-member countries. In addition to the OECD Network on Corporate

²⁴¹ Le Roux F *The Applicability of the Third King Report on Corporate Governance to Small and Medium Enterprises* (Masters of Business Administration Research Report, University of Stellenbosch 2010).

²⁴² Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 34.

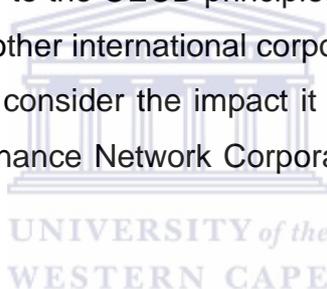
²⁴³ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 34.

²⁴⁴ Jesover F, Kirkpatrick G 'The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: an International Review* January 2005 2.

Governance of State-Owned Enterprises in Southern Africa, the OECD has organised meetings of the Regional Corporate Governance Roundtables in 18 countries, which involved consultations with non-member countries and were first held in Asia, Europe, Latin America, Russia and Southeast Europe.²⁴⁵

These Roundtables have spawned a great deal of information and recognised key aspects of corporate governance that are of particular importance to developing and emerging economies.²⁴⁶ This information will be of invaluable assistance in the pursuit of engendering an environment of compliance within the region, and together with the work of the OECD Network on Corporate Governance of State-Owned Enterprises in Southern Africa illustrates the value that the OECD adds as a corporate governance authority internationally.

Further credence can be given to the OECD principles on corporate governance due to its influential status among other international corporate governance authorities. In amplification of the aforesaid, consider the impact it has had on formulation of The International Corporate Governance Network Corporate (ICGN) Global Governance Principles.



The ICGN's mission is to inspire and advocate effective standards of corporate governance to promote efficient markets and economies world-wide.²⁴⁷ This is achieved through influencing policy by providing a reliable source of practical knowledge and experiences on high standards of corporate governance; allowing for communication among peers to provide a forum for dialogue between companies, investors and other stakeholders; and informing knowledge through guidance and education to stimulate awareness and discourse among members.²⁴⁸

Illustrating the mutually-symbiotic relationship between the OECD and the ICGN is the fact that the ICGN was a key player in the formulation of the OECD principles of

²⁴⁵Jesover F, Kirkpatrick G 'The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries' *Corporate Governance: an International Review* January 2005 5.

²⁴⁶Robinett D *et al* 'Experiences from the Regional Corporate Governance Roundtables' (2003) available at <http://www.oecd.org/daf/ca/corporategovernanceprinciples/23742340.pdf> (accessed 11th October 2016).

²⁴⁷ About ICGN available at <https://www.icgn.org/about> (accessed 11th October 2016).

²⁴⁸ About ICGN available at <https://www.icgn.org/about> (accessed 11th October 2016).

corporate governance, as well as the fact that many members of the OECD's Ad Hoc Taskforce on Corporate Governance referenced the principles of the ICGN.²⁴⁹

Further illustrating the point is the fact that the ICGN have rated the OECD principles as a prime example of minimum best practice standards for companies and investors from an international point of view.²⁵⁰ The ICGN further has recommended the OECD Principles as a significant achievement of corporate governance common ground among varied interests, practices and cultures.²⁵¹

Accordingly, the OECD principles can be used as a point of departure, with the principles of King IV being used to flesh out aspects that are not explicitly covered therein.

4.5 Proposed Solution

As mentioned previously, this paper seeks to determine the feasibility of implementing a uniform corporate governance regime among SADC member states, in the pursuit of deep economic integration (it being one of SADC's primary goals).

In light of the foregoing submissions, it is proposed that SADC model a corporate governance regime based on the OECD principles of corporate governance. Simultaneously, it would be imprudent to ignore the benefits of incorporating aspects of the King Report on Corporate Governance for South Africa, owing largely to its international status as a pioneering work in the field of corporate governance. The King Report on Corporate Governance for South Africa's flexibility via the 'apply and explain' principle is highly desirable in this respect, particularly owing to SADC member states' fiercely protective nature described in Chapter three.

The manner of implementing a uniform corporate governance regime in SADC, within SADC's existing architecture is somewhat complex. The obvious point of departure

²⁴⁹Mallin C *Corporate Governance* 4th edition (2013) 45.

²⁵⁰ International Corporate Governance Network Statement on Global Corporate Governance Principles (1999).

²⁵¹Mallin C *Corporate Governance* 4th edition (2013) 45.

would be to promulgate a Protocol on the principles of corporate governance within SADC.

An immediate complication is the fact that corporate governance disputes will not often be among nation states. In fact, this will very rarely be the case, and as such there will be no recourse for affected stakeholders in the event of a breach of the protocol. The reason for this has been discussed in chapter three. Accordingly, without a means of enforcement, a SADC protocol seems an unworkable concept.

An alternative to the SADC Protocol, would be the use of a so-called 'SADC Model Law', which, it is submitted, is a lesser known route but carries with it its own significant merits. The details of the concept of a SADC Model Law has been discussed in chapter three.

It is submitted that the approach of a SADC Model Law is most suited to the challenge of reforming corporate governance in the SADC region and implementing a uniform regime. It must be noted that the OECD Principles on Corporate governance are extremely similar in their nature to the concept of a SADC Model law and has a track record of success. Particularly in light of the hindrances facing the SADC Tribunal and the resultant lack of prospects of a SADC Protocol, a SADC Model law as a template for the member states to aspire to is perhaps the most apt approach. This would be in keeping with the desired flexibility and absence of encroachment on the sovereignty of the member states.

The fact that these principles are non-binding and do not require signing into law (as a starting point) brings with it the benefit that is manifest in the absence of the politics that come with treaties and conventions. A simple cursory examination will attest to the reality that SADC member states have a propensity for insubordination in respect of their own treaties.²⁵²

²⁵² Reference is here made to the case of *Campbell and Others v Zimbabwe (Merits)*, Case No SADC (T) 2/2007.

Consequently, there is no reason to resolutely believe and rely on the prospect that they would respect their own laws on corporate governance. Thus, the advantage of these type of non-binding principles is that there is a prospect that they will be accepted due to the fact that they do not encroach on the sovereignty of the membership which has proven to be sacrosanct to the member states and resultantly has been one of the problems facing economic integration in the region.

Furthermore, as stated earlier, the OECD Principles on Corporate Governance are recognised for the fact that they establish and exploit a mutuality, as it were, among varied practices in their member states.²⁵³ This indicates that an approach modelled on the OECD Principles of Corporate Governance would also cater for the varied legal systems prevalent among SADC member states.

In amplification of the aforesaid, the current thinking on corporate governance increasingly recognises that the intersection of legal, political and cultural factors combine to produce the unique 'version' of corporate governance that emerges in any given setting.²⁵⁴ For example, in Asia, the prominence of family-owned businesses and the Confucian tradition²⁵⁵ raise the importance of familial relationships and hierarchy in this part of the world – with corresponding implications, for good and bad, for corporate governance in these economies.²⁵⁶ Appeals have been made in Africa for corporate governance to be conceptualised around its own cultural frameworks and economic context.²⁵⁷ Accordingly, a corporate governance regime in the region will require to take proper cognisance of these factors and be tailored accordingly.

Bearing the above in mind, with the implementation of a corporate governance regime modelled on the OECD principles of corporate governance, an environment of predictability (insofar as the corporate governance practices are concerned) will become apparent in the region, which is paramount in the pursuit of investor interest.

²⁵³Mallin C *Corporate Governance* 4th edition (2013) 45.

²⁵⁴ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 72.

²⁵⁵Tricker B '*Corporate Governance: Principles, Policies and Practices*' (2011) 162.

²⁵⁶ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 72.

²⁵⁷ 'Avoiding the dinosaur trap', *The Economist*, (31 May 2014), p 9–13.

4.6 Possible Challenges to the Proposed Solution

It is submitted that it is necessary to briefly examine the criticisms of implementing a corporate governance regime based on the OECD principles of corporate governance, if only to provide a balanced view of the concept.

It has been submitted that the OECD principles on corporate governance are based on a common understanding of its member countries.²⁵⁸ There would be increasing issues of compatibility with SADC countries as these countries have, as alluded to in Chapter Three, a large secondary economy made up of the informal sector²⁵⁹ and includes family firms-governance, corruption and the tricks to veil or obscure the transparency and accountability assumed as the basis of the Principles for the leading OECD countries.²⁶⁰

The difficulties and failings in implementing corporate governance regimes cannot be separated from the general challenges in the business environment as a whole. Corporate governance in the formal sector, to the extent that it requires formal compliance, carries with it considerable costs and as a more sophisticated business sector emerges, and as governments ramp up the effectiveness with which they operate an ever-more effective system of corporate governance will need to emerge.²⁶¹

4.7 Conclusion

Thus, it is submitted that the OECD principles of governance may not be a perfect fit for the region, but it does provide an extremely useful touchstone in the pursuit of the concept of a uniform corporate governance regime. As mentioned previously, it could

²⁵⁸Siems M and Alvarez-Macotela O F 'The OECD Principles of Corporate Governance in Emerging Markets: A successful example of networked governance?' *Networked Governance, Transnational Business and the Law* (2014) 20.

²⁵⁹Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 17.

²⁶⁰Siems M and Alvarez-Macotela O F 'The OECD Principles of Corporate Governance in Emerging Markets: A successful example of networked governance?' *Networked Governance, Transnational Business and the Law* (2014) 20.

²⁶¹ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 38.

conceivably be amalgamated with key characteristics of the King Report on Corporate Governance for South Africa, for a balanced and workable solution.

Perhaps the lead of King IV can be followed, whereby a SADC Model Law on Corporate Governance is devised which encompasses the essential objectives of a sound corporate governance regime as espoused in chapters one and two, with sector supplements that address the specific challenges of the state-owned sector²⁶² and the various informal economies within the member states, amongst others.

SADC's circumstances, therefore, impose severe challenges. In the greater scheme of the pursuit of deeper economic integration, these are amplified by the aim to do things according to global best practice.²⁶³ Striving for best practice demands that, as SADC builds and improves its corporate governance architecture, it limits any tendencies of cultural essentialism.²⁶⁴ As a recent report on Asian business in *The Economist* observed, successful Asian companies are consolidating themselves by acknowledging their weaknesses and drawing on the experiences of Western companies to upgrade their corporate governance.²⁶⁵

The following quote was found to be apt for the conclusion of this Chapter:

*'For business to prosper in the African environment, a number of things will have to be put right. Among them are the implementation of corporate governance standards, including the timely provision of information to investors; a clear separation of interests by executives; strongly enforced independent audit practices; and clear lines of responsibility for corporate leaders.'*²⁶⁶

The following chapter will present a summary of the information discussed and submit a recommendation thereto.

²⁶² Which, as stated in chapter two, makes up the largest part of the economy in Southern Africa.

²⁶³ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 72.

²⁶⁴ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 72.

²⁶⁵ One world', *The Economist*, (31 May 2014), 40.

²⁶⁶ Mills G, *Poverty to Prosperity: Globalisation, Good Governance and African Recovery*. Cape Town and Johannesburg: Tafelberg and SAIIA, (2002) 245–246.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This paper has sought to illustrate the shortcomings of SADC in its pursuit of its stated objectives, specifically attracting investment and fostering economic development and integration. Furthermore, it has sought to demonstrate the link between a sound corporate governance regime and integration as well as posit various solutions to the aforementioned shortcomings via the mechanism of a uniform corporate governance regime.

This chapter will review the conclusions reached in the foregoing chapters and suggest the most ideal model for the implementation of such a uniform corporate governance regime.



5.2 Corporate Governance as a Relevant Solution

As submitted in chapter 2, the core of a sound corporate governance regime is concepts such as ethical leadership, sustainability, transparency and acting in the best interest of the stakeholders. These ideals are central to the theme of 'good governance' and the off-shoot hereof is the creation of a favourable investment climate which is necessary for attracting investment and growing the economy.²⁶⁷

In addition to the aforesaid, the fact that foreign direct investment has been a major factor in the economic development and growth in the region²⁶⁸ must be borne in mind, as well as the fact that most foreign direct investment is aimed at the extraction of the abundant natural resources in the region.²⁶⁹ It is submitted that it is within this sphere

²⁶⁷OECD-SADC Policy Brief June 2015 available at <http://www.oecd.org/dat/inv> (accessed 25 September 2016).

²⁶⁸Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 61.

²⁶⁹Adeoye A *Macroeconomic Level Corporate Governance and FDI in Emerging Markets: Is there a close relationship?* (Masters of Management Science thesis, King's College London, 2007) 13.

that corporate governance (with the emphasis it places on sustainability) becomes critically important.

A further factor to consider is that state-owned enterprises are believed to make up the largest part of the economy in Southern Africa.²⁷⁰ It has been argued that the absence of a clear and operational corporate governance framework, as well as deficient infrastructure, corruption, and inadequately trained workforce within state-owned enterprises are hindering the business environment within the SADC region.²⁷¹

Perhaps most presciently, SADC has been acknowledged as having failed in its objectives, due in large part to the presence of legal uncertainties in its very own constitutional framework²⁷² and a resistance to the implementation of its own principles.²⁷³

Accordingly, a robust corporate governance regime is precisely the correct antidote to the remedy some of the ills currently faced by SADC.

5.3 Corporate Governance and Integration

In support of the submission that a sound corporate governance regime will invariably result in the growth of the economies and facilitate integration within the SADC region, it has been argued that the member states' economic growth is dependent on the businesses operating within them, which are in turn dependent on proper systems of regulation and governance.²⁷⁴ Simply put, a proper system of corporate governance will aid the success of businesses in the region, which in turn will aid in the development of the economy.

Furthermore, it has been submitted that the promotion of economic integration within the region can only be achieved in the presence of sound corporate governance

²⁷⁰ Sultan Balbuena, S. (2014), "State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges", *OECD Corporate Governance Working Papers* OECD Publishing 7.

²⁷¹ Corrigan T Policy Briefing 101 'Building an African Corporate Governance' August 2014.

²⁷² Erasmus G 'Is the SADC Trade Regime a Rules-based System?' (2011) *SADC Law Journal* 130.

²⁷³ Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 475.

²⁷⁴ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 7.

structures.²⁷⁵ Indeed, it has been suggested that corporate governance is an essential component of building a culture of ethics and accountability, which is vital for the cultivation of a strong economy.²⁷⁶

5.4 SADC Model Law on Corporate Governance

Having regard for the above, as well as the salient features of the OECD principles on corporate governance and of the King Report on Corporate Governance for South Africa, it is submitted that the most appropriate route to take would be the devising and implementation of a SADC Model Law on Corporate Governance. The SADC Model Law is desirable due to its voluntary nature, and the fact that it sets a 'hope for' standard which domestic legislation should aspire to and is accordingly not a legislative burden on member states.²⁷⁷

This Model Law would be fashioned along the lines of the OECD Principles on Corporate governance, whilst incorporating appropriate aspects of the King Report on Corporate Governance for South Africa. Of particular benefit in respect of following the example set by the OECD Principles on Corporate Governance is the fact that it is recognised for the fact that it establishes and exploits a mutuality, among varied practices in their member states,²⁷⁸ which is useful in light of the varied legal systems prevalent among SADC member states. Principles such as the ensuring of transparency and sustainability; protection of shareholder rights; clearly identifying the role of stakeholders; and board accountability would be logical inclusions in this Model Law.

In addition, aspects of the King Report on Corporate Governance for South Africa can be incorporated into this Model Law, where the OECD Principles on Corporate Governance fall short,²⁷⁹ and due to its flexibility via the 'apply and explain' principle,

²⁷⁵'Economic and Corporate Governance' available at <http://nepadbusinessfoundation.org/index.php/thematic-areas/economic-and-corporate-governance> (accessed 10th October 2016).

²⁷⁶ Corrigan T *Getting Down to Business: Lessons from the African Peer Review Mechanism* (2014) 9.

²⁷⁷ Which has the added complication of not being enforceable due to the non-functionality of the SADC Tribunal.

²⁷⁸Mallin C *Corporate Governance* 4th edition (2013) 45.

²⁷⁹ Such as the duties and rights of stakeholders.

which would be highly desirable in this region,²⁸⁰ as well as the emphasis by King IV on the inclusive role of stakeholders (both internal and external). Furthermore, as mentioned in chapter four, the approach employed by King IV of devising a foundation of corporate governance principles together with sector supplements which govern specific sectors and their unique challenges is perhaps ideal.

It is thus submitted that the most suitable option to pursue is the SADC Model Law, formulated as espoused above, due to it being perhaps the best fit for the climate currently prevalent in the region. It is submitted that the presence of some form of uniform corporate governance regime will reap innumerable benefits for the region, not least in the pursuit of SADC's objectives of poverty eradication, economic growth and (most importantly) economic integration.



“We must pull together and work hard in ensuring that SADC succeeds in its agenda of development, economic cooperation and regional integration.”

- Festus Mogae
Former President of Botswana

²⁸⁰ Particularly owing to SADC member states' fiercely protective nature described in chapter three.

BIBLIOGRAPHY

Books:

1. Clough M & Ravenhill J *Political Change in Southern Africa* (1982) University of California Berkeley
2. Du Plessis, Hargovan & Bagaric *Principles of Contemporary Corporate Governance* 2 ed (2011) Cambridge University Press
3. Evans D, Holmes P and Mandaza I 'SADC: *The Cost of Non-integration*' (1999) SAPES Books Harare
4. King M *The Corporate Citizen* (2006) Johannesburg: Penguin Books
5. Mallin C *Corporate Governance* 4 ed (2013) Oxford University Press
6. Mattli W *The Logic of Regional Integration: Europe and Beyond* (1999) Cambridge University Press
7. Mills G, *Poverty to Prosperity: Globalisation, Good Governance and African Recovery* (2002) Cape Town Tafelberg
8. Muthraika B *Towards Multinational Economic Cooperation in Africa* (1972) New York
9. Naidoo R *Corporate Governance* 2 ed (2009) Cape Town: Juta
10. Robson P *Economic Integration in Africa* (2011) London: Routledge Library Editions
11. Tricker R I *Corporate Governance* (2000) Oxford University Press
12. Wiese T 'Corporate Governance in South Africa: *With International Comparisons*' (2014) Cape Town: Juta

Journal Articles:

13. Afadameh-Adeyemi A and Kalula E 'SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community' (2010) *Monitoring Regional Integration in Southern Africa: Yearbook* 5 - 22

14. Armour J, Hansmann H, & Kraakman R 'The essential elements of corporate law: what is corporate law?' (2009) *Harvard John M. Olin Centre For Law, Economics, And Business Discussion Paper No. 643* 1 – 31
15. Bebchuk L 'The Case for Increasing Shareholder Power' (2004-5) 118 *Harvard Law Review* 844 1 – 83
16. Cohen D 'A President, An International Tribunal And A Band Of Farmers Walk Into A Constitutional Court-The Last Laugh: Mike Campbell V. The Government Of The Republic Of Zimbabwe' (2012) 28 *Emory International Law Review* 29 - 41.
17. Corrigan T 'Getting Down to Business: Lessons from the African Peer Review Mechanism' (2014) SAIIA
18. Corrigan T 'Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism' (2015) SAIIA 1 – 60
19. De Wet E 'The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa' (2013) 28 *ICSID Review* 45 – 63
20. Emmerich AO, Savitt W, Niles SV & Ongun S 'United States' in Calkoen WJL (ed.) *The Corporate Governance Review* (2013) 1 – 435
21. Erasmus G 'What has Happened to the Protection of Rights in SADC' *Tralac Stellenbosch* (2012)
22. Engelbrecht, L. 'King III code: comply vs. apply, what's the difference' (2009) *Occupational Risk Management* Volume 5, Issue 6
23. Gibb R 'Southern Africa in Transition: Prospects and Problems facing Regional Integration' (1998) *JMAS* 287 – 306
24. Hope K 'Towards Good Governance and Sustainable Development: The African Peer Review Mechanism', *Governance: an international journal of Policy, Administration and Institutions*, 18 (2) April 2005
25. Jesover F, Kirkpatrick G 'The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries' (January 2005) *Corporate Governance: an International Review*
26. Khama S *Africa Research Bulletin* (1979) 51 – 55

27. Meyn M 'The Progress of Economic Regionalisation in Southern Africa: Challenges for SADC and COMESA' (2005) 5 *Monitoring Regional Integration in Southern Africa Yearbook* 186 – 207
28. Mongalo T 'The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa' (2003) 120 *SALJ* 93 – 116
29. Ng'ong'ola C 'Regional Integration and Trade Liberalisation in Africa: The Treaty for the Establishment of an African Economic Community Revisited in the Context of the WTO System' (1999) *Journal of World Trade* 485 – 506
30. Oosthuizen GH *The Southern African Development Community: The Organisation, Its Policies and Prospects* (Institute for Global Dialogue Midrand 2006)
31. P Ryan 'Will there ever be a "Delaware of Europe?"' (2004/2005) *Columbia Journal of European Law* 11 187.
32. Saurombe A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2012) 15 2 *PER/PELJ* 454 – 485
33. Schmitter PC 'Three neo functional hypotheses about international integration', (1969) *International Organisation*, 23 (1) 161 – 166
34. Siems M and Alvarez-Macotela O F 'The OECD Principles of Corporate Governance in Emerging Markets: A successful example of networked governance?' *Networked Governance, Transnational Business and the Law* (2014) 257 – 280
35. Sultan Balbuena, S., "State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges", *OECD Corporate Governance Working Papers* (2014)OECD Publishing
36. Tsumba L L 'Corporate Governance Country Case Experience – Perspectives and Practices: Zimbabwe' *Reserve Bank of Zimbabwe*

Reports:

37. African Development Bank Corporate Governance Strategy July 2007
38. 'Carrots and Sticks – Promoting Transparency and Sustainability' Report by United Nations Environment Programme (2010)

39. Corrigan T Policy Briefing 101 *Building an African Corporate Governance* 2014 August
40. Deloitte Touche Tohmatsu Limited report on King IV (2016)
41. Matlosa K 'Consolidating Democratic Governance in the SADC Region: Transitions and Prospects for Consolidation EISA Research Report (2008)
42. SADC-UNECA Governance of Financial Institutions in Southern Africa: Issues for an Institutional Convergence Framework for Regional Financial Integration in SADC (2009)
43. Panel of Eminent Persons, APRM, *Country Review Report (CRR) of the Republic of South Africa*, APRM Secretariat (May 2007)
44. World Bank and IFC (International Finance Corporation), *Doing Business 2014: Understanding Regulations for Small and Medium-Size Enterprises* (2013)

Internet Sources:

45. About ICGN available at <https://www.icgn.org/about>
46. Brown L 'States Matter: America Is a Federal Republic' *New York Times* 8 August 2013 available at <http://www.nytimes.com/roomfordebate/2013/07/16/state-politics-vs-the-federal-government/states-matter-america-is-a-federal-republic>
47. Caesar Zvayi, *Zim Wants SADC Tribunal Rulings Nullified* (May 19, 2011) available at <http://www.herald.co.zw/zim-wants-sadc-tribunal-rulings-nullified/>
48. Cornell University Legal Information Institute '17 CFR 229.407 - (Item 407) Corporate governance' available at <https://www.law.cornell.edu/cfr/text/17/229.407>
49. Corporate Governance of State-Owned Enterprises in Southern Africa available at <http://www.oecd.org>
50. Definition of economic integration available at <http://www.calculemus.org/pub-libr/eu-integr/1-2econ-integr.pdf>
51. Definition of economic integration available at <http://www.investopedia.com/terms/e/economic-integration>

52. 'Economic and Corporate Governance' available at <http://nepadbusinessfoundation.org/index.php/thematic-areas/economic-and-corporate-governance>
53. Editorial, *Re-Empower SADC Tribunal*, MAIL & GUARDIAN, June 28, 2013, available at <http://mg.co.za/article/2013-06-28-editorial-re-empower-sadc-tribunal> ("Justice can come wrapped in cruel irony.")
54. IMF 'World Economic Outlook' available at <http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx>
55. Jakobeit C, Hartzenberg T and Charalambides N *Overlapping Membership in COMESA, EAC, SACU and SADC: Trade Policy Options for the Region and for EPA Negotiations - Summary of Findings 2005* available at: www.acp-eustrade
56. OECD-SADC Policy Brief June 2015 available at <http://www.oecd.org/dat/inv>
57. OECD 'History' available at <http://www.oecd.org/about/history/>
58. What is the OECD? available at <http://www.usoecd.usmission.com>
59. The Regional Indicative Strategic Development Plan available at <http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/>
60. Robinett D et al 'Experiences from the Regional Corporate Governance Roundtables' (2003) available at <http://www.oecd.org/daf/ca/corporategovernanceprinciples/23742340.pdf>
61. Sonnenfeld JA 'The Jamie Dimon Witch Hunt' *The New York Times* 8 May 2013 available at http://www.nytimes.com/2013/05/09/opinion/the-jamie-dimon-witch-hunt.html?_r=0
62. Vecchiato P, 'Eskom's bad record on environment "worrying"', *Business Day*, 23 November 2012, available at <http://www.bdlive.co.za/national/science/2012/11/23/eskoms-bad-record-on-environment-worrying>
63. Visser, C.B. 2009. *Corporate governance and the new King III report*. Southern Business School available at <http://www.sbsonline.info/essays-and-other-opinion-pieces>

Theses:

64. Adeoye A *Macroeconomic Level Corporate Governance and FDI in Emerging Markets: Is there a close relationship?* (Masters of Management Science thesis, King's College London, 2007)
65. Le Roux F *The Applicability of the Third King Report on Corporate Governance to Small and Medium Enterprises* (Masters of Business Administration Research Report, University of Stellenbosch 2010)
66. Mafatle T S *The Evolution of Corporate Social Responsibility* (LLM Thesis abstract, 2009)

Treaties, Instruments, Policies, Legislation

67. Companies Act 71 of 2008
68. The King Report on Corporate Governance for South Africa 2009 (King III)
69. The King Report on Corporate Governance for South Africa 2016 (King IV)
70. OECD Principles of Corporate Governance
71. Principles of Corporate Governance of the New York Stock Exchange
72. SADC Treaty of 1992
73. Sarbanes-Oxley Act of 2002
74. Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010
75. Securities and Exchange Act of 1934
76. UK Corporate Governance Code

Case Law

77. *Campbell and Others v Zimbabwe (Merits)*, Case No SADC (T) 2/2007